THE CROWN'S DUTY TO CONSULT ABORIGINAL PEOPLES: TOWARDS AN UNDERSTANDING OF THE SOURCE, PURPOSE, AND LIMITS OF THE DUTY

CHRIS W SANDERSON, QC, KEITH B BERGNER, AND MICHELLE S JONES*

While the duty to consult fulfils a critically important role in defining, guiding, and developing the interrelationship of the Crown and Aboriginal peoples, the role of the duty to consult, properly understood, is but one of several important elements in the overall scheme of satisfying the Crown's constitutional duties to Canada's Aboriginal peoples. The Crown's duty to consult and, if necessary, accommodate is both important and useful; however, this duty to consult should not be stretched in an attempt to fulfil other roles or serve other purposes. The Crown's duty to consult coexists with the other elements of the scheme, including the Crown's fiduciary obligations, treaty obligations, and the obligation to justify infringements of Aboriginal rights and title. This distinction in approach between the duty to consult and substantive Aboriginal rights is more understandable when one clearly distinguishes between the purpose of and the limitations on the Crown's duty to consult and those of the other elements of the Crown's obligations to satisfy its constitutional duties to Canada's Aboriginal peoples.

Alors que l'obligation de consulter joue un rôle très important dans la définition, la direction et le développement des rapports humains entre la Couronne et les peuples autochtones, cette obligation de consulter, proprement dite, n'est qu'un de plusieurs éléments d'un ensemble requis pour satisfaire les obligations constitutionnelles de la Couronne à l'égard des peuples autochtones du Canada. L'obligation de consulter de la Couronne et, au besoin, de faire des accommodements est à la fois importante et utile. Cependant, cette obligation ne doit pas être étirée de manière à y inclure d'autres rôles ou de servir à d'autres fins. Cette obligation coexiste avec d'autres éléments de l'ensemble, incluant les obligations fiduciaires de la Couronne, les obligations en vertu des traités et l'obligation de justifier les atteintes portées aux droits et titres des Autochtones. Cette distinction dans l'approche entre l'obligation de consulter et les droits substantiels des Autochtones se comprend mieux si on fait la distinction entre la raison d'être et les limitations de l'obligation de consulter de la Couronne et les autres éléments des obligations de la Couronne de satisfaire les obligations constitutionnelles à l'égard des peuples autochtones du Canada.

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* Chris W Sanderson and Keith B Bergner are partners at Lawson Lundell LLP. Michelle S Jones is an associate with the same firm. Chris W Sanderson presented the argument of the appellant British Columbia Hydro and Power Authority (BC Hydro) in *Rio Tinto Alcan v Carrier Sekani Tribal Council*. Keith B Bergner acted as co-counsel for BC Hydro in *Rio Tinto Alcan* and also appeared as co-counsel for the appellant Government of the Yukon in *Beckman v Little Salmon/Carmacks First Nation* and the intervener Canadian Association of Petroleum Producers in *Standing Buffalo Dakota First Nation v Enbridge Pipelines*. Michelle S Jones provided research support in respect of all three cases.

I. INTRODUCTION AND PURPOSE

In the last three months of 2010, the Supreme Court of Canada released a number of important decisions at both the appeal and leave to appeal level in cases that address the Crown's duty to consult with Aboriginal peoples, including the decisions in *Rio Tinto Alcan v Carrier Sekani Tribal Council*[1] and *Beckman v Little Salmon/Carmacks First Nation*.[2] This was the first occasion since the Supreme Court of Canada's trilogy of decisions in 2004 and 2005 — *Haida Nation v British Columbia (Minister of Forests)*,[3] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*,[4] and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*[5] — that the Court provided significant further discussion, elaboration, and analysis of the parameters of the Crown's duty to consult with Aboriginal peoples. As the Court aptly noted in *RTA*, "[i]n the intervening years [since *Haida*], government-Aboriginal consultation has become an important part of the resource development process."[6] Given the recent decisions (and the length of time that has passed since the Court's original trilogy of decisions), an overall review of the Court's jurisprudence is appropriate to determine the state of the existing law in relation to the Crown's duty to consult with Aboriginal peoples.

This article will argue that, while the duty to consult fulfils a critically important role in defining, guiding, and developing the interrelationship of the Crown and Aboriginal peoples, the proper role of the duty to consult is more limited than some early claims (and some lower

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1 2010 SCC 43, [2010] 2 SCR 650 [*RTA*].
2 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon*]. In addition to *RTA* and *Little Salmon*, released in October and November 2010 respectively, the Supreme Court of Canada, in December 2010, denied leave to appeal to the Federal Court of Appeal's decision in *Standing Buffalo Dakota First Nation v Enbridge Pipelines*, 2009 FCA 308, [2010] 4 FCR 500, leave to appeal to SCC refused, 33462, 33480, 33481, 33482 (2 December 2010) [*Standing Buffalo*]. The decision in the leave application had been deferred pending the outcome of the Court's decision in *RTA*.
3 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].
4 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].
5 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew*].
6 *Supra* note 1 at para 2.

courts) would have it fulfil. In this sense, perhaps the most notable implication from the Court's recent decisions is the reminder that the duty to consult, although powerful, is but one of several mechanisms to further the goal of reconciliation. The Crown's duty to consult, as elucidated by the Court's recent decisions, must be properly situated within the context of the overall suite of available means for the Crown to satisfy its constitutional duties to Canada's First Nations. Those other elements include the Crown's fiduciary obligations, treaty obligations, and the obligation to justify infringements of Aboriginal rights and title. Each of these interrelated doctrines has a distinct role and purpose, and each will better fulfil its purpose if the boundaries and overlaps between them are clarified. Such is the burden this article attempts to carry.

