NAVIGATING MURKY WATERS: EMERGING TRENDS IN ABORIGINAL CONSULTATION AND PROJECT APPROVAL

MAUREEN KILLORAN, Q.C.* DAN KOLENICK,** AND THOMAS GELBMAN***

This article surveys the most significant recent Canadian decisions engaging the Crown's duty to consult Aboriginal peoples in the context of natural resource and infrastructure developments and explores the following themes.

First, project opponents are initiating legal challenges early and often. Second, recent decisions have affirmed the principle that the duty to consult can be fulfilled through an existing regulatory review process. Third, the jurisdiction of certain administrative tribunals to determine the adequacy of consultation and other constitutional questions remains unsettled. Fourth, Aboriginal groups continue to launch novel challenges, seeking to expand the scope of the duty to consult, often beyond the specific Crown conduct being challenged. Fifth, courts are increasingly intolerant of abuses of process, particularly where litigants fail to seek proper recourse for their grievances. Finally, project proponents are seeking recourse against the Crown in cases where it has failed to adequately consult or accommodate.

Cet article passe en revue les dernières grandes décisions canadiennes où l'État a eu l'obligation de consulter les peuples autochtones sur le développement de ressources naturelles et d'infrastructures et examine les thèmes suivants.

Premièrement, les opposants au projet lancent des défis juridiques au début du processus et à plusieurs reprises. Deuxièmement, les récentes décisions ont confirmé le principe que l'obligation de consulter peut se faire dans le cadre d'un processus de révision réglementaire existant. Troisièmement, le ressort de certains tribunaux administratifs devant déterminer le caractère adéquat de la consultation et autres questions constitutionnelles demeure non réglé. Quatrièmement, les groupes autochtones continuent de lancer de nouveaux défis, de demander une plus grande portée de l'obligation de consulter, souvent au-delà de la conduite spécifique contestée de l'État. Cinquièmement, les tribunaux sont de plus en plus intolérants à l'égard des abus de processus, surtout lorsque les plaideurs ne trouvent pas le bon recours à leurs griefs. Enfin, les partisans au projet demandent réparation à l'État lorsque celui-ci a manqué à l'obligation de consultation ou d'accommodement adéquat.

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* Maureen Killoran, Q.C., is a Litigation Partner in the Calgary office of Osler, Hoskin & Harcourt LLP (Osler) specializing in energy litigation. Over the last 24 months, her energy practice has included the defence of a disproportionate number of Aboriginal and environmental challenges to major resource projects. Most recently, Maureen acted as lead counsel on: Shell/Jackpine; Brion/Dover; Nalcor Energy (Hydro Electric Generation Project); Nalcor Energy (Maritime Link Project); Kinder Morgan (TransMountain Pipeline) — among others.

** Dan Kolenick has been with Shell Canada Energy as Senior Legal Counsel, Litigation since 2007. Prior to that he was an associate in the Aboriginal, Energy, and Regulatory group at Osler. He currently supports the regulatory and Aboriginal consultation groups on a variety of Shell projects, and regularly engages in consultation and negotiation with various Aboriginal communities, as well as regulatory advocacy on behalf of Shell.

*** Thomas Gelbman is a Senior Associate in Osler's Calgary office, specializing in energy litigation. A significant portion of his practice involves the defence of Aboriginal and environmental challenges to major natural resource development and infrastructure projects throughout Canada including Nalcor Energy's Lower Churchill Hydro Electric Generation Project and Labrador-Island Transmission Link, Shell Canada's Jackpine Mine Expansion Project, and Kinder Morgan's Trans Mountain Pipeline Expansion.

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I. INTRODUCTION

Ten years after the Supreme Court of Canada decision in *Haida Nation v. British Columbia (Minister of Forests)*,[1] Aboriginal opponents to major resource development projects are challenging government and tribunal decisions at every stage of the regulatory process. The Supreme Court's task in *Haida Nation* was to establish a general framework for the duty to consult and accommodate and, as foretold by Chief Justice McLachlin, "[a]s this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate."[2]

In the intervening years, Aboriginal litigants have raised a broad range of challenges in the context of resource development projects, and the courts have been "filling in the details" of the legal framework. In this regard, the Supreme Court of Canada's decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*[3] has made a significant contribution, in particular on how to focus the scope of consultation.

There is a significant amount of new resource development proposed across Canada including oil and gas development, mining projects, wind and hydroelectric development, and infrastructure projects such as transmission lines and pipelines. These projects engage

1 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].
2 *Ibid* at para 11.
3 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto*].

extensive regulatory processes and government decision-making. Given the scale of many of these undertakings, where Aboriginal rights may be affected, they will also engage the Crown's duty to consult and, if necessary, accommodate.

Resource development is often a strike point for conflict. At the policy level, and consistent with judicial pronouncements on the duty to consult and accommodate, there have been recent attempts to reframe the relationship among Aboriginal groups, the Crown, and industry, and to promote resource development as an opportunity for shared economic development and reconciliation.[4] Proponents must be prepared to engage Aboriginal groups at an early stage to understand and mitigate adverse impacts of a proposed project, and support Crown consultation efforts. Where negotiation, cooperation, and reconciliation are unsuccessful, litigation is likely to arise.

The primary form of challenge is by way of judicial review — both before and after significant decisions are taken, and during the decision-making process. Leave to appeal is sometimes required for judicial review of certain administrative decisions, but often it is not, and administrative appeals may lie as of right. Parties have also resorted to civil actions for damages, and applications for injunctive relief to enjoin specific conduct. These challenges have resulted in proponents seeking remedies against the Crown for damages arising out of project delays caused by deficiencies in the Crown's consultation regarding a proponent's regulatory approvals. Outside the legal system, project opponents have engaged in blockades or other civil disobedience to attempt to stop projects from proceeding.

At a practical level, the upswing in litigation arising from project approvals has had two main impacts on proponents. The first can be characterized broadly as an increased cost of doing business. Proponents are increasingly taking on the tasks associated with consultation, with or without direct Crown involvement. Although the duty to consult is owed by the Crown, proponents can and do assist in fulfilling that duty. Proponents have invested heavily in business units or external consultants to advise on and liaise with Aboriginal groups. There is also a need for proponents to consider implementing mitigation measures in response to Aboriginal interests, such as alterations to project components (within the realm of economic and technical feasibility) or training and employment initiatives. Investment in these areas, while potentially costly, is also tied to the second main impact on the industry.

Second, in part because the outcome of a consultation process cannot always be anticipated, proponents must budget for the cost of potential litigation, associated delays, and additional planning. There is an increased risk that projects may be delayed by litigation or civil disobedience, and subject to imposed conditions. Small and mid-sized proponents in particular may not have access to the resources required to cover the costs associated with lengthy delays. One way to mitigate such risk (where consultation and negotiation fails) is to adopt practical measures to evaluate that risk, and be prepared to respond quickly to litigation as it arises. Among other things, mitigation can be achieved by implementing internal mechanisms to ensure that the front end investment can be used in the litigation

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[4] Douglas R Eyford, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development* (Ottawa: Minister of Natural Resources, 2013), online: <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/www/pdf/publications/ForgPart-Online-e.pdf> at 4.

context. Should a dispute arise as to the adequacy of consultation, the proponent should be prepared to point to a proven, good faith record of consultation efforts to counter allegations to the contrary and complement the Crown's defence of such challenges.

This article surveys the most significant recent Canadian decisions engaging the duty to consult, and explores the following themes in the context of natural resource and infrastructure developments:

1. project opponents are initiating legal challenges early and often, particularly in the context of multi-stage regulatory proceedings;

2. recent decisions have affirmed the principle established in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*[5] that the duty to consult can be fulfilled through an existing regulatory review process;

3. the jurisdiction of certain administrative tribunals to determine the adequacy of consultation and other constitutional questions remains unsettled;

4. Aboriginal groups continue to launch novel challenges, seeking to expand the scope of the duty to consult, often beyond the specific Crown conduct being challenged;

5. courts are increasingly intolerant of abuses of process, particularly where litigants fail to seek proper recourse for their grievances; and

6. project proponents are seeking recourse against the Crown in cases where it has failed to adequately consult or accommodate.

Prior to exploring these themes, we will review the essential principles that underlie the duty to consult in the context of resource development.

II. DUTY TO CONSULT

A. WHAT TRIGGERS THE DUTY TO CONSULT?

Natural resource development in Canada frequently affects asserted or established Aboriginal rights. Due to the scale and potential environmental impacts of such projects, approvals by provincial and federal authorities are required before they can commence. The nexus among government involvement, the potential impacts of proposed energy projects, and Aboriginal rights triggers the duty to consult and, where appropriate, accommodate.

The legal basis of the duty to consult and accommodate Aboriginal peoples is rooted in section 35(1) of the *Constitution Act, 1982*, which provides that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[6] This provision applies to formally recognized Aboriginal and treaty rights as well as unresolved

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5 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

6 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

Aboriginal claims, and requires the Crown to engage in honourable negotiations with Aboriginal groups leading to a just settlement of such claims. This involves reconciling claims with other important societal rights and interests.[7]

While an Aboriginal claim remains unresolved, section 35(1) requires the Crown to act honourably in negotiations relating to the claim, and in its actions affecting interests and resources that are subject to the claim. Absent such a duty, the value of the interests or resources may be depleted by Crown action before the Aboriginal claim over them can be resolved through negotiations.[8] The honour of the Crown requires that, before taking any action that may adversely affect the interests or resources subject to an Aboriginal claim, the Crown must consult and sometimes accommodate the Aboriginal group asserting the claim.

The Supreme Court has identified three factors that cumulatively trigger the Crown's duty to consult and accommodate: (1) the existence of an Aboriginal claim or potential right; (2) the Crown's knowledge, actual or constructive, of the claim or right; and (3) proposed Crown action that may adversely affect the claim or right.[9]

B. CONTENT OF THE DUTY

The content of the Crown's duty to consult and accommodate Aboriginal groups varies based on the circumstances of the case, but is informed by certain broad standards:

> The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised …, through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation.… Mere hard bargaining … will not offend an Aboriginal people's right to be consulted.[10]

The scope of consultation, and whether the duty includes accommodation, will depend on the facts of the case. This includes the prima facie strength of the claim to an Aboriginal right, and the seriousness of the potential adverse effect of the proposed Crown action on the land or resources subject to the claim.[11] The duty to consult is understood through the concept of a "spectrum" as set out in *Haida Nation*:

> In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.
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> …

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7 *Haida Nation*, *supra* note 1 at para 20.
8 Peter W Hogg, *Constitutional Law of Canada*, 5th ed supp (Toronto: Carswell, 2007) at 28-52.
9 *Haida Nation*, *supra* note 1 at para 35; *Taku River*, *supra* note 5 at para 25; *Rio Tinto*, *supra* note 3 at para 31.
10 *Haida Nation*, *ibid* at para 42.
11 *Rio Tinto*, *supra* note 3 at para 36; Hogg, *supra* note 8 at 28-53.

> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
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> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually.[12]

The consultation process, once engaged, may trigger a duty to accommodate. This will occur if the consultation reveals that accommodation is required to prevent the proposed Crown action from adversely impacting a strong Aboriginal claim. The duty of accommodation does not give the Aboriginal group a veto over the proposed Crown action. Rather, it requires the Crown to balance Aboriginal concerns reasonably with other societal interests.[13] The Supreme Court of Canada has recently emphasized that the Aboriginal group need not be accommodated to the point of undue hardship for the non-Aboriginal population.[14]

Courts have cautioned that the duty to consult and accommodate should not be treated as a substitute for the ultimate settlement of the Aboriginal claim. The duty to consult is not meant to provide Aboriginal people with what they would be entitled to once their claims were proved or settled 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.[15]

Nevertheless, resource development has proved to be a rallying point for some groups to advance their treaty negotiations or otherwise gain commercial leverage.[16]

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12 *Supra* note 1 at paras 43-45.
13 *Ibid* at paras 47-50.
14 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103 at para 81.
15 *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2012 FC 297, 406 FTR 229 at para 123 [*Ka'a'Gee Tu*].
16 *Nunatukavut Community Council Inc v Newfoundland and Labrador Hydro-Electric Corp (Nalcor Energy)*, 2011 NLTD 44, 307 Nfld & PEIR 306 [*Nunatukavut Community*]; *Nalcor Energy v Nunatukavut Community Council Inc*, 2012 NLTD 175, 330 Nfld & PEIR 233, appeal as of right to the CA, St John's 2012 No 011H0101 (CA) [*Nalcor Energy*].

C. FULFILMENT OF DUTY THROUGH EXISTING REGULATORY PROCESSES

Where the duty to consult is triggered, the Crown is not invariably required to establish a special process for consulting the Aboriginal group asserting the claim. It may be possible to fulfil the duty through an existing statutory or regulatory review process relating to the proposed Crown action.[17]

This approach was applied by the Supreme Court of Canada in *Taku River*, in which the Court found that the British Columbia Crown had fulfilled its duty to consult the First Nation regarding a decision to permit the reopening of a mine within their asserted traditional lands, by including the group in an environmental review process under the British Columbia *Environmental Assessment Act*.[18]

However, Aboriginal participation in an existing statutory or regulatory review process will not always satisfy the duty to consult, as it depends in part on the manner in which the Aboriginal group participates in the process. If the group is accorded participation rights no greater than those of the general public or other stakeholders, the duty may not be satisfied.[19] The Crown must consider, on a case-by-case basis, what form of Aboriginal participation is required for the duty to be fulfilled.[20]

Under some review processes, the manner of the Aboriginal group's participation may be restricted by the requirements of the governing statute or regulation. Such restrictions cannot be relied on to limit the scope of the duty to consult and accommodate. The duty is constitutional in nature and cannot be "boxed in by legislation."[21] Where the statutory or regulatory review process is affected by limitations that preclude it from satisfying the duty to consult and accommodate, the Crown may have to supplement the review process and engage in a separate consultation process with the Aboriginal group.

D. RECIPROCAL DUTY OF ABORIGINAL GROUP TO CO-OPERATE

The duty to consult and accommodate is a two-way street. The Aboriginal group to whom the Crown duty is owed has a reciprocal duty to co-operate and participate. As articulated by the Supreme Court:

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17 *Brokenhead Ojibway Nation v Canada (Attorney General)*, 2009 FC 484, 345 FTR 119 at para 25.

18 *Taku River*, *supra* note 5; RSBC 1996, c 119 as repealed by SBC 2002, c 43. See also *ibid* at para 40.

19 Jack Woodward, *Native Law*, vol 1 (Toronto: Carswell, 1994) at 5-74.1, 5§2090.

20 *Yellowknives Dene First Nation v Canada (Attorney General)*, 2010 FC 1139, 377 FTR 267 at paras 99-102.

21 *Ka'a'Gee Tu First Nation v Canada (Attorney General)*, 2007 FC 763, 315 FTR 178 at para 121 [*Ka'a'Gee Tu #2*].

> [T]here is some reciprocal onus on the [Aboriginal group] to carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution.[22]

Further, an Aboriginal group may not remain silent during consultation in the hope of complaining about unaddressed concerns at a later stage of the proceedings.[23]

III. LEGAL CHALLENGES — EARLY AND OFTEN

Given the number of regulatory decisions that must be made to approve a significant resource development project, including federal and provincial environmental assessments (EAs) and subsequent permitting on various aspects of a complex project, opponents are initiating legal challenges early and often, in respect of the same project. Opponents are challenging all manner of administrative decisions; those made in the past and those not yet made. Such challenges typically impugn the adequacy of consultation and accommodation on constitutional grounds and the validity of the decision under the applicable legislation.

While these broad-based challenges are typically brought by way of summary procedure, they involve complicated, document-intensive proceedings. Consequently, resource project proponents must assess such litigation risk and factor it into project scheduling, planning, and cost considerations.

A. MULTIPLE CHALLENGES RELATED TO THE SAME PROJECT

A dramatic example of the frequency of challenges is Nalcor Energy's Lower Churchill Hydroelectric Project, a proposal to construct and operate two hydro-electric generating stations on the lower section of the Churchill River in Labrador, with a combined capacity of 3,074 MW. Muskrat Falls will have a capacity of 824 MW, including two dams, a power house, and a 60 km long reservoir, and Gull Island will have a capacity of 2,250 MW, including a dam and a 232 km long reservoir. Since its registration in 2006, Nalcor has successfully defended against an application seeking to enjoin the federal-provincial joint review panel (JRP) hearing process,[24] has successfully defended a challenge to the EA report

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22 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 SCC 69, [2005] 3 SCR 388 at para 65 [*Mikisew Cree*]. See also, *Haida Nation, supra* note 1 ("[a]s for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached" at para 42); *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470, 129 BCAC 32 ("[t]here is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions" at para 161).

23 *Cheslatta Carrier Nation v British Columbia (Project Assessment Director)* (1998), 53 BCLR (3d) 1 at para 73; *Haida Nation*, *supra* note 1 at para 36; *Fort McKay First Nation v Alberta (Environment and Sustainable Resource Development)*, 2014 ABQB 32, 98 Alta LR (5th) 1 at para 19 [*Fort McKay*].

24 *Nunatukavut Community*, *supra* note 16.

issued by that JRP,[25] and was forced to obtain an injunction preventing Aboriginal protesters from blockading its worksite.[26]

The project also faces an unsuccessful Federal Court challenge to the Governor-in-Council and Ministerial decisions pursuant to the 1992 *Canadian Environmental Assessment Act* (in respect of which the applicant has sought leave to appeal to the Supreme Court of Canada),[27] two judicial review applications in the Federal Court of Canada arising from permits granted pursuant to sections 32(2) and 35(2) of the *Fisheries Act*,[28] and a judicial review application in the Newfoundland and Labrador Supreme Court arising from a *Water Resources Act* permit.[29] The related Labrador-Island Transmission Link project is currently the subject of two judicial review applications in the Federal Court.[30]

Similarly, as it made its way through the regulatory process, the extension project proposed by Paramount Resources Ltd., involving oil and gas development in the Northwest Territories, faced three Federal Court challenges by the Ka'a'Gee Tu First Nation.[31]

More recently, the National Energy Board's decision in respect of the Enbridge Northern Gateway Project has attracted a significant number of challenges by environmental and Aboriginal groups, both in the Federal Court and the Federal Court of Appeal. There was also a challenge before the process was fully underway.[32] The outcome of these proceedings, many of which will be heard by the Federal Court of Appeal,[33] remains to be seen. However, they will still create a degree of planning uncertainty for proponents until they are settled or finally adjudicated.[34]

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25 *Grand Riverkeeper, Labrador Inc v Canada (Attorney General)*, 2012 FC 1520, 422 FTR 299 [*Grand Riverkeeper*].

26 *Nalcor Energy*, *supra* note 16; *Nalcor Energy v Nunatukavut Community Council Inc*, 2012 NLTD 149, [2012] NJ No 349 (QL).

27 *Conseil des Innus de Ekuanitshit v Canada (Attorney General)*, 2013 FC 418, 431 FTR 219, aff'd 2014 FCA 189, 85 CELR (3d) 1, leave to appeal to SCC requested, 36136 (21 Octoer 2014) [*Ekuanitshit*]; *Canadian Environmental Assessment Act*, SC 1992, c 37 [*CEAA* 1992], repealed by SC 2012, c 19, s 52 [*CEAA, 2012*].

28 *Nunatsiavut Government v Attorney General of Canada*, Halifax T-1347-13 (FC); *Nunatukavut Community Council Inc v Attorney General of Canada*, Halifax T-1339-13 (FC); *Fisheries Act*, RSC 1985, c F-14.

29 *Nunatsiavut Government v Canada (Minister of the Department of Environment and Conservation)*, St John's 2013-01G-3947 (Supt Ct); *Water Resources Act*, SNL 2002, c W-4.01.

30 *Conseil des Innus de Ekuanitshit, v Procureur Général du Canada*, Montreal T-2127-13 (FC); *Conseil des Innus de Ekuanitshit v Ministre des Ressources Naturelles*, Montreal T-1083-14 (FC).

31 *Ka'a'Gee Tu*, *supra* note 15; *Ka'a'Gee Tu #2, supra* note 21; *Ka'a'Gee Tu First Nation v Canada (Minister of Indian & Northern Affairs)*, 2007 FC 764, 311 FTR 260.

32 *Gitxaala Nation v Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 1336, 421 FTR 169.

33 *Forest Ethics Advocacy Assn v Canada (National Energy Board)*, 2014 FCA 88, [2014] FCJ No 356 (QL).

34 More of the unsettled cases on this issue are the following outstanding applications for judicial review: *Gitga'at First Nation v Attorney General of Canada*, Vancouver A-67-14 (FCA); *Gitxaala Nation v Minister of Environment*, Vancouver T-247-14 (FC) and A-64-14 (FCA); *ForestEthics Advocacy v Attorney General of Canada*, Vancouver T-248-14 (FC) and A-56-14 (FCA); *Haisla Nation v Canada (Minister of Environment)*, Vancouver T-273-14 (FC) and A-63-14 (FCA); *Federation of British Columbia Naturalists v Attorney General of Canada*, Vancouver T-270-14 (FC) and A-59-14 (FCA).

B. EARLY CHALLENGES — PRE-EMPTIVE STRIKES

With some exceptions, courts are disinclined to entertain pre-emptive challenges and prefer to wait until a final decision is made. Two recent decisions are noteworthy in this regard.

The project at issue in *Nunatukavut Community*[35] was Nalcor Energy's Lower Churchill Project (discussed in the previous Part). The application was brought, *ex parte*, on the eve of the public hearing being held by the federal-provincial JRP struck to conduct an EA of the project pursuant to the *CEAA* 1992 and the Newfoundland and Labrador *Environmental Protection Act*.[36] By this time, the EA had been ongoing for approximately four years. The applicant sought, among other things, to enjoin the public hearing on the basis that consultation had been inadequate. The application judge required notice to all parties, and the matter quickly proceeded to a two-day hearing while the JRP hearing was ongoing.

The Court examined the extensive consultation record and concluded that the allegations of inadequate consultation were baseless, that it was premature to assess the adequacy of consultation at such an early stage in the established Crown consultation process, and finally that it made no sense to enjoin a process that was expressly intended to facilitate consultation:

> Aside from the fact that it is premature to say Nunatukavut will suffer irreparable harm because of the lack of consultation and accommodation when the process is unfinished, Nunatukavut risks losing an important opportunity to influence the development of the project by declining to participate in the public hearings before the JRP.
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> Overall, I reject Nunatukavut's claim that it will suffer irreparable harm if the public hearings are not enjoined because it has not been properly consulted or accommodated. As I have already said, I do not agree that the consultation and accommodation to date have been deficient; and there is still much to be done yet before the process is completed during which Nunatukavut will continue to be involved if it chooses.[37]

This decision, which was heard on an expedited basis, demonstrated the value of a comprehensive consultation record to undermine allegations of insufficient consultation. It also affirmed judicial confidence in the regulatory and consultation process, as the Court was unwilling to interfere with a valid and lawful process that was specifically mandated to facilitate consultation with the applicant (and others).

The project at issue in *Métis Nation of Alberta Region 1 v. Joint Review Panel Established to Review the Jackpine Mine Expansion Project*[38] was the proposed Shell Canada Limited (Shell) Jackpine Mine Expansion (JME Project) located about 70 km north of Fort McMurray

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35 *Supra* note 16.