A. OUTLINE

This article will first consider the source (Part II) and purpose (Part III) of the duty to consult before turning to a consideration of its limits as clarified by the Court's recent decisions in *RTA* and *Little Salmon* (Part IV). We will then consider how the duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations and how the duty is interrelated to the other elements of this scheme, including the Crown's fiduciary obligations, treaty obligations, and the obligation to justify infringements of Aboriginal rights and title (Part V). This enhanced understanding of the duty to consult, and in particular its limits, provides a foundation for understanding and appreciating the interrelationship between administrative law and Aboriginal law principles. Two aspects of this relationship will be discussed. First, when the true purpose and limits of the duty to consult are understood, the similarities between the duty to consult and the requirements of procedural fairness, particularly in respect of their practical purpose and procedural contents, can be appreciated and utilized (Part VI). Second, the interrelationship between administrative and Aboriginal law permits an appreciation of the process in which consultation (or analogous processes) may be carried out, and of the roles of various Crown actors within such a process (Part VII).

II. THE SOURCE OF THE DUTY TO CONSULT — THE HONOUR OF THE CROWN

The Supreme Court of Canada's 2004 and 2005 trilogy of decisions clearly grounds the duty to consult in the honour of the Crown, both for cases of asserted but unproven rights (such as in *Haida* and *Taku Rive*r) and treaty rights (as in *Mikisew*). In *Haida*, the Court stated, "[t]he government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown."[7] In *Mikisew*, the Court stated that the duty of consultation "flows from the honour of the Crown."[8]

The Court's recent decisions confirm and reinforce the sourcing of the duty to consult in the honour of the Crown, again both for cases of asserted but unproven rights (such as in *RTA*) and treaty rights (as in *Little Salmon*). In *RTA*, the Court stated that "[t]he duty to

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7 *Supra* note 3 at para 16.
8 *Supra* note 5 at para 4. See also *ibid* at para 51.

consult is grounded in the honour of the Crown"[9] and characterized the duty as "a corollary of the Crown's obligation to achieve the just settlement of Aboriginal claims through the treaty process."[10] In *Little Salmon*, Justice Binnie (for the majority) stated that the duty to consult is "derived from the honour of the Crown"[11] and provided the following comments on the history of the concept of the honour of the Crown:

> The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation* of 1763 (reproduced in R.S.C. 1985, App. II, No. 1), in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples. The honour of the Crown has since become an important anchor in this area of the law: see *R. v. Taylor* (1981), 62 C.C.C. (2d) 227 (Ont. C.A.), leave to appeal refused, [1981] 2 S.C.R. xi; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Nikal*, [1996] 1 S.C.R. 1013; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; as well as *Badger*, *Marshall* and *Mikisew Cree*, previously referred to. The honour of the Crown has thus been confirmed in its status as a constitutional principle.[12]

The duty to consult, however, should not be conflated with its source. While it is clear that the duty to consult is grounded in or flows from the honour of the Crown, it is important not to confuse the honour of the Crown itself with the Crown's duty to consult and, if necessary, accommodate. While the two concepts are related, they are not co-extensive.

The Court has made it clear that "[t]he honour of the Crown gives rise to different duties in different circumstances."[13] Case law has identified the following obligations:

- *A Duty to Consult:* We have already examined in the cases referenced above how the honour of the Crown can give rise to the duty to consult and, if necessary, accommodate.

- *A Fiduciary Duty:* The honour of the Crown may give rise to a fiduciary duty in circumstances where the Crown has assumed discretionary control over specific Aboriginal interests, such as reserve lands[14] or funds belonging to First Nations.[15] Fulfilment of the fiduciary duty "requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake."[16]

- *Treaty Obligations:* "The honour of the Crown also infuses the processes of treaty making and treaty interpretation."[17]

While each of these obligations is grounded in the honour of the Crown, none of them should be confused or conflated with the honour of the Crown.

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9 *Supra* note 1 at para 32.
10 *Ibid*.
11 *Supra* note 2 at para 38.
12 *Ibid* at para 42.
13 *Haida*, *supra* note 3 at para 18.
14 See e.g. *Guerin v R*, [1984] 2 SCR 335 [*Guerin*].
15 See e.g. *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222.
16 *Haida*, *supra* note 3 at para 18.
17 *Ibid* at para 19.

Properly distinguishing between the honour of the Crown and the duty to consult (which is a duty that may arise from the honour of the Crown in some but not all circumstances) is critical in understanding the proper role of the duty to consult among the other related duties and obligations that govern the relationship between the Crown and Aboriginal peoples. As with the duty to consult, the Crown's fiduciary duty, treaty obligations, and requirement to justify infringement all play an essential role in the process of reconciliation. However, confusion about the role of the duty to consult, and in particular, attempts to broaden its scope beyond its proper purpose, distracts and in some instances detracts from the ultimate goal of reconciliation.