36 SNL 2002, c E-14.2 [*EPA*].

37 *Nunatukavut Community*, *supra* note 16 at paras 44-45. The applicants filed an appeal to the Newfoundland and Labrador Court of Appeal, which was deemed abandoned for want of prosecution (Docket 2011 01H0034). The action filed in the Newfoundland and Labrador Supreme Court was dismissed (Docket 2012 01G5232).

38 2012 ABCA 352, 539 AR 146, leave to appeal to SCC refused, 35193 (11 April 2013) [*Métis Nation of Alberta*].

on the east side of the Athabasca River. At the time of the leave application, the JME Project was being considered by a JRP struck pursuant to subsection 22(3) of the *Energy Resources Conservation Act*,[39] and section 40 of the *Canadian Environmental Assessment Act, 2012*,[40] to, among other things, conduct an EA and consider Shell's application for approval of the JME Project under sections 10 and 11 of Alberta's *Oil Sands Conservation Act*[41] and section 3 of the *Energy Resources Conservation Act*.[42] The applicants, the Métis Nation of Alberta (MNA) and Athabasca Chipewyan First Nation (ACFN) sought leave to appeal a decision of the JRP regarding its jurisdiction to consider certain questions of constitutional law and a stay of the JRP hearing.

Shortly before the commencement of public hearings on the JME Project, ACFN and MNA each issued Notices of Questions of Constitutional Law (NQCL) pursuant to the Alberta *Administrative Procedures and Jurisdiction Act*,[43] asking the JRP to determine whether the Crown had discharged its duty to consult the applicants with respect to the potential adverse effects of the JME Project on their Aboriginal rights.

After receiving written and oral submissions on the NQCLs, the JRP issued a written decision, declining to consider the constitutional questions, concluding that such questions were ultra vires the JRP and, as a practical matter, there was no point in making such an assessment.[44] This was because: (1) the Aboriginal consultation process was still at an early stage; (2) the Crown had acknowledged that consultation was not complete; and (3) the Crown had committed to continue consultation following the EA.[45]

Since it was a leave to appeal application, the analysis revolved around the six-part test for leave to appeal a decision taken under the ERCA:

> (a) Is the proposed issue a question of law or jurisdiction?
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> …
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> (b) Is the issue of general importance, in that the issue is of interest to more than the immediate parties, and has a wider relevance?
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> (c) Is the point raised of significance to the action itself?
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> …
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> (d) Does the appeal have arguable merit?

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39 RSA 2000, c E-10.
40 *CEAA, 2012*, *supra* note 27.
41 RSA 2000, c O-7 [*OSCA*].
42 RSA 2000, c E-10 [*ERCA*], as repealed by *Responsible Energy Development Act*, SA 2012, c R-17.3, s 112 [*REDA*].
43 RSA 2000, c A-3, s 12.
44 Joint Review Panel Established to Review Jackpine Mine Expansion Project, *Re: Notices of Questions of Constitutional Law* (26 October 2012), online: Canadian Environmental Assessment Agency <www.ceaa-acee.gc.ca/050/documents/p59540/83073E.pdf> [JRP Decision].
45 *Ibid* at 1-2. See also *Métis Nation of Alberta*, *supra* note 38 at paras 20-27.

…

(e) What standard of review is likely to be applied?

…

(f) Will the appeal unduly hinder the progress of the action?[46]

Justice Slatter found that the first three parts of the test were likely met: it was a question of jurisdiction (which was agreed by the parties), the issue was of general importance, of interest to Aboriginal peoples and the resource extraction industry, and there was sufficient arguable merit to warrant further consideration by the Alberta Court of Appeal.[47]

However, the applicants were ultimately unsuccessful because Justice Slatter held that it is generally inappropriate to grant leave to appeal on interlocutory issues and preferable to wait until the tribunal has completed its work.[48] Further, the Court endorsed the JRP's conclusion that there was no point in assessing the adequacy of consultation when it was still in progress:

> The Joint Review Panel held that even if it did have jurisdiction to consider whether the Crown had discharged its duty to consult, it would be premature to consider that question at this stage. The Joint Review Panel agreed with the submissions of Alberta and Canada that the hearing on the Jackpine mine was itself a part of the duty to consult. Both levels of government were counting on the Joint Review Panel to make recommendations about the accommodation of aboriginal interests that would enable the Crown to discharge its obligation to consult. As counsel for Shell put it, with respect to the stay application, the applicants' argument was essentially "stop the consultation, because there hasn't been enough consultation". Even if this Court was to conclude that the Joint Review Panel did have jurisdiction to consider the proposed constitutional questions, it is clear that the Joint Review Panel has decided not to do so at this stage.[49]

Leave to appeal to the Supreme Court of Canada was denied in April 2013, which validated the existing process and refused a premature foray into litigation in the midst of a process specifically intended to facilitate consultation.

These decisions are a clear message from the courts that pre-emptive challenges to a regulatory process are unwelcome, except in exceptional circumstances. However, in a recent decision, the Federal Court demonstrated a willingness to stand in the shoes of the decision-maker, even when the decision had not yet been made.

In *Coldwater Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*[50] the Applicants sought an order preventing the Minister of Indian and Northern Affairs (the Minister) from taking an administrative decision, and *mandamus*,

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46 *Métis Nation of Alberta*, *ibid* at para 12; *Berger v Alberta (Energy Resources Conservation Board)*, 2009 ABCA 158, [2009] AJ No 417 (QL) at para 2.

47 *Métis Nation of Alberta*, *ibid* at paras 13-20.

48 *Ibid* at para 21.

49 *Ibid* at para 18.

50 2013 FC 1138, [2014] 1 CNLR 25 [*Coldwater*].

requiring the Minister to follow the Coldwater Indian Band's (Coldwater) instructions in considering whether to consent to transfer two indentures granted for a pipeline easement through the Coldwater reserve, from one Kinder Morgan entity to another. The Notice of Application pleaded a failure of the Crown to consult in the decision, but that argument was ultimately abandoned during the proceeding. The application related to the existing Trans Mountain Pipeline (Pipeline) and also engaged Kinder Morgan's application for approval of the Trans Mountain Expansion, which is (at the time of publication) currently before the National Energy Board (NEB).

Approved in 1951, the Pipeline runs from Edmonton, Alberta to Burnaby, British Columbia.[51] The right-of-way runs through a series of Indian Reserves, including Coldwater Reserve No. 1, and was granted pursuant to two Orders in Council and two subsequent indentures issued by the then Minister of Citizenship and Immigration which authorized the expropriation of an easement across the reserve pursuant to section 35 of the *Indian Act*.[52] The indentures stipulate that the owner of the right-of-way (Trans Mountain, later, Kinder Morgan) shall not assign them without the written consent of the Minister.

As part of a series of transactions arising from the sale of its British Columbia natural gas distribution business in 2007, Kinder Morgan transferred the Pipeline, including the indentures, to two affiliates. At the time, it inadvertently failed to obtain the consent of the Minister, though it obtained all other regulatory approvals. Coldwater and others brought the issue to Kinder Morgan's attention, who then tried unsuccessfully to negotiate a resolution to the Band's concerns. Kinder Morgan then applied to the Minister for consent.

Prior to the Minister taking a decision, Coldwater brought an application before the Federal Court, seeking to prevent the Minister from consenting to the transfer. Coldwater argued that the transfer was not in its best interests, and the Minister's fiduciary duty to the Band required him to follow the instructions of the Band and refuse consent to the transfer. During the Federal Court proceeding, Coldwater brought an injunction application, seeking to enjoin the Minister from making a decision before the resolution of the proceeding. This interlocutory motion was ultimately abandoned. Coldwater also commenced a civil claim in the British Columbia Supreme Court seeking, among other things, damages for the alleged trespass arising from the failure to obtain Ministerial consent.[53]

The following issues were identified in the case before the Federal Court:

1. Does the Minister have a fiduciary duty to refuse to consent to the Assignment upon being advised by Coldwater that it does not agree that the Minister should consent?

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51 The Pipeline was approved by the Federal Board of Transport Commissioners pursuant to sections 11 and 12 of the *Pipe Lines Act*, RSC 1952, c 211, as repealed by *National Energy Board Act*, SC 1959, c 46, s 94. Sections 66-67 of the 1959 *Act*, continues the intent of sections 21 and 22 of the *Pipe Lines Act*, which later became sections 66-67 of RSC 1970, c N-6, which later became sections 77-78 of RSC 1985, c N-7 [*NEB Act*], which it still is. Between 1985 and 2013, section 77 of the *NEB Act* has been amended twice by: (a) *Federal Law-Civil Law Harmonization Act, No 2*, SC 2004, c 25, s 156(E), the version pursuant to which the Amending Orders were granted; and (b) *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19, s 90, which created the version that currently governs the Pipeline.

52 RSC, 1985, c I-5.

53 *Coldwater Indian Band v Fortis Inc*, Vancouver 133088 (SC Civ Div).

2. In the alternative, is the Minister obliged to re-examine whether Coldwater's consent is required, and whether consent … is in Coldwater's best interests and/or in the public's best interest?[54]

In addressing these issues, the Court answered the following questions: Does the Minister owe Coldwater a fiduciary duty? If so, what is the nature and extent of that duty? In the facts of this case, how is that duty to be exercised? And finally, what relief, if any, should be given?

The parties all agreed that the Minister owed the Band a fiduciary duty. The Court canvassed the jurisprudence on the content of the Crown's fiduciary duties in similar circumstances, and concluded:

- [T]he nature and extent of [the] fiduciary duty may vary according to the circumstances and importance of the matter;
- The Crown has a duty to prevent the First Nation from being exploited; and
- The Crown must listen in good faith to the concerns of the First Nation, but has a duty to weigh those concerns against other public interests that the Crown represents; it must endeavour to reach a compromise between those interests, while endeavouring to obtain the best possible result for the First Nation.[55]

The Court concluded there was "little reason" to refuse consent on the first easement, but on the second, that it would be prudent of the Minister to consider Coldwater's concerns.[56]

Regarding the appropriate remedy, the Court concluded:

> I have determined that, particularly with respect to the second easement, the Minister should consider whether that easement has expired for non-use; and, therefore, whether re-negotiation with Kinder Morgan for terms much more favourable to Coldwater is required should Kinder Morgan wish to use that second easement or a new easement for another pipeline.[57]

Coldwater's appeal and Kinder Morgan's cross appeal are expected to be heard in November 2014. At issue in the appeals will be, among other things, the correctness of: (1) the conclusion that the Minister does not have an absolute duty to follow Coldwater's directions; and (2) the order fettering the Minister's discretion prior to a Ministerial decision being made.

While not a consultation case, *Haida Nation*[58] was invoked by the applicants. In the context of resource development or infrastructure projects, it is also an example of a pre-emptive Aboriginal challenge to both a specific administrative decision and a project on the verge of going through regulatory approval process.

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54 *Coldwater*, *supra* note 50 at para 25.
55 *Ibid* at para 60.
56 *Ibid* at para 64.
57 *Ibid* at para 66.
58 *Supra* note 1.

IV. CONSULTATION IN THE CONTEXT OF REGULATORY PROCESSES

As outlined below, recent challenges have affirmed the principle established in *Taku River* that the duty to consult can be fulfilled through an existing statutory or regulatory review process relating to the proposed Crown action.

Increasingly, the Crown's processes are withstanding judicial scrutiny, particularly in the context of significant regulatory processes, where the provincial and federal governments design processes to meet consultation obligations in a consistent and systematic manner. These processes are designed to: (1) ensure dissemination of adequate information; (2) engage input into the process design; (3) provide capacity funding; and, (4) encourage Aboriginal consultation from an early stage. The processes engage Aboriginal groups separately from the general public, and are usually supplemented by face-to-face consultation with interested and affected Aboriginal groups. Two recent decisions are particularly significant in that regard.

The first is the decision in *Ekuanitshit*, which concerned Nalcor Energy's Lower Churchill Project.[59] Registered in 2006, the Lower Churchill Project (Project) was subject to a joint review panel EA under the federal *CEAA* 1992[60] and the Newfoundland and Labrador *EPA*.[61] The panel issued its EA report in August 2011.[62] The applicant challenged the Governor in Council and the Responsible Authorities' subsequent decisions to release the Project from environmental review under sections 37(1) and 37(1.1) of the *CEAA* 1992.

The applicant was an Indian Band under the *Indian Act*, with asserted rights in the area around the Project footprint. The Applicant sought to set aside the Order in Council on the following basis: (1) that the Applicant was not adequately consulted and accommodated in relation to the Project; (2) the Order in Council was unreasonable and taken on the basis of inadequate or incorrect information; and (3) the Project had an improper scope according to section 15 of the *CEAA* 1992.

While much of the decision addresses a novel "scoping" argument (which was unsuccessful), the main issue was the adequacy of consultation. None of the respondents questioned that the duty to consult arose, and that the Crown contacted the applicant early in the process. The Crown had designed the EA process to be an integral component of the Crown's Aboriginal consultation regarding the Project. The five phase consultation process reflected each stage of the regulatory process. The applicant was provided numerous opportunities for Crown consultation before, during, and after the EA. The applicant participated extensively in the EA, received capacity funding to do so, and had engaged directly with the Crown and the proponent in expressing concerns about the Project and EA process itself. However, before issuing the impugned decisions, the Crown failed to expressly communicate to the applicant how it had considered their concerns, and how the applicant would be accommodated, if at all.

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59 *Ekuanitshit*, *supra* note 27. The project is described above in Part III.A.
60 *Supra* note 27.
61 *EPA*, *supra* note 36.
62 This report was the subject of an unsuccessful judicial review: see *Grand Riverkeeper*, *supra* note 25.

In determining that the Crown had met its constitutional duty to consult and accommodate the applicant with respect to the Order in Council, the Federal Court made three key findings. First, it found that the challenge to the entirety of the Crown consultation process regarding the Project was premature. The judicial review was initiated following the conclusion of phase four of a five phase process; consultation associated with phase five, the permitting stage, had not yet taken place. Given that, the Court concluded that it was premature to assess the adequacy of the entirety of consultation. It did, however, evaluate the adequacy of consultation to the date of the impugned decisions.[63]

Second, the Court examined the proponent's efforts to consult with the applicant. Although there is no duty to consult on the part of a proponent,[64] the proponent and applicant had commenced negotiation of a community consultation agreement, whereby the applicant would receive funds to facilitate consultation in respect of the Project. The parties were unable to reach agreement, and therefore no funding was provided by the proponent to facilitate consultation. The Court found that the proponent was committed to providing the applicant with meaningful opportunities to consult. One of the reasons that no agreement was concluded was that the applicant had rejected outright the offer of $87,500 in financial assistance made by the proponent and made unsubstantiated demands for $600,000 (which the proponent considered unreasonable). The Court held that if the applicant believed the proponent's offer was insufficient, it was incumbent on the applicant to present a counter-offer that demonstrated that it was genuinely engaged in the process. Further, the failure by the applicant to provide a meaningful counter-offer frustrated the consultation process.[65] In the context of proponent-Aboriginal group relations, this decision reflects the Supreme Court dicta in *Haida Nation* that both parties should commit to a meaningful process of consultation and that Aboriginal claimants must not take unreasonable positions to frustrate consultation efforts.

Third, the applicant argued that the Crown failed to adequately consult by failing to demonstrate a meaningful consideration of the applicant's concerns. Although the applicant had participated in the consultation process and the process was reasonable, the Crown had not expressly responded to the applicant's stated concerns, nor did it explain how its concerns were accommodated in the decision that accompanied the Order in Council. The Court noted that responsiveness is a key requirement of honourable consultation, but characterized this omission as a mere "misstep" that did not invalidate an otherwise reasonable consultation.[66] Moreover, the Crown's failure was mitigated by the fact that the applicant's concerns were expressly considered in the JRP Report, which was before the Governor in Council, and the Crown had committed to carrying out the relevant recommendations.[67]

This decision was affirmed by the Federal Court of Appeal and Ekuanitshit has sought leave to appeal the decision to the Supreme Court of Canada.[68]

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63 *Ekuanitshit*, *supra* note 27 at para 112.
64 *Haida Nation*, *supra* note 1 at paras 52-56.
65 *Ekuanitshit*, *supra* note 27 at para 129.
66 *Ibid* at para 131.
67 *Ibid* at paras 117-19.
68 *Ekuanitshit*, *supra* note 27.

The decision in *Halalt First Nation v. British Columbia (Minister of Environment)*[69] involved a challenge to an Environmental Assessment Certificate (EAC) issued for the Chemainus Wells Water Supply Project located in North Cowichan. The adequacy of Crown consultation in the context of a statutorily mandated environmental review process was at issue.

In 2003, the District of North Cowichan proposed to install three wells on the banks of the Chemainus river. The river and a substantial part of the river's aquifer passed through the First Nation's land. The British Columbia Environmental Assessment Office (the EAO) concluded the project may have significant adverse effects and, as a result, issued an order requiring an EAC.

In March 2008, the EAO advised it would not recommend certification of the project as it was then designed because of the unresolved environmental effects related to year-round drilling. As a result, the District modified the project proposal by suggesting drilling only two wells, to be operated one at a time and only during the winter months. The EAC was issued in March 2009 based on the modified proposal.

In the Supreme Court of British Columbia, the applicant First Nation sought judicial review of the EAC.[70] The chambers judge found that the applicant was not adequately consulted because: (1) the EAO did not consider and consult on the implications of a year-round well operation;[71] and (2) the applicant was not appropriately consulted about the modifications to the project before the modifications were made.[72] The chambers judge issued an order staying project activities pending consultation on year-round well operations.

On appeal, the British Columbia Court of Appeal considered whether the scope of consultation extended to an activity that might be proposed in the future, but was not considered within the project at issue. The Court noted the extensive consultation about the potential adverse effects that might arise from year-round pumping, finding that it was this information that informed the proposed modification to confine pumping to the winter months. Relying on *Rio Tinto*[73] the Court limited the scope of the duty to consult to the specific Crown proposal at issue and not to possible future activities.[74] The Court of Appeal concluded that the Crown's ability to address future potential adverse impacts was in no way compromised; in fact, any future attempt to expand to year-round pumping would again engage the Crown's duty to consult.[75] Several recent cases have similarly concluded that the duty to consult does not extend to activities that a proponent may seek approval for in the future when those activities are beyond the present authorization being sought.[76]

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69 2012 BCCA 472, 330 BCAC 177 [*Halalt Nation*].
70 *Halalt First Nation v British Columbia (Minister of Environment)*, 2011 BCSC 945, 60 CELR (3d) 179 [*Halalt* (BCSC)].
71 *Ibid* at para 565.
72 *Ibid* at para 615.
73 *Supra* note 3.
74 *Halalt Nation*, *supra* note 69 at paras 132-37.
75 *Ibid* at para 142.
76 See Part V below.

The second issue on appeal was whether the timing of consultation was relevant to the Crown's fulfillment of its duty. The Court noted that the duty to consult "cannot be considered in a vacuum."[77] The applicant argued that the duty to consult was breached because information regarding the modifications to the project was initially provided only to the direct project participants. The Court found that the applicant was subsequently adequately consulted on the modified scope of the project and the duty to consult did not require advance notice of such modifications.[78] Regarding the duty to accommodate, the Court found that the modifications to the project (in respect of which the applicant was consulted) were specifically adopted in response to the applicant's comments, and constituted an accommodation of their interests.[79]

Halalt Nation provides support for the principle that, where deep consultation is required, the adequacy of consultation will not be undermined where there is no formal assessment of the strength of the First Nation's claim at the outset of consultation.[80] However, the Court noted that Crown disclosure to an Aboriginal group of those materials or issues that the Crown viewed as demonstrative of a weak Aboriginal rights claim served to reduce the risk of underestimating the strength of Aboriginal claims.[81] In addition, the Crown may engage proponents separately from Aboriginal groups provided that all parties are given the relevant materials for consultation and an opportunity to comment.

In *Cold Lake First Nations v. Alberta (Minister of Tourism, Parks and Recreation)*[82] the Government of Alberta, as proponent, sought to redevelop and expand a campground beside Cold Lake territory following several years of consultation with Cold Lake First Nations (CLFN). CLFN sought judicial review of the Crown's decisions to conclude the consultation and commence construction. CLFN was successful at the Court of Queen's Bench,[83] and the Crown appealed.

The majority of the Alberta Court of Appeal overturned the decision, concluding that the reviewing judge erred in reviewing the decisions on a correctness standard, and failing to analyze the strength of the rights asserted and the seriousness of the potentially adverse effects of the campground on those rights.[84] The majority concluded that the content of the duty to consult in the circumstances included providing CLFN with notice of the development and information about it, meeting with CLFN, seriously considering its concerns, and adjusting its plans in order to mitigate and address some of those concerns.[85] The Court held that the Crown had met its obligations.[86]

While this case did not involve a regulatory process per se, the focus on process and efforts by the Crown to consult with CLFN is instructive. It affirms the dicta in *Ka'a'Gee Tu*

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77 *Halalt Nation*, *supra* note 69 at para 150.
78 *Ibid*.
79 *Ibid* at paras 187-90.
80 *Ibid* at para 118.
81 *Ibid* at para 122.
82 2013 ABCA 443, 566 AR 259, leave to appeal to SCC refused, 35733 (15 May 2014) [*Cold Lake*].
83 *Cold Lake First Nation v. Alberta (Tourism, Parks and Recreation)*, 2012 ABQB 579, 543 AR 198.
84 *Cold Lake*, *supra* note 82 at paras 40, 57.
85 *Ibid* at para 34.
86 *Ibid* at para 50.

that a reviewing court must focus on process, not outcomes.[87] This is true whether or not a formal regulatory process exists. Particularly compelling to the Court of Appeal was the "voluminous"[88] consultation record, which included: (1) information on impacts of the development on CLFN; (2) evidence that CLFN were actively engaged in the process; (3) information regarding the risks associated with the development; and (4) the range of specific efforts by the Crown to engage with CLFN (and in one case, the efforts of CLFN to frustrate them).[89] The importance of a complete consultation record when reviewing the adequacy of consultation cannot be overstated. A physical record documenting consultation is hard evidence that is difficult for a court to ignore. In this case and others,[90] the consultation record played a significant role in defending the consultation process.

This decision also highlighted the fact that Aboriginal participation in consultation is a two-way street. CLFN argued that the Crown had failed to obtain information about certain Aboriginal practices. The majority rejected this position, holding that the Crown was not obliged to conduct such research in lieu of CLFN since "the First Nations should be in a much better position to ascertain their own historical practices."[91] They then underscored the correlative nature of the duty to consult, stating that "[b]oth parties have reciprocal duties to facilitate an assessment of the asserted rights and to outline concerns with clarity."[92]

V. LEGAL CHALLENGES THAT GO BEYOND THE DECISION AT ISSUE

Aboriginal groups are launching novel challenges, seeking to expand the scope of the duty to consult, often (and contrary to the Supreme Court of Canada's dicta in *Rio Tinto*) beyond the Crown conduct contemplated in the circumstances. This was the case in *Halalt Nation*,[93] but is also particularly relevant in the context of successive administrative decisions in respect of the same project. The specific Crown conduct and the rights or interests that may be affected are critical to whether the duty to consult is triggered.