As Justice Binnie stated in *Little Salmon*, "[t]he concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose."[18] This brings us to a discussion of the purpose of the duty to consult.

III. THE PURPOSE OF THE DUTY TO CONSULT

The 2004 and 2005 trilogy discussed the source of the duty to consult and when it arose, but stopped short of any explicit discussion of the purpose the duty was to serve. The Supreme Court's recent jurisprudence sheds important light on this question in both the context of asserted but unproven claims to Aboriginal rights and title and treaty rights.

A. ASSERTED BUT UNPROVEN CLAIMS TO ABORIGINAL RIGHTS AND TITLE — INTERIM PROTECTION

The duty to consult was first articulated in the context of asserted but unproven claims to Aboriginal rights and title. In *Haida* and *Taku River*, the Court provided "a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided."[19] Interestingly, although neither case involved a consideration of a treaty or treaty rights, the Court made frequent references to the obligations of the Crown to negotiate treaties. The duty to consult accorded respect to these asserted but unproven interests in the interim period prior to treaty: "The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests."[20]

In *RTA*, the Court took advantage of the opportunity to engage in a more extensive articulation of the purpose of the duty to consult in the context of asserted but unproven claims. At paragraph 33 of its decision, the Court stated, "[t]he duty to consult described in *Haida Nation* derives from the need to protect Aboriginal interests while land and resource claims are ongoing or when the proposed action may impinge on an Aboriginal right."[21] At

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18 *Supra* note 2 at para 44.
19 *Haida*, *supra* note 3 at para 11.
20 *Ibid* at para 27.
21 *RTA*, *supra* note 1.

paragraph 41 the Court continued, "the purpose of consultation is to protect unproven or established rights from irreversible harm as the settlement negotiations proceed."[22]

It is clear from the Court's discussion in *RTA* that one purpose of the duty to consult is to protect asserted Aboriginal rights and title pending the resolution of claims (whether by negotiation or by litigation).

B. TREATY RIGHTS — FILLING PROCEDURAL GAPS

The duty to consult has also been applied (some would say transformed) in the context of treaty rights, where applying the duty to consult as an interim measure is not required or appropriate. In *Mikisew*, the Court applied the duty to consult in the context of a historic treaty — *Treaty No 8*, concluded in 1899.[23] The Court found that *Treaty No 8* contemplated that land would be "taken up,"[24] but that it did not specify the process by which such taking up would occur. The Court employed the duty to consult to fill this procedural gap: "Both the historical context and the inevitable tensions underlying implementation of Treaty No 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably."[25]

In *Little Salmon*, Justice Binnie followed this approach to fill what the majority (seven of nine justices) perceived to be a procedural gap in a modern treaty (the Little Salmon/Carmacks Final Agreement, concluded in 1997): "[T]he procedural gap created by the failure to implement Chapter 12 had to be addressed, and the First Nation, in my view, was quite correct in calling in aid the duty of consultation in putting together an appropriate procedural framework."[26]

Justice Deschamps (for the minority) agreed in principle that if there was a procedural gap in a modern treaty then the common law duty to consult could be applied to fill that gap. However, the minority examined the treaty's transitional provisions and concluded that no such gap could be found in the treaty in question.[27] Justice Deschamps would appear to draw a distinction between the duty to consult in the context of asserted but unproven claims and the duty to consult in the context of a treaty, going so far as to state that it would be misleading to consider the duty to consult to be the same duty in both contexts:

> Moreover, where, as in *Mikisew*, the common law duty to consult must be discharged to remedy a gap in the treaty, the duty undergoes a transformation. Where there is a treaty, the function of the common law duty to consult is so different from that of the duty to consult in issue in *Haida Nation* and *Taku River* that it would be misleading to consider these two duties to be one and the same. It is true that both of them are constitutional duties based on the principle of the honour of the Crown that applies to relations between the Crown and Aboriginal peoples whose constitutional — Aboriginal or treaty — rights are at stake. However,

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22 *Ibid*.
23 Canada, *Treaty No 8 Made June 21, 1899 and Adhesions, Reports, Etc* (Ottawa: Queen's Printer, 1966), online: Office of the Treaty Commissioner <http://www.otc.ca/siteimages/Treaty8.pdf> [*Treaty No 8*].
24 *Mikisew*, *supra* note 5 at para 30.
25 *Ibid* at para 33 [emphasis in original].
26 *Little Salmon*, *supra* note 2 at para 38.
27 *Ibid* at para 124.

> it is important to make a clear distinction between, on the one hand, the Crown's duty to consult before taking actions or making decisions that might infringe Aboriginal rights and, on the other hand, the minimum duty to consult the Aboriginal party that necessarily applies to the Crown with regard to its exercise of rights granted to it by the Aboriginal party in a treaty.[28]

Regardless of whether the duty to consult is characterized as a single duty that applies differently in different contexts or whether a distinction is made between the duties that arise in the context of asserted but unproven rights and treaty rights, it is clear that the duty (or duties) are grounded in or flow from the honour of the Crown. In the treaty context, the duty to consult serves to fill procedural gaps in the treaty, whether a historic or modern treaty.