A. THRESHOLD FOR THE DUTY TO CONSULT

The duty to consult and accommodate derives from section 35(1) of the *Constitution Act, 1982*.[94] Given its constitutional status, courts have determined that the duty applies to all forms of Crown action. This is true regardless of whether the Crown action is pursuant to statute or to Crown prerogative,[95] and (in the case of statutory action) regardless of whether the action is discretionary or required by the statute: "[t]he duty to consult is a constitutional

87 *Supra* note 15 at para 92.
88 *Cold Lake*, *supra* note 82 at para 27.
89 *Ibid* at paras 28, 44, 47.
90 See e.g. *Nunatukavut Community*, *supra* note 16.
91 *Cold Lake*, *supra* note 82 at para 29.
92 *Ibid*.
93 *Supra* note 69.
94 *Supra* note 6.
95 *Rio Tinto*, *supra* note 3 ("[t]his raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers.… This accords with the generous, purposive approach that must be brought to the duty to consult" at para 43).

principle that applies 'upstream' of a statute … the government cannot follow a legislative mandate in a manner that offends the Constitution."[96]

The test is whether there is any Crown conduct that attracts the consideration of whether a constitutional principle is engaged to ensure the honour of the Crown.[97] Whether legislative action should be treated as Crown action subject to the duty to consult is an open question,[98] however the duty to consult does apply to orders in council issued by the Governor-in-Council.[99] The threshold for the duty to consult was also explored in three recent decisions.

While not a resource development decision, *Native Council of Nova Scotia v. Canada (Attorney General)*[100] considered the triggers for consultation. The issue was whether the 2010 decision of the Government of Canada to eliminate the long-form census triggered the duty to consult. The applicants relied on *Haida Nation* to argue that the honour of the Crown arises in all government dealings with Aboriginal peoples, including broad-based administrative decisions. The Court rejected this, concluding that the honour of the Crown arises only when a specific Aboriginal interest or right is engaged.[101] In this case, the applicants failed to identify any particular Aboriginal or treaty right that may have been adversely affected by the Crown's conduct.[102]

In *Fond du Lac Denesuline First Nation v. Canada (Attorney General)*[103] the Applicants applied for judicial review of the decision of the Canadian Nuclear Safety Commission (the "Commission") to renew the operating license for the Areva Resource Canada Inc. McClean Lake Uranium mine and mill and incorporate certain activities of Areva's Midwest Uranium Mine into the renewed license. The central questions before the Court were whether the Commission had jurisdiction to consider the duty to consult and whether consultation was adequate in the circumstances. The Federal Court concluded that the Commission's jurisdiction included consideration of constitutional issues.[104] If a duty to consult did arise, it was fulfilled by the public information and consultation activities carried out by the proponent in respect of the licensing application, the regulatory process, and the full participation of the applicants in that process.[105]

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96 *Ross River Dena Council v Yukon*, 2011 YKSC 84, 343 DLR (4th) 545 at para 54 [*Ross River*]. See also *Klahoose First Nation v Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 CNLR 110 at para 131.

97 *Ross River*, *ibid* at para 55.

98 *Rio Tinto*, *supra* note 3 at para 44; see also *Chief Steve Courtoreille v The Governor General in Council*, Ottawa T-43-13 (application for judicial review). Similarly, Hupacasath First Nation commenced a judicial review regarding Canada's pending ratification of 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* (online: Foreign Affairs, Trade and Development Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx>). Chief Justice Crampton denied the application: *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900, 438 FTR 210, appeal to FCA pending (A-324-13).

99 *Rio Tinto*, *ibid*; *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*, 2011 BCSC 266, 20 BCLR (5th) 356 at para 128 [*Adams Lake*].

100 2011 FC 72, 383 FTR 64 [*Native Council*].

101 *Ibid* at para 39.

102 *Ibid* at para 37.

103 2010 FC 948 377 FTR 50.

104 *Ibid* at para 201.

105 *Ibid* at para 229.

The main issue on appeal was whether the renewal of a uranium mining and operation licence triggered the duty to consult.[106] In denying the appeal, the Federal Court of Appeal affirmed the Federal Court's determination that the Commission had implicit jurisdiction to determine whether the duty to consult was triggered and, if so, whether it was satisfied.[107] It also concluded that no duty to consult existed because the appellants failed to identify any potential harm that may be caused to an Aboriginal or asserted right as a result of the licence renewal.[108] The Federal Court held that existing treaty rights do not equate, without further proof, to the fact that those rights may be compromised. The duty to consult arises only when there is evidence of a possibility of harm to an Aboriginal or treaty right.[109] Since the appellants had not identified any such harm, the Commission was justified in concluding that the duty to consult did not arise. This conclusion, and in particular its focus on impacts, contrasts slightly to that of the Court in *Native Council*, which focused on the failure on the part of the Applicant to identify any rights or interests.

In *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*,[110] the Saskatchewan Court of Queen's Bench dismissed the applicant's claim that the posting for sale and subsequent grant of certain mining exploration permits by the Minister of Energy and Resources triggered the duty to consult. The Minister did not consult the First Nation regarding the permits, and the Court concluded that "[t]here [was] nothing to consult about."[111]

Citing *Rio Tinto*, the Court held that, for the duty to be triggered in a given case, the impugned government action must be shown to potentially adversely affect treaty rights.[112] The applicant did not establish the necessary causal nexus between the granting of the permit and potential effect on its rights. Like prior decisions on the duty to consult, the Court underscored the importance of proffering credible evidence in respect of the causal nexus.

The Court drew a further distinction between what the permits allowed (to engage in exploration) and what they did not allow (to go onto the land to engage in physical exploration work).[113] The Court highlighted that the permit-holder would require further authorizations to physically go onto the land, which would then trigger the need for consultation.[114] Because the permit holder did not apply for authorization to go onto the land, there was no possibility for First Nation treaty-protected land to be impacted without further Crown conduct (which would be the subject of future consultation).

Finally, the Court found that the decision to post for sale and subsequently grant the permits was not the "strategic, higher level decisions" contemplated in *Rio Tinto* that may generate a duty to consult.[115] In this case, the decisions "were not made at the ministerial

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106 *Fond du Lac Denesuline First Nation v Canada (Attorney General)*, 2012 FCA 73, 430 NR 190.
107 *Ibid* at para 7.
108 *Ibid* at para 8.
109 *Ibid* at para 12.
110 2014 SKQB 69, [2014] SJ No 174 (QL) [*Buffalo River*].
111 *Ibid* at para 48.
112 *Ibid* at para 49.
113 *Ibid* at para 27.
114 *Ibid*.
115 *Ibid* at para 28, *Rio Tinto*, *supra* note 3 at para 44.

level … [but] … were made at an administrative level, with hardly any information at hand, and the decisions involved no planning."[116]

For proponents, *Buffalo River* signals the importance placed by courts on the need for First Nations to establish a causal link between the impugned Crown conduct and their rights, and that administrative decisions that do not implicate high-level strategy or macro-scale land-use planning are less likely to trigger a duty to consult.

Together, these three decisions assist in filling in the details of the third element of the *Haida Nation* test, prescribing a determination of: (1) whether specified Aboriginal rights or interests exist; (2) the nature of the Crown conduct; and (3) whether, as a matter of fact, there are any adverse effects on those rights or interests.

In *Neskonlith Indian Band v. Salmon Arm (City)*,[117] the Neskonlith Indian Band (in this section, the Band) unsuccessfully argued before the British Columbia Supreme Court that the City of Salmon Arm failed to consult on its decision to issue a permit allowing construction on a flood plain beside a Neskonlith Indian Reserve.[118] The primary issue before the British Columbia Court of Appeal was whether the municipality owed a duty to consult the Band before issuing the permit. Neskonlith argued that, like the application of the *Canadian Charter of Rights and Freedoms* to municipal governance, the duty to consult also binds municipalities where their decisions impact Aboriginal rights or interests.[119] The respondents argued that the honour of the Crown was non-delegable and, consequently, the duty to consult remained with the Crown.

The Court of Appeal rejected Neskonlith's reasoning, concluding that as creatures of statute, the duty to consult is not imposed on municipalities in making the day-to-day operational decisions, and further that local governments lack the authority and practical resources to engage in "the nuanced and complex constitutional process" required to fulfil the duty to consult.[120] While this decision affirms what was apparent in *Haida Nation* and *Rio Tinto*, it has the practical effect of assisting proponents and stakeholders in focusing consultation efforts where they are relevant — provincial and federal decision-making — and limiting judicial review on Aboriginal grounds of practical day-to-day decisions taken at the municipal level.

B. SUCCESSIVE DECISIONS IN RESPECT OF THE SAME PROJECT AND NEW DECISIONS THAT RELATE TO PAST PROJECTS

There are several recent decisions in which, despite the Supreme Court of Canada decision in *Rio Tinto*, the applicant sought to collaterally attack past or future decisions. As discussed above with respect to *Halalt Nation*, the duty to consult applies to the contemplated Crown action at issue, not to future or past Crown conduct.[121] Where a particular decision engages

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116 *Buffalo River*, *ibid* at para 31.
117 2012 BCCA 379, 327 BCAC 276 [*Neskonlith Indian Band*].
118 *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCSC 499, 32 BCLR (5th) 408.
119 *Neskonlith Indian Band*, *supra* note 117 at para 62; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, *supra* note 6 [*Charter*].
120 *Neskonlith Indian Band*, *ibid* at paras 68, 70-71.
121 See Part IV above.

past decisions, consultation (if any is required) will be conducted regarding novel impacts only, as confirmed by the following jurisprudence.

The impugned decision in *Louis v. British Columbia (Minister of Energy, Mines and Petroleum Resources)*,[122] was the grant of several mine permits to Thompson Creek Metals Company Inc. (Thompson Creek) in respect of a mine expansion and modernization. The issue before the Court of Appeal was the scope and adequacy of consultation in approving the mine expansion.

The mine is located within the traditional territory claimed by Stellat'en First Nation (Stellat'en). The Crown granted the right to mine in 1965. Beginning in 2008, Thompson Creek applied for various permits to expand and modernize the mining operations. The Crown attempted to engage in consultations with Stellat'en throughout the permit application process. The parties disagreed on the appropriate scope for consultation, and consultation was unsuccessful.[123]

Stellat'en sought judicial review of several mine permits on the basis that consultation had been inadequate. It argued that the Crown was required to engage in consultation on the entirety of the expansion project rather than just the regulatory approvals. The chambers judge dismissed the petition on the basis that there were no novel adverse impacts on the rights claimed by Stellat'en.[124]

The Court of Appeal upheld the lower Court's decision. The rights held by Thompson Creek prior to its mine expansion application included title to both the minerals and the land, and mining was authorized under the original permit for an indefinite period. The purpose of consultation is to ensure that asserted Aboriginal interests are given proper consideration in the context of contemplated Crown conduct. Accordingly, the Crown must consider immediate and future adverse impacts.[125] As held by the Court, "[a] new application for regulatory approval must be considered on its merits, and where it will affect asserted Aboriginal rights, the Crown must engage in consultation."[126] However, it cannot be used to undermine a proponent's existing rights. Remedies for past and continuing breaches, including previous failures to consult, are available through other procedures.[127]

The Court held that the Crown's incremental approach to consultation was sufficient. The process did not include high-level or strategic planning decisions, and approval of one aspect of the project did not inexorably lead to approval of aspects at the later stages.[128] Further, the consultation efforts in which the Crown engaged were appropriately directed at the novel impacts of the expansion project. Given the small increase to the mine's footprint, the process was reasonable. This was particularly so in light of Stellat'en's refusal to identify

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122 2013 BCCA 412, 342 BCAC 280, leave to appeal to SCC refused, 35630 (27 February 2014) [*Louis*].
123 *Ibid* at para 2.
124 *Louis v British Columbia (Minister of Energy, Mines and Petroleum Resources*), 2011 BCSC 1070, 338 DLR (4th) 658 at para 186.
125 *Louis*, *supra* note 122 at para 80.
126 *Ibid* at para 81.
127 *Ibid* at para 69 citing *Rio Tinto*, *supra* note 3 at para 49.
128 *Louis*, *ibid* at para 107.

particular impacts of the project on Aboriginal rights.[129] Aboriginal peoples cannot use their lack of participation in the consultation process to assert that the Crown has engaged in minimal consultation.[130]

In *Upper Nicola Indian Band v. British Columbia (Minister of Environment)*,[131] the Applicant sought judicial review of an EAO decision to approve an EAC for the expansion of a transmission line in British Columbia. The project at issue involved widening 49 km of the existing right-of-way and adding 73 km of new right-of-way. The issue before the Court was whether the scope of the Crown's duty to consult was confined to the adverse impacts flowing from the specific proposal at issue or, if it included impacts arising from the original right-of-way.

The applicant advanced two main arguments: first that the scope of the Crown's duty to consult, once engaged, must include consultation for ongoing impacts of past failures to consult, and second that the honour of the Crown required the Crown to fulfill its commitment to consult broadly on (among other things) past claims and actions as part of the EA process.

The Court held that the Crown's duty to consult is triggered by contemplated government action. In cases involving the sale or renewal of long-term leased land, "the duty to consult arises *before the actual conduct* lest the subject matter of the duty to consult be irretrievably lost."[132] Relying on *Rio Tinto*, the Court held that consultation must

> be directed at the potential effects of contemplated conduct, not the past, existing, ongoing or future impacts of past decisions or actions.
>
> …
>
> The constitutional duty to consult does not apply to the larger historic impacts of previous works, or the ongoing existing impacts arising from previous decisions, for which there are other remedies. The subject of the right of consultation is the impact on the claimed rights of the current decision under consideration.[133]

Aboriginal groups have recourse to other avenues to address historic or ongoing consultation issues not stemming directly from the specific Crown proposal at issue, including civil claims and treaty negotiations. On the applicant's second argument, the Court found that the Crown had not committed to consult on existing or ongoing impacts arising from the prior project.[134]

Upper Nicola also addressed consultation adequacy where an Aboriginal group failed to participate fully. The Court held that the applicant's failure to participate precluded the legal remedies sought.[135] Further, any concern as to the extent of participation by the applicant was

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129 *Ibid* at para 85.
130 *Ibid* at para 92.
131 2011 BCSC 388, 21 BCLR (5th) 81 [*Upper Nicola*].
132 *Ibid* at para 114 [emphasis in original].
133 *Ibid* at paras 119, 156.
134 *Ibid* at para 144.
135 *Ibid* at para 149.

alleviated by the fact that the EAC contained provisions for ongoing consultation, and the project timeline had been substantially relaxed.[136]

In *Adams Lake Indian Band v. Lieutenant Governor in Council (BC)*,[137] the decision at issue was the incorporation of the Sun Peaks Mountain Resort Municipality. Adams Lake First Nation (ALFN) claimed title to a territory in south-central British Columbia including Mount Tod. A ski resort development commenced in the area in 1961. In 1993, the province entered into a Master Development Agreement (the MDA) with Sun Peaks Resort Corporation to further develop the resort. No consultation occurred between the province and the applicant during the drafting and implementation of the MDA.

Although some attempt was made to consult in respect of the incorporation, it was largely unsuccessful, in part because ALFN insisted that the larger issue of Aboriginal title needed to be determined before incorporation could take place. In March 2010, an order in council issued authorizing letters patent for the Municipality. ALFN filed a petition for an order quashing the order in council on the basis that government consultation with ALFN about the incorporation of the Municipality had been inadequate.

The central question before the Court was whether the province could sever the decision to incorporate the Municipality from the other consultation issues between the parties. It concluded that the province did not breach its duty to consult by treating the incorporation as a stand-alone issue. ALFN had sufficient opportunity to consult on the potential effects of the incorporation. That ALFN chose not to present focused arguments on the issue of incorporation per se did not require the province to complete consultation with respect to all issues before any single issue could be resolved.[138]

Citing *Rio Tinto*, the Court then affirmed that there must be a causal connection between the proposed Crown conduct and the potential adverse impact on an Aboriginal claim or right before the duty to consult will arise. While incorporation changed the structure of local government, it did not change the overall powers of government vis-à-vis Aboriginal rights and title.[139] Accommodation by the province was also found to be reasonable; the Municipality was required to form a First Nations advisory committee which was a role that did not exist under the local governance at the time.[140]

The British Columbia Supreme Court reached a similar decision in *Adams Lake Indian Band v. British Columbia (Minister of Forests, Lands and Natural Resource Operation)*,[141] in which Adams Lake challenged a decision of the Ministry of Forests, Lands and Natural Resource Operations of British Columbia to issue a licence of occupation to Sun Peaks Resort Corporation. This case raised the issue of how the Crown's duty to consult First Nations applies to a phased development. The Court concluded that the Crown has a duty to

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136 *Ibid* at para 154.
137 2012 BCCA 333, 326 BCAC 154, rev'g *Adams Lake*, *supra* note 99, leave to appeal to SCC refused, 35023 (11 April 2013).
138 *Ibid* at para 71.
139 *Ibid* at para 76.
140 *Ibid* at para 79.
141 2013 BCSC 877, 50 BCLR (5th) 86.

consult on "in stream decisions" that may have an adverse impact on Aboriginal rights, but that duty does not extend to the cumulative effects of past claims infringements.[142]

Finally, in *Ktunaxa Nation v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*,[143] the British Columbia Supreme Court considered an application for judicial review of a Master Development Agreement (MDA) entered into between the project proponent, Glacier Resorts Ltd., and the British Columbia Minister of Forests, Lands and Natural Resource Operations in respect of a ski resort located near Invermere, British Columbia (the Project). The judicial review application was commenced by the Ktunaxa Nation on the grounds that the Minister failed to fulfill the Crown's duty to consult and accommodate the Ktunaxa in respect of the MDA, and further that the MDA violated the Ktunaxa's right to freedom of religion under section 2(a) of the *Charter*.[144]

In this case, the MDA represented the final approval required to commence development of the Project. The approval process for the Project commenced in 1991 and spanned a period of 21 years. The regulatory process began when Glacier submitted a formal proposal to the Minister in accordance with the Commercial Alpine Ski Policy. From the outset, the Ktunaxa communicated its opposition to the Project and requested continued consultation.

The regulatory process proceeded through several phases, including: (1) land-use planning for the Kootenay region; (2) an extensive EA under the B.C. *Environmental Assessment Act*; (3) consultation in respect of the "draft master plan" for the Project; and (4) additional meetings, workshops, and studies over a period of approximately two years. The Ktunaxa was engaged throughout and provided with capacity funding. It never formally challenged previous administrative decisions in respect of the Project.

Toward the end of the process, the Minister advised the Ktunaxa that in the Minister's opinion the consultation that had taken place was reasonable, the Ktunaxa's outstanding issues were primarily interest-based rather than legally driven, and the Project could proceed on the basis of the proposed mitigation measures. It was only at that time that the Ktunaxa took the position that its asserted Aboriginal rights could not be accommodated under any circumstances.

The Court applied the well-established jurisprudence in assessing the adequacy of the consultation and accommodation, with a focus on process, not outcomes. It concluded that when a court reviews the procedural aspects of the duty to consult, it is appropriate to consider all of the consultation in respect of past regulatory processes relating to the Project.[145]

While not dispositive, the Court noted that the fact that the Ktunaxa had not challenged the earlier regulatory approvals lay in stark contrast to its extreme late-in-the-day "no-accommodation" view of the Project.[146] The Court held that while a First Nation must not be

142 *Ibid* at paras 34, 45.
143 2014 BCSC 568, [2014] BCJ No 584 (QL), appeal as of right to the CA [*Ktunaxa Nation*].
144 *Charter*, *supra* note 119.
145 *Ktunaxa Nation*, *supra* note 143 at para 205.
146 *Ibid* at para 208.

punished for continuing to negotiate rather than litigate, it does not absolve them of the obligation to identify the asserted Aboriginal right or title that will be affected by a project.[147] The Court concluded that the consultation process and the accommodation offered to the Ktunaxa were reasonable in the circumstances, not least because the Ktunaxa had been extensively consulted, and practical and thoughtful accommodation and mitigation proposals had been required.[148] This decision has been appealed to the British Columbia Court of Appeal.

These decisions are authority for the proposition that the scope of the duty to consult in the context of successive decisions (or, new decisions in respect of existing projects) will only consider novel adverse impacts of the contemplated Crown conduct on asserted Aboriginal or treaty rights. Aboriginal groups must identify specific adverse impacts on their asserted rights that relate to the contemplated Crown decision at hand. Further, the consultation and regulatory processes for incremental approvals should not be used to undermine a proponent's existing rights.

VI. JURISDICTION OF ADMINISTRATIVE TRIBUNALS

The jurisdiction of certain administrative tribunals to determine the adequacy of consultation remains an open question, in particular, in the context of Alberta's *Administrative Procedures and Jurisdiction Act*.[149]

In *Cold Lake First Nations v. Alberta (Energy Resources Conservation Board)*,[150] Cold Lake First Nations (CLFN) sought leave to appeal a decision of the Energy Resources Conservation Board (ERCB) in relation to a bitumen recovery project.[151] In a July 2012 decision, the ERCB determined that it lacked jurisdiction to determine the adequacy of Crown consultation in relation to alleged adverse impacts on CLFN treaty rights. The following day, an agreement was reached among the parties and CLFN withdrew its objection to the project. Nevertheless, CLFN proceeded with its application, arguing that a resolution of the constitutional question was in the public interest and the absence of a full record would not impair the Court's ability to resolve it. The respondent argued that the issue was moot since the project had been approved.[152]

Leave to appeal was denied. The Court concluded that consideration of questions of jurisdiction and treaty interpretation in the absence of facts would counter Supreme Court jurisprudence cautioning against such "freestanding, legislative type pronouncement[s]."[153]

In *Métis Nation of Alberta*[154] one of the core bases on which leave was sought was the jurisdiction of the JRP to consider questions of constitutional law under the *APJA*. Justice

147 *Ibid* at para 210.
148 *Ibid* at para 245.
149 RSA 2000, c A-3 [*APJA*].
150 2012 ABCA 304, [2012] AJ No 1046 (QL) [*Osum Oil Sands*].
151 The ERCB was continued as the Alberta Energy Regulator (AER) pursuant to *REDA*, *supra* note 42, ss 81-82 in June 2013.
152 *Osum Oil Sands*, *supra* note 150 at paras 2-4.
153 *Ibid* at para 7.
154 *Supra* note 38.

Slatter opined that the issue was of general importance, of interest to Aboriginal peoples and the resource extraction industry, and that there was sufficient arguable merit to warrant further consideration by the Court of Appeal.[155]

In this case, the constitutional question related to the adequacy of consultation. In Alberta, the question of the AER's jurisdiction to consider adequacy of consultation has been addressed by the recent enactment of *REDA*, which provides that the AER has no jurisdiction to assess such a thing.[156] That responsibility is left to the newly established Alberta Consultation Office.[157] However, the question of the AER's jurisdiction to consider other constitutional questions under the *APJA* remained an open question.

Only months later, Justice Slatter once again had the opportunity to determine whether this issue was worthy of consideration by the Alberta Court of Appeal. In *Fort McKay First Nation v. Alberta Energy Regulator*,[158] the Fort McKay First Nation (FMFN) filed an application for leave to appeal certain decisions of the ERCB (now the AER). The decisions related to an application by Brion Energy Corporation to develop a steam assisted gravity drainage oil sands project (the Project) in north-eastern Alberta.