C. A BROADER PURPOSE — RECONCILIATION

The above two sections have examined the purpose of the duty to consult as it applies in two different contexts — asserted but unproven rights on the one hand and treaty rights on the other hand. This section will explore a broader purpose of the duty to consult that comfortably applies in both contexts: advancing the objective of reconciliation.

As Justice Binnie stated in *Little Salmon*: "The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*."[29] In *Mikisew*, the Court defined reconciliation as the "fundamental objective of the modern law of aboriginal and treaty rights."[30] In *Haida*, the Court stated that "[i]t is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate."[31] The Court then went on to say that reconciliation does not end with the formal resolution of claims:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.[32]

The long term objective of reconciliation fits readily into either the treaty context or the context of asserted but unproven Aboriginal rights and title. In *Taku River*, a case involving asserted but unproven rights, the Court stated that "[i]n all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1)."[33]

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28 *Ibid* at para 119.
29 *Ibid* at para 10.
30 *Supra* note 5 at para 1.
31 *Supra* note 3 at para 20.
32 *Ibid* at para 32.
33 *Supra* note 4 at para 24.

Similarly, Professor Brian Slattery describes what he terms the "Principles of Reconciliation"[34] as governing

> the legal effects of aboriginal title in modern times. They take as their starting point the historical title of the Indigenous group, as determined by Principles of Recognition, but they also take into account a range of other factors, such as the subsequent history of the lands in question, the Indigenous group's contemporary interests, and the interests of third parties and the larger society. So doing, they posit that historical aboriginal title has been transformed into a *generative right*, which can be partially implemented by the courts but whose full implementation requires the negotiation of modern treaties.[35]

The fact that the overarching goal of reconciliation applies to both asserted and established rights is not surprising given that, regardless of the legal status of the Aboriginal interests at play, the need to reconcile such interests within society as a whole remains. As stated by Chief Justice McLachlin in her article "Aboriginal Peoples and Reconciliation": "The way ahead lies in ending fragmentation by validating Aboriginal roots while recognizing that Aboriginal peoples are also shaped by and must live their lives in modern, multicultural societies. In short, it lies in reclaiming culture and rights and reconciliation of those within society as a whole."[36]

D. SUMMARY OF THE PURPOSES OF THE DUTY TO CONSULT

Though it is the minority decision, the judgment of Justice Deschamps in *Little Salmon* provides what is perhaps the pithiest summary of the purpose of the duty to consult. At paragraphs 103 and 104, Justice Deschamps stated:

> Thus, the constitutional duty to consult Aboriginal peoples involves three objectives: in the short term, to provide "interim" or "interlocutory" protection for the constitutional rights of those peoples; in the medium term, to favour negotiation of the framework for exercising such rights over having that framework defined by the courts; and, in the longer term, to assist in reconciling the interests of Aboriginal peoples with those of other stakeholders.
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> …
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> The short-, medium- and long-term objectives of the constitutional duty to consult Aboriginal peoples are all rooted in the same fundamental principle with respect to the rights of Aboriginal peoples, namely the honour of the Crown, which is always at stake in relations between the Crown and Aboriginal peoples (*R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 24).[37]

This portion of her judgment was not the source of disagreement with the majority and serves as an accurate summary of the law.

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34 Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can Bar Rev 255 at 257.
35 *Ibid* at 282 [emphasis in original].
36 Beverley McLachlin, "Aboriginal Peoples and Reconciliation" (2003) 9 Canterbury Law Review 240 at 244.
37 *Little Salmon*, *supra* note 2.

As will be discussed below, great mischief can arise when the honour of the Crown and the duty to consult are conflated or not properly distinguished.[38] When the duty to consult and the honour of the Crown are conflated, the duty to consult can be stretched beyond its purposes (as discussed in Part III) and can expand the role of various Crown actors beyond what their proper function contemplates (as discussed in Parts VI and VII).

IV. THE LIMITS ON THE DUTY TO CONSULT

A. THE INITIAL EXPANSION OF THE DUTY TO CONSULT

In the years following the 2004 and 2005 trilogy of decisions, attempts have been made (both in the litigation process and, more frequently, at the negotiating table) to invoke the Crown's duty to consult to serve a variety of purposes. For example, in *Ahousaht First Nation v Canada (Fisheries and Oceans)*[39] the First Nation argued that the duty to consult was triggered because the Crown's contemplated conduct affected the First Nation's financial interest in the treaty process. The Federal Court disagreed that potential impacts of this nature gave rise to a duty, stating: "[C]oncerns over any impact on the treaty process, which is a discrete process, would not trigger a duty to consult. The treaty negotiation process and the litigation in which the applicants are involved are only relevant insofar as they demonstrate that the applicants have asserted a right to fish commercially, as it is this assertion that triggers the duty to consult."[40]

Similar attempts have been made in the realm of criminal law. In *Labrador Métis Nation v Canada (AG)*,[41] the Labrador Métis Nation tried to argue that the Attorney General's discretion on whether or not to stay a prosecution was subject to the Crown's duty to consult. The Federal Court of Appeal found that it was not and noted that "the Attorney General's stay of a prosecution is very different from the decisions in the above cases to which the duty to consult attached: they all had a much more direct impact on claimed underlying aboriginal rights than is the case here."[42] The Federal Court of Appeal went on to acknowledge that the threshold for the trigger is low but found:

> [T]he very tenuous nature of the connection between the issue of the stay and damage to aboriginal rights is insufficient to support a duty to consult. Any doubts on this score are put to rest by the constitutional principle that the Attorney General must exercise the prosecutorial functions of the office in an independent manner and, for most practical purposes, free from judicial review.[43]

Similarly, in *R v Janvier*,[44] the Cold Lake First Nation argued that the Crown had a duty to consult before putting in place an undercover operation aimed at catching individuals

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38 Justice Deschamps puts it more strongly when, in *Little Salmon*, *ibid* at para 107, she speaks of the honour of the Crown being taken "hostage together with the principle of the duty to consult that flows from it."

39 2007 FC 567, 313 FTR 247, aff'd 2008 FCA 212, 297 DLR (4th) 722.

40 *Ibid* at para 32.

41 2006 FCA 393, 277 DLR (4th) 60, aff'g 2005 FC 939, 276 FTR 219.

42 *Ibid* at para 24.

43 *Ibid* at para 29.

44 2005 ABPC 194, [2006] 2 CNLR 179, aff'd 2006 ABQB 204, 399 AR 365.

violating fishing regulations. The Alberta Provincial Court disagreed and found that no duty to consult existed in the circumstances.

This proliferation of consultation claims is not unlike the proliferation of claims based on the fiduciary duty that emerged following the Court's 1984 decision in *Guerin*. As discussed above, the fiduciary duty (like the duty to consult) is grounded in the honour of the Crown, but arises only in a particular set of circumstances. Following the articulation of the fiduciary duty in *Guerin*, many claims were brought forth that invoked the fiduciary duty in a wide variety of contexts. Some 16 years later, in 2002, the Court clarified in *Wewaykum Indian Band v Canada*,[45] that the Crown's fiduciary duty is not an overriding obligation governing all elements of the Crown-Aboriginal relationship but arises only when specific Indian interests are at play: "[T]here are limits [to the duty]. The appellants seemed at times to invoke the 'fiduciary duty' as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests."[46]

Similar to the limits on the Crown's fiduciary duty, the Crown's duty to consult is not an overarching doctrine that governs all elements of the Crown-Aboriginal relationship. Instead, it is one (useful and necessary) element in the overall scheme of satisfying the Crown's constitutional duties to Canada's Aboriginal peoples. Its role and purpose should not and need not be expanded to encroach on and/or displace the other older and well-established doctrines (also grounded in the honour of the Crown) that collectively govern the overall relationship between the Crown and Aboriginal peoples, including the Crown's fiduciary obligations, treaty obligations, and obligation to justify infringements of Aboriginal rights and title.

B. SOME LIMITATIONS ON THE DUTY TO CONSULT

This section will consider a number of limitations on the duty to consult that have been clearly articulated by the Court in its recent decisions. As articulated or elaborated in the recent decisions, the Crown's duty to consult is:

- not a means to seek the resolution of historical infringements;
- not a means to seek leverage or a negotiating position in respect of other claims; and
- not a means to dictate a particular substantive outcome.

Each of these will be discussed in turn. In latter sections of this article, consideration will be given to the other elements of the Crown's obligations, which underlie the reason for these limitations on the Crown's duty to consult and, if necessary, accommodate. As will be seen,

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45 2002 SCC 79, [2002] 4 SCR 245 [*Wewaykum*].

46 *Ibid* at para 81. It is noteworthy that in *Haida*, *supra* note 3 at para 18, the Court quoted this paragraph in the context of a discussion surrounding the fact that "[t]he honour of the Crown gives rise to different duties in different circumstances."

there are other complementary elements of the Crown's obligations that are better suited to address such circumstances.

1. NOT A MEANS TO SEEK THE RESOLUTION OF HISTORICAL INFRINGEMENTS

In *RTA*, the Court confirmed that an essential element of the duty to consult is the "possibility that the Crown conduct may affect the Aboriginal claim or right."[47] However, the Court forcefully drew the line at the suggestion that a historical underlying continuing infringement was, in and of itself, an adverse effect for the purpose of triggering the Crown's duty to consult: "The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights. *Past wrongs, including previous breaches of the duty to consult, do not suffice*."[48]

In coming to this conclusion, the Court drew on the purpose of the duty to consult as an interim mechanism to protect Aboriginal rights and claims pending resolution by some other mechanism: "An underlying or continuing breach, while remediable in other ways, is not an adverse impact for the purposes of determining whether a particular government decision gives rise to a duty to consult. The duty to consult is *designed to prevent* damage to Aboriginal claims and rights *while claim negotiations are underway*."[49] By this finding, the Court makes it clear that the role of the duty to consult does not extend to providing a means to remedy past infringements (alleged or established) to Aboriginal claims or rights. The Court went on, however, to provide reassurance that past and continuing breaches could be adequately and appropriately dealt with through other means: "This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult."[50]

The remedy for such an infringement flows from an ordinary court action in which Aboriginal rights (or title) are proven, an infringement is established and a claim for damages and/or other appropriate remedy for the alleged infringement are sought. There is nothing new in the notion of an Aboriginal group advancing a claim for damages (or other appropriate remedy) against the Crown in an action in respect of an alleged infringement. As discussed further below, if the Crown can not discharge its obligation to establish that such an infringement is justified, then the Crown would be subject to a damages claim.