In advance of the Project hearing, FMFN gave notice to the ERCB that it proposed to raise several constitutional issues. By letter dated 23 May 2013, the ERCB advised the FMFN that, due to its lack of jurisdiction, it would not consider the questions. In June 2013, *REDA* came into force and the ERCB was replaced by the AER. In closing argument at the hearing, FMFN raised another question of constitutional law, without giving notice under the *APJA*. The AER concluded that the question was the same as the one posed previously and that it did not have jurisdiction to consider it. The AER conditionally approved the Project on 6 August 2013.[159]

In September 2013, FMFN applied for leave to appeal the AER's decision on four issues. The first two related to the ability of the AER to consider and decide constitutional issues. The third issue related to the AER's narrow interpretation of its jurisdiction to consider cumulative environmental affects. Finally, the FMFN challenged the process used to make findings respecting project impacts.[160]

In determining whether to grant leave to appeal, Justice Slatter considered the constitutional issues raised by the FMFN. He rejected the respondents' argument that the leave application was filed out of time (*REDA* requires the application to be filed within one month of when the decision was made). He concluded that complex project approvals often lend themselves to being decided in stages. The issue of jurisdiction was part of the ultimate decision, and therefore the appeal was not out of time.[161] This was consistent with his opinion

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155 *Ibid* at paras 14-20.
156 *Supra* note 151, s 21.
157 Created pursuant to Alberta, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resources Management* (3 June 2013), online: Alberta Aboriginal Relations <www.aboriginal.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf> at 5.
158 2013 ABCA 355, [2013] AJ No 1108 (QL) [*Fort McKay*].
159 *Ibid* at paras 3-5.
160 *Ibid* at para 6.
161 *Ibid* at paras 10-11.

in *Métis Nation* that courts should discourage appeals of interlocutory decisions.[162] Further, the constitutional issues raised required the AER to inquire into the FMFN's treaty rights and the legislative competence of the province. The AER declined to do both, which created a live issue respecting the AER's interpretation of its power to decide constitutional issues.[163] FMFN was unsuccessful on the other issues, and accordingly, leave was granted on the following questions: (1) whether the AER misconstrued its jurisdiction to consider questions of constitutional law; and (2) whether that had any impact on the AER's decision to approve the project.[164]

The appeal was discontinued prior to being heard. Accordingly, the AER's jurisdiction over questions of constitutional law remains unsettled. Until such time as these issues are adjudicated, or a legislative change occurs (for example, an amendment to the *APJA*) proponents should be prepared for the inevitable court challenge.

VII. ABUSE OF PROCESS

Three recent decisions address the concept of abuse of process in relation to Aboriginal groups initiating blockades to obstruct or prevent lawfully authorized resource development activities. These cases demonstrate both a diminished judicial tolerance for parties who take matters into their own hands and a requirement for aggrieved parties to pursue legal recourse in accordance with statutorily defined processes.

In *Nalcor Energy*,[165] Nalcor obtained an order permanently enjoining Nunatukavut Community Council (NCC) and its members from obstructing access to the Muskrat Falls worksite, but permitting them to protest and voice their concerns about the Lower Churchill Project in a designated "safety zone" constructed and maintained by the proponent. In October 2012, NCC blockaded the only access point to the worksite at which the project preparatory work was occurring. Protesters prevented Nalcor, contractors, and government officials from entering the site, and there were serious operational and safety concerns arising from the blockade. Nalcor obtained an interim injunction the next day, which was reduced in scope following a hearing a few days later. Due to a number of public statements from NCC indicating that they would continue the "on the ground action" against the project, Nalcor applied for a permanent injunction.

The work undertaken at the site — clearing land, building a work camp, erecting power lines — was permitted by the province. The permitting process was governed by an Aboriginal consultation policy guideline. NCC had been invited to participate in the creation of that process, but failed to do so. Each permit was sent to NCC, inviting comments and concerns about the proposed work. NCC failed to participate in that process as well, they wrote letters of objection to the overall project, but did not comment on the permits that authorized the work being done at the site. Instead, they chose to erect a blockade.

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162 *Supra* note 38 at para 21.
163 *Fort McKay*, *supra* note 158 at para 14.
164 *Ibid* at para 20.
165 *Supra* note 16.

The Court applied the test for a permanent injunction as set out in *Schoof v. Medical Services Commission (BC)*,[166] together with the "blockade" decision *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*.[167] Justice Stack attempted to reconcile the interests of the parties, weighing NCC's stated concerns and the proponent's valid authorization to conduct the work. He found that the province had followed a valid process and genuinely tried to engage NCC.[168]

However, he concluded that NCC's tactics amounted to "rear guard action": (1) they chose not to participate in the statutory process; (2) they failed to judicially review or otherwise challenge the permits that were granted; and, (3) instead chose a self-help remedy to try to gain leverage in their negotiations with the Federal Government.[169]

An appeal of Justice Stack's decision was heard by the Newfoundland and Labrador Court of Appeal in September 2013. The decision is pending.

Justice Stack's decision was consistent with the subsequent Supreme Court of Canada decision, *Behn v. Moulton Contracting Ltd*.[170] At issue in that case, was whether the Behns' acts constituted an abuse of process. The Supreme Court concluded that it was an abuse of process on the part of the individuals involved (the Behns) to raise a breach of treaty rights and of the duty to consult as a defence to a civil action, in particular where no legal challenge had been launched in respect of the permits at issue. The direct language of Justice LeBel, writing for a unanimous court, is noteworthy:

> In my opinion, the Behns' acts amount to an abuse of process. The Behns clearly objected to the validity of the Authorizations on the grounds that the Authorizations infringed their treaty rights and that the Crown had breached its duty to consult. On the face of the record, whereas they now claim to have standing to raise these issues, the Behns did not seek to resolve the issue of standing, nor did they contest the validity of the Authorizations by legal means when they were issued. They did not raise their concerns with Moulton after the Authorizations were issued. Instead, without any warning, they set up a camp that blocked access to the logging sites assigned to Moulton. By doing so, the Behns put Moulton in the position of having either to go to court or to forgo harvesting timber pursuant to the Authorizations it had received after having incurred substantial costs to start its operations. To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence.[171]

Though decided later, the facts in *Behn* were almost identical to those in *Nalcor Energy*, therefore, the law now appears settled. Claims of a breach of treaty rights or a failure in the duty to consult do not constitute a defence to civil disobedience, trespass, or abuse of process

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166 2010 BCCA 396, 292 BCAC 8.
167 2008 ONCA 534, 91 OR (3d) 1, leave to appeal to the SCC refused, 32764 (4 December 2008).
168 *Nalcor Energy*, *supra* note 16 at para 98.
169 *Ibid* at para 97.
170 2013 SCC 26, [2013] 2 SCR 227 [*Behn*], aff'g *Moulton Contracting Ltd v British Columbia*, 2011 BCCA 311, 20 BCLR (5th) 35 [*Moulton Contracting*].
171 *Behn*, *ibid* at para 42.

in circumstances where the applicant has failed to participate in the regulatory process. Instead, such actions are seen as a collateral attack on a legitimate process.

In *Canadian Forest Products Ltd. v. Sam*,[172] the validity of a cutting licence issued to Canfor by the Ministry of Forests and Range (MFR) was at issue. In late 2001, Kelah First Nation members sought to blockade an attempt by Canfor to log what is known as the Redtop area. The negotiations that ensued between the Kelah, MFR representatives, and the office of the Wet'suwet'en resulted in an agreement pursuant to which the MFR was obligated to end logging access through the Red Top Road. In 2003, the MFR developed a legislative plan to create new forest sector opportunities with First Nations and other smaller players in the forest industry. The Redtop was reallocated to Canfor in June 2005. Kelah and the Wet'suwet'en were not involved in the discussions leading up to the transfer, nor were they informed of the transfer after it occurred. Upon learning of Canfor's efforts to obtain cutting permits, the Kelah again expressed their disagreement with logging in the Redtop area. Logging commenced in November 2009, and a blockade of the road occurred within days.

In determining the validity of the cutting permit, the Court relied extensively on the reasoning of the British Columbia Court of Appeal decision in *Moulton Contracting*.[173] It concluded that the form of action commenced by the Kelah constituted "an impermissible collateral attack on the issuance of the permit."[174] However, the finding of collateral attack did not extinguish the ability of the First Nation to pursue its Aboriginal rights and title, it merely required them to do so in the appropriate forum.

The rule against collateral attack prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route. *Canadian Forest Products* affirms that where the government has jurisdiction to grant a permit, the permit is binding and conclusive unless it is set aside on appeal or lawfully quashed. Therefore, an applicant's attempt to circumvent the appropriate forum for judicial review will likely result in the finding of an impermissible attack on the government's decision to grant an approval.

Similarly, in a December 2013 unreported decision, the Court of Queen's Bench of Alberta, relying on *Behn*, granted Penn West Petroleum Ltd. (Penn West) an order enjoining members of the Lubicon Lake Nation from blockading an access road used by Penn West to access oil development operations.[175] In granting the order, the Court concluded that Penn West had valid licences and a right to access its operations. The respondents had not challenged those decisions, and could not be permitted to take matters into their own hands.

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172 2013 BCCA 58, 43 BCLR (5th) 25 [*Canadian Forest Products*].
173 *Supra* note 170.
174 *Canadian Forest Products*, *supra* note 172 at para 30.
175 *Penn West Petroleum v Bernard Ominayak* (16 December 2013), Calgary 1301-14668 (QB).

VIII. CROWN LIABILITY FOR FAILURE TO CONSULT

The question of whether the Crown may be civilly liable to proponents for a failure to adequately consult with Aboriginal groups is now before the courts. Given that the duty to consult must be fulfilled by the Crown, and in light of the significant economic losses that may be faced by a proponent where a failure of the Crown to adequately consult and accommodate results in significant delays or project abandonment, it is not surprising that proponents have sought to hold the Crown liable for such damages. While there are initial indications that courts are willing to award damages in such cases, the question remains unsettled.

Late in 2013, the British Columbia Supreme Court in *Moulton Contracting Ltd. v. British Columbia*,[176] concluded that the province was liable to a proponent for civil damages in the amount of $1,750,000 arising from their failure to adequately consult the Fort Nelson First Nation (FNFN) in respect of the sale of Timber Sales Licences (TSL). The claims against the FNFN and individual members were dismissed. This case concerned liability for economic losses alleged to have been sustained by Moulton Contracting Ltd. (Moulton), a logging contractor, when it was prevented by the actions of certain members of the FNFN from gaining access to certain lands near Fort Nelson, British Columbia. Moulton was granted the right to log the areas through the purchase of two TSLs from the province. Moulton alleged that the province breached both the TSLs and a road permit by failing to fulfill its duty to consult the FNFN.

The facts in this case are detailed and lengthy, but can be summarized briefly. After having obtained the TSLs, Moulton sought to commence operations. Citing a failure by the province to consult in respect of the TSLs, members of FNFN blockaded the access road, preventing Moulton from harvesting. The province was aware of the FNFN's (and individual members') grievances, but did not notify Moulton of them. Moulton was unable to harvest the area, except for a small quantity of lumber, thereby incurring a loss of profit.

Moulton commenced a civil claim against the Crown in: (1) breach of contract for failure to provide Moulton with access to the lands designated in the TSLs, contrary to an express term of the TSLs and of the Road Permit; (2) breach of contract, or breach of a condition precedent of the TSLs and Road Permit, that the Crown had consulted with all relevant Aboriginal groups; and, (3) negligent misrepresentations that access would be granted to the lands designated in the TSLs, and that consultation with Aboriginal groups had taken place.

The claims against the FNFN and individual members of FNFN were based in tort and included: (1) intentional interference with Moulton's business interests; (2) conspiracy to interfere with Moulton's business; and, (3) wilful obstruction, interruption, or interference by the defendants with Moulton's use, enjoyment, or operation of the access road, the TSLs, or the Road Permit, such as to constitute mischief, in contravention of section 430 of the *Criminal Code*.[177] These claims were dismissed.

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[176] 2013 BCSC 2348, [2014] 2 CNLR 240 [*Moulton* (BCSC)].
[177] RSC 1985, c C-46.

The Court found that the Crown must be taken to be aware of the risk of not engaging in meaningful consultation with Aboriginal groups, and that "a party engaging in negotiations with the Crown for license to use Crown land must be entitled to assume that the Crown has taken adequate steps to discharge its obligation."[178] The Court held that "[t]he commercial reality of dealing with land subject to Aboriginal claims justifies and necessitates such expectations being recognized as forming implied terms of a contract with the Crown."[179] Specifically, the Court implied the following terms to the TSLs:

> (a) That the Province had engaged in all necessary consultation with affected First Nations, and had discharged its duty to consult; [and]
>
> (b) [t]hat the Province was not aware of any First Nations expressing dissatisfaction with the consultation undertaken by the Province, save as the Province had disclosed to Moulton Contracting.[180]

Although the Court concluded that the province had failed to adequately consult FNFN, it held that the province was not liable for breach of the implied term that it had discharged its duty to consult because there was an insufficient causal connection between the lack of the necessary level of consultation and Moulton's losses, and the fact that the losses were caused by the blockade, which fell within an express exemption of liability in the timber sale licences.[181]

However, the province did breach the implied term that it was unaware of any First Nations dissatisfied with the adequacy of consultation. The Court found that the province knew, or ought to have known, that the First Nation was threatening a blockade and was obliged, as a matter of contract, to advise Moulton of these threats in a timely manner. This knowledge also grounded concurrent liability in negligence. The Court held that the province owed a duty of care to Moulton, arising out of their contractual relationship, and that this duty required the province to pass on critically important information to Moulton in respect of Moulton's ability to avail itself of its rights under the TSLs.[182] Had Moulton been advised of the First Nation's dissatisfaction and intention to block access to the area, it would have pursued other opportunities. The province was held liable to Moulton for the loss of those opportunities. This decision has been appealed to the BCCA.[183]

A similar claim was filed in the Ontario Superior Court of Justice. On 25 October 2013, Northern Superior Resources Inc. (Northern Superior) filed a statement of claim against the government of Ontario alleging that Northern Superior had lost its ability to benefit from mining permits as a result of the government's failure to engage in meaningful consultation with First Nations.[184] The claim, which has been amended once following the decision in *Moulton* (BCSC), alleges that the Provincial Crown owes an implied duty of good faith and duty of care *to project proponents* to properly discharge the Crown's duty to consult.

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178 *Moulton* (BCSC), *supra* note 176 at para 290.
179 *Ibid*.
180 *Ibid* at para 291.
181 *Ibid* at paras 298-301.
182 *Ibid* at para 302.
183 Vancouver CA041524 (CA).
184 *Northern Superior Resouces Inc v Ontario*, Toronto CV-13-491444 (Sup Ct).

Moreover, Northern Superior contends that a grant of rights contains an implied promise on the part of the provincial government to consult.

Northern Superior has an unencumbered interest in three groups of unpatented mining claims located northwest of Thunder Bay. It claims that between 2005 and 2011 it engaged in meaningful consultation with Aboriginal groups in the Thunder Bay area, allegedly with the Crown largely absent. The claim stems from two alleged incidents that occurred during this time.

First, Northern Superior claims Sachigo Lake First Nation (SLFN) began making unreasonable demands in 2011, including requiring Northern Superior to pay additional "administrative fees," and physically detaining Northern Superior employees to procure payments. The relationship deteriorated and SLFN "evicted" Northern Superior from the land in 2012.[185] Second, in response to disputes between Ontario and other First Nations, Ontario designated a mining exploration exclusion zone that allegedly affected Northern Superior's mining interests.

Northern Superior claims damages in the amount of $110,000,000.00, representing the present day value of its mineral claims or, in the alternative, an order that the mineral claims be transferred to the government of Ontario upon payment to Northern Superior of $110,000,000.00. In addition, Northern Superior seeks reimbursement for all sums it spent during Aboriginal consultation and accommodation work, which it estimates to be approximately $15,000,000.00.

While it is too early to speculate on the likelihood of success of this claim, the decision in *Moulton* (BCSC) (and its pending appeal) is likely to be influential. The prospect that the Crown may be civilly liable to proponents for a failure to adequately consult Aboriginal groups will likely have far reaching implications for future consultation processes.

IX. EXPLAINING THE INCREASE IN LITIGATION

The marked increase in litigation arising from resource development projects tracks Canada's rise in the global energy market and the increased sophistication, experience, and collective action of Aboriginal litigants. Additionally, the influx of litigation in this area is a reflection of the principles articulated by the Supreme Court of Canada in cases like *Haida Nation* and *Rio Tinto*, as well as lower court decisions elaborating on those principles.

As Canada's resource sector develops, and as projects advance further north and into the hinterlands, the likelihood of litigation arising from consultation-related disputes with Aboriginal communities increases. Additionally, the immense monetary and physical scale of some projects raises the stakes for proponents, governments, and Aboriginal groups alike, thereby further increasing the prospect of litigation. With so much at stake for affected parties, disputes merit the cost of litigation. Put simply, the sheer volume of projects (many of which impact Aboriginal rights) combined with the profound economic impacts associated

[185] *Ibid* (Statement of Claim at paras 27-39).

with such projects, serves to increase the points of contact with Aboriginal groups and increases the risk of disputes.

The increase in litigation arising from project approvals is also attributable to the evolving case law in this area. In the wake of landmark decisions like *Haida Nation* and *Rio Tinto*, Aboriginal groups, governments, and proponents have more guidance on the parameters of the duty to consult. Simultaneously, the open-ended nature of the Supreme Court of Canada's language in those cases leaves parties uncertain as to the precise requirements of the duty. This mix of certainty and uncertainty leaves the lower courts to absorb the downstream jurisprudence from the Supreme Court and apply it to the upstream of litigation sparked by disputes between Aboriginal communities, proponents, and the governments. The result is an increase in litigation seeking to test the boundaries of the existing jurisprudence.

A final reason for the recent rise in litigation — which should not be viewed in isolation — is the steadily increasing legal sophistication of Aboriginal groups. After years of litigation arguing disputes in the energy and resource sector, Aboriginal groups have developed significant expertise and understanding of the process. Furthermore, Aboriginal groups are well organized and often collaborate with other Aboriginal and environmental groups in their opposition to (or participation in) resource development. This expertise and organization, at a time when the energy and resource sector is developing rapidly, has secured First Nations a stronger voice and an enhanced opportunity for engagement. Litigation, though a last resort, has become a valuable tool to gain leverage and to enhance negotiating positions with government and proponents alike.

X. POSTSCRIPT: *TSILHQOT'IN NATION V. BRITISH COLUMBIA*

On 26 June 2014, after this article was presented at the Canadian Energy Law Foundation 2014 Jasper Research Seminar, the Supreme Court of Canada released its decision in *Tsilhqot'in Nation v. British Columbia*.[186] While the focus of the decision is Aboriginal title, there is no doubt that it will add to the understanding of the duty to consult and accommodate, and lead to a body of jurisprudence relevant to natural resource development in Canada. The authors therefore felt it necessary to add a brief discussion of this historic decision.

The Tsilhqot'in Nation is a semi-nomadic grouping of six bands, living in central British Columbia. In 1983, British Columbia granted a commercial logging licence on land considered by the Tsilhqot'in people to be part of their traditional territory. The band objected and sought a declaration prohibiting commercial logging on the land. Talks with the province were unsuccessful, and the original land claim was amended to include a claim for Aboriginal title over 4,380 square kilometres, only a fraction of the Tsilhqot'in traditional territory. The federal and provincial governments opposed the title claim. In 1998, Chief Roger William of the Xeni Gwet'in Indian Band brought an action on behalf of the Tsilhqot'in against British Columbia and Canada.

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[186] 2014 SCC 44, 374 DLR (4th) 1 [*Tsilhqot'in Nation*].

The Supreme Court upheld the trial judge's finding that the Tsilhqot'in people were entitled to a declaration of Aboriginal title to a portion of its claimed area, as well as a small area outside the claimed area. This decision is significant because it is the first time that any court has formally declared that Aboriginal title exists to a particular tract of land, based on the existing body of jurisprudence regarding Aboriginal title, beginning with *Calder v. Attorney General of British Columbia*.[187]

In cases where Aboriginal title is unproven, the Supreme Court in *Tsilhqot'in Nation* affirmed the well-established requirement that the Crown owes a procedural duty to consult and, if appropriate, accommodate the unproven Aboriginal interest.[188] By contrast, where Aboriginal title has been established, the Crown must not only comply with its procedural duties but also ensure that the proposed government action is substantively consistent with the requirements of section 35 of the *Constitution Act, 1982*.[189] At the time the commercial logging licences were granted, the Tsilhqot'in title claim had not yet been proven, and the Supreme Court found that the honour of the Crown required the province to consult with the Tsilhqot'in people on the uses of the lands and accommodate their interests. By failing to do both, the province breached the duty owed to the band.[190]

Once established, Aboriginal title gives the right to exclusive use and occupation of the land for a variety of purposes, not confined to traditional or distinctive uses. Aboriginal title holders have the right to decide how land is used and the right to benefit from those uses, subject to the requirement that the uses must be consistent with the group nature of the interest. The Supreme Court stated that once title is established, it may be necessary for the Crown to reassess its prior conduct and potentially cancel decisions that result in an unjustifiable infringement of Aboriginal title.[191] These comments will likely be the subject of future litigation.

Governments and others seeking to use the land must obtain the consent of the Aboriginal title holder. If the Aboriginal title holder does not consent to the proposed use of the land, the government must establish that the proposed incursion on the land is justified under section 35 of the *Constitution Act, 1982*, in accordance with the test previously set out in *R. v. Sparrow*[192] and with reference to *Delgamuukw v. British Columbia*.[193]

On the issue of interjurisdictional immunity, the Supreme Court held that provincial laws of general application apply to lands held under Aboriginal title, subject to the constitutional limits and the infringement and justification framework from *Sparrow*.[194] The decision expressly overturned *R. v. Morris*,[195] in which the Supreme Court held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of federal power over "Indians." Provincial governments are no longer categorically barred from regulating the exercise of Aboriginal rights, including Aboriginal title.

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187 [1973] SCR 313.
188 *Supra* note 186 at para 93.
189 *Ibid* at para 80; *Constitution Act, 1982*, *supra* note 6.
190 *Tsilhqot'in Nation*, *ibid* at para 95.
191 *Ibid* at para 92.
192 [1990] 1 SCR 1075 [*Sparrow*].
193 [1997] 3 SCR 1010.
194 *Tsilhqot'in Nation*, *supra* note 185 at paras 105-106.
195 2006 SCC 59, [2006] 2 SCR 915 [*Morris*]; *ibid* at para 150.

With the exception of the Supreme Court of Canada's finding on *Morris*, *Tsilhqot'in Nation* is consistent with earlier Supreme Court case law regarding Aboriginal rights and title generally. In particular it:

(1) confirms that governments can infringe proven Aboriginal title, provided that they meet the established test for "justification";

(2) confirms that the Crown's procedural duty to consult continues to apply to activities or decisions by the Crown that may affect asserted, but unproven, Aboriginal title;

(3) provides regulatory certainty by making clear that provincial laws of general application apply to Aboriginal title lands, subject to constitutional limits; and

(4) affirms that governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.