Admittedly, bringing such claims to prove (and establish the infringement of) Aboriginal rights and title has proven difficult, time consuming, and costly. Moreover, Aboriginal title claims have proven to be particularly lengthy. In the seminal case of *Delgamuukw v British Columbia*,[51] for example, the British Columbia Supreme Court trial lasted 374 days over three years, wherein over 61 witnesses provided oral testimony. Ultimately, the Supreme Court of Canada determined that a defect in the pleadings prevented the Court from considering the merits of the particular claim before the Court. More recently, in the British

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47 *Supra* note 1 at para 45.
48 *Ibid* [emphasis added].
49 *Ibid* at para 48 [emphasis added].
50 *Ibid* at para 49.
51 [1997] 3 SCR 1010 [*Delgamuukw*].

Columbia Supreme Court's decision in *Tsilhqot'in Nation v British Columbia*,[52] that Court heard evidence lasting 339 days. Despite the length of the evidentiary phase of the trial, Justice Vickers determined that, again based on the pleadings, he was "not able, in the context of these proceedings, to make a declaration of Tsilhqot'in Aboriginal Title."[53]

It is readily apparent that litigating Aboriginal title claims for every single First Nation with an outstanding title claim would be a daunting prospect for all concerned — Aboriginal peoples, governments, courts, and society at large. Litigating Aboriginal rights claims has proven only slightly less intensive and with mixed success for First Nation claimants. A few examples will suffice:

- In *Ahousaht Indian Band and Nation v Canada (AG)*,[54] after a lengthy trial that lasted in excess of 100 days, the British Columbia Supreme Court issued a declaration as to the First Nation's Aboriginal right to fish and sell fish.[55] The Aboriginal rights found at trial were largely upheld (although slightly reduced in scope) by the British Columbia Court of Appeal.[56]

- In *Lax Kw'alaams Indian Band v Canada (AG)*,[57] the British Columbia Supreme Court, after a trial lasting 124 days, dismissed a claim for commercial fishing rights.

The length (and cost) of these claims is perhaps not surprising given what is at stake. A discussion of the challenges involved in enhancing such claims through the civil litigation process is beyond the scope of this article; however, the answer to the procedural challenge of proving Aboriginal right and title claims does not lie in expanding the duty to consult beyond its purpose of providing interim protection for such claims pending their proof or a negotiated settlement.

In light of the challenges associated with proving Aboriginal rights (and infringement), it is not surprising that some have tried to utilize the duty to consult (which does not require conclusive proof) to address past infringements of their rights. The number of cases wherein past grievances were alleged to have been within the scope of consultation on new projects exploded in the period leading up to the Court's decision in *RTA*. This was particularly true for cases arising in the province of British Columbia, where the vast majority of Aboriginal claims remain unsettled. Examples include:

- attempts made by the Nlaka'pamux Nation Tribal Council to expand the scope of consultation in respect of an expansion to the existing Cache Creek Landfill to include impacts arising from the construction of the original landfill project;[58]

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52 2007 BCSC 1700, [2008] 1 CNLR 112.

53 *Ibid* at iii (Executive Summary). The appeal of this case was heard by the British Columbia Court of Appeal in November 2010 and a decision is pending.

54 2009 BCSC 1494, [2010] 1 CNLR 1.

55 *Ibid* at para 896. The British Columbia Supreme Court found it unnecessary to address the First Nation's claim to Aboriginal title.

56 See *Ahousaht Indian Band and Nation v Canada (AG)*, 2011 BCCA 237, 333 DLR (4th) 197.

57 2008 BCSC 447, [2008] 3 CNLR 158, aff'd 2009 BCCA 593, 314 DLR (4th) 385, aff'd 2011 SCC 56, [2011] 3 SCR 535.

58 *Nlaka'pamux Nation Tribal Council v British Columbia (Environmental Assessment Office)*, 2011 BCCA 78, [2011] 2 CNLR 186 at para 72 [*NNTC*].

- attempts made by a number of First Nations potentially affected by British Columbia Transmission Corporation's (now BC Hydro's) Interior to Lower Mainland Transmission Project to expand the scope of consultation in respect of that project to include the impact of the construction of two previously built transmission lines running along the same right of way as the proposed new line;[59] and

- attempts made by the Okanagan Nation Alliance, the Ktunaxa Nation Council, and the Sinixt Nation Society to expand the consultation process in respect of BC Hydro's purchase of a one third undivided interest in the Waneta Dam and associated assets to include impacts arising from the original construction of the dam and associated assets.[60]

However, *RTA* makes it clear that the duty to consult is not the appropriate tool for resolving past and continuing infringements.[61]

2. NOT A MEANS TO SEEK LEVERAGE OR A NEGOTIATING POSITION IN RESPECT OF OTHER CLAIMS

In *RTA*, the Court commented further on the nature of the adverse effect required to trigger the duty to consult: "The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice."[62] The Court went on to say:

> Nor does the definition of what constitutes an adverse effect extend to adverse impacts on the negotiating position of an Aboriginal group. The duty to consult, grounded in the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests, no doubt may have the ulterior effect of delaying ongoing development. The duty may thus serve not only as a tool to settle interim resource issues but also, and incidentally, as a tool to achieve longer term compensatory goals.… However, cut off from its roots in the need to preserve Aboriginal interests, its purpose would be reduced to giving one side in the negotiation process an advantage over the other.[63]

In short, consultation is not simply a means to obtain leverage in respect of other outstanding claims. Such broader claims must be pursued by other means.

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59 British Columbia Utilities Commission (BCUC), *In the matter of British Columbia Transmission Corporation Reconsideration of the Interior to Lower Mainland Transmission Project*, BCUC Decision (3 February 2011), online: BC Hydro <http://www.bchydro.com/etc/medialib/internet/documents/projects/ilm/ILM_bcuc_reconsideration_decision.Par.0001.File.ILM-BCUC-reconsideration-decision.pdf>. Leave to appeal this decision has been sought. See also *Upper Nicola Indian Band v British Columbia (Environment)*, 2011 BCSC 388, [2011] 2 CNLR 348 [*UNIB*]. An appeal to the British Columbia Court of Appeal is pending.

60 BCUC, *In the matter of a Filing by British Columbia Hydro and Power Authority for the Acquisition from Teck Metals Ltd of an Undivided One-Third Interest in the Waneta Dam and Associated Assets*, BCUC Reasons for Decision to Order G-12-10 (12 March 2010), online: BCUC <http://www.bcuc.com/Documents/Proceedings/2010/DOC_24831_G-12-10_BCH%20Waneta%20Reasons%20-%20WEB.pdf>.

61 See *NNTC*, *supra* note 58 at para 72; *UNIB*, *supra* note 59 at paras 122-25.

62 *Supra* note 1 at para 46.

63 *Ibid* at para 50.

The above comments from *RTA* were made in the context of an Aboriginal group with asserted but unproven claims to Aboriginal rights and title. In principle, a similar proviso (that is, that the duty to consult is not a means to seek leverage or a negotiating position in respect of other claims) appears to apply with equal measure in the context of treaty claims. As will be discussed below, the Crown's obligation to negotiate, conclude, and honourably implement treaties (which is also grounded in the honour of the Crown) exists alongside of the Crown's duty to consult and, if necessary, accommodate. The two obligations, although sharing a common grounding in the honour of the Crown, are not co-extensive. It is not necessary to invoke the duty to consult as a means to (or for the purpose of) obtaining leverage at the negotiating table (either in respect of treaty negotiations or negotiations for compensation in respect of historic infringements).

3. NOT A MEANS TO DICTATE A PARTICULAR SUBSTANTIVE OUTCOME

In *Haida*, the Court clarified that "[w]hen the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation."[64] However, the Court was clear that "[t]his process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim."[65] In *Little Salmon*, the Court commented on how this applied in the circumstances of that case:

> The First Nation goes too far, however, in seeking to impose on the territorial government not only the procedural protection of consultation but also a substantive right of accommodation. The First Nation protests that its concerns were not taken seriously — if they had been, it contends, the Paulsen application would have been denied. This overstates the scope of the duty to consult in this case. The First Nation does not have a veto over the approval process. No such substantive right is found in the treaty or in the general law, constitutional or otherwise.[66]

The Court found that "[*s*]*omebody*"[67] has to bring the consultation process to an end and make a decision. This *somebody* is the government decision-maker, who is subject to judicial review.

Given the purposes of and limitations on the duty to consult discussed above, the courts have had to consider the development of tools to inform and elucidate the duty to consult. It is not surprising that the Court's recent decisions have drawn upon the principles of administrative law to do this.

V. THE INTERRELATIONSHIP OF THE CROWN'S DUTY TO CONSULT WITH OTHER ELEMENTS OF THE CROWN'S OBLIGATIONS

The Supreme Court of Canada has positioned the duty to consult as one element among several others in the legal principles governing the Crown-Aboriginal relationship: "[T]he

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64 *Supra* note 3 at para 47.
65 *Ibid* at para 48.
66 *Supra* note 2 at para 14.
67 *Ibid* at para 84 [emphasis in original].

duty to consult may be seen as a necessary element in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations."[68]

Since 1982, the Court has developed various processes that collectively comprise this overall scheme. This section provides a brief overview of the other processes in order to more clearly outline the role of the duty to consult and accommodate within the scheme. Without attempting to create an exhaustive typology, it is possible to identify at least three such elements in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations:

(1) the Crown's fiduciary obligation, which arise where the Crown has assumed discretionary control over specific Aboriginal interests;

(2) the Crown's treaty obligations (including negotiating, treaty making, and treaty interpretation); and

(3) the Crown's obligation in respect of justifying infringements of proven Aboriginal rights or title.

While each of these processes is aimed at a different aspect of the Crown's constitutional duties, they are all grounded in the honour of the Crown. Although a full analysis of these other elements is beyond the scope of this article, each of them will be discussed briefly in turn. The emphasis will be on attempting to identify the boundaries (or overlaps) between these elements and the duty to consult.

A. THE FIDUCIARY OBLIGATION

Like the duty to consult, the Crown's fiduciary obligation is grounded in the honour of the Crown. While both emanate from the same source, the Crown's fiduciary duty has a different trigger, purpose, and content than the duty to consult. Regarding its trigger, the Crown's fiduciary obligation arises only in specific circumstances where a prior relationship exists between the Crown and the First Nation in respect of specific interests. As stated by the Court in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*:[69]

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[70]

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68 *RTA*, *supra* note 1 at para 50.
69 [1995] 4 SCR 344 [*Blueberry River*].
70 *Ibid* at para 38 [emphasis in original].

Thus, whether or not the Crown's fiduciary duty exists is dependent on the Crown having taken legal responsibility over a specific interest held by the First Nation and the First Nation must be vulnerable as a result of this. The two areas most commonly associated with the Crown's fiduciary duty are those of Indian reserves (where the Crown has assumed general control via the *Indian Act*[71]) and treaty rights (where the Crown has contracted to protect the interests of First Nations vis-à-vis third parties).

While the above description articulates the Crown's fiduciary duty to Aboriginal peoples in general trust terms, the Court has been clear that the resulting relationship is not that of a general trust or agency relationship but rather one that is *sui generis* as a result of the "unique character both of the Indians' interest in land and of their historical relationship with the Crown."[72]

In *Haida*, the Court made it clear that when dealing with asserted but unproven Aboriginal interests the honour of the Crown does not give rise to a fiduciary obligation: "Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title."[73] More recently, in *Little Salmon*, the Court again reiterated that the two concepts are not interchangeable: "[T]he fiduciary duty is not always constitutional in nature. Nor is it equivalent to the duty to consult implied by the principle of the honour of the Crown that the Crown must maintain in its relations with Aboriginal peoples as holders of special constitutional rights."[74]

Once a fiduciary duty has been established, the Crown is required to adhere to certain legal obligations vis-à-vis the specific interests to which the fiduciary duty applies. Perhaps most importantly, the Crown must act as would "a man of ordinary prudence in managing his own affairs."[75] Further, in doing so, the Crown's behavior further attaches the "obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the [First Nation]."[76] Clearly there are distinct roles for the fiduciary obligation and the Crown's duty to consult and, if necessary, accommodate.

B. THE CROWN'S TREATY OBLIGATIONS

It is notable that in *Haida* — a case that did not involve a treaty — the Court still discussed the Crown's obligations vis-à-vis treaties. In doing so, the Court was clear that the Crown's obligation in respect of treaties arises (as does the duty to consult) as a result of the honour of the Crown: "Section 35 represents a promise of rights recognition, and '[i]t is

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71 RSC 1985, c I-5.
72 *Guerin*, *supra* note 14 at 387.
73 *Supra* note 3 at para 18.
74 *Supra* note 2 at para 142, Deschamps J.
75 *Blueberry River*, *supra* note 69 at para 104, citing *Fales v Canada Permanent Trust*, [1977] 2 SCR 302 at 315.
76 *Wewaykum*, *supra* note 45 at para 94.

always assumed that the Crown intends to fulfil its promises'.… This promise is realized and sovereignty claims reconciled through the process of honourable negotiation."[77]

As to the specific types of behavior required of the Crown in respect of treaties, the Court in *Haida* further articulated that the honour of the Crown "infuses the processes of treaty making and treaty interpretation"[78] such that the Crown is required to act "with honour and integrity, avoiding even the appearance of 'sharp dealing.'"[79] Even where treaties have not been commenced (let alone concluded), the honour of the Crown requires the government to be open to negotiations that will lead to a "just settlement of Aboriginal claims."[80]

The Court expanded on this in *Mikisew*, where in the context of a historic numbered treaty, it stated: "Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it."[81] The Court went on to reiterate that "the honour of the Crown infuses every treaty and the performance of every treaty obligation."[82]

Most recently in *Little Salmon*, the Court revisited these themes, again in the context of a modern land claim agreement, where it found that the content of consultation can be shaped or even excluded, subject to the requirement that the outcome is consistent with the Crown's duty to act honourably:

> [T]he content of meaningful consultation "appropriate to the circumstances" will be shaped, and in some cases determined, by the terms of the modern land claims agreement. Indeed, the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown.[83]

It is notable that, unlike the treaty at issue in *Little Salmon*, a number of recent treaties concluded in British Columbia contain a provision setting out an exhaustive list of the consultation obligations of Canada and British Columbia and further provide that "[f]or greater certainty, the exercise of a power or authority, or an action taken, by Canada or British Columbia that is consistent with or in accordance with this Agreement is not an infringement of the Section 35 Rights of Tsawwassen First Nation and will not be subject to any obligation to consult except as set out in [specified clauses in the Agreement]."[84]

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77 *Haida*, *supra* note 3 at para 20, citing *R v Badger*, [1996] 1 SCR 771 at para 41 [*Badger*].
78 *Ibid* at para 19.
79 *Ibid*, citing *Badger*, *supra* note 77 at para 41.
80 *Haida*, *ibid* at para 20.
81 *Supra* note 5 at para 54.
82 *Ibid* at para 57.
83 *Supra* note 2 at para 46.
84 *Tsawwassen First Nation Final Agreement* (8 December 2006) at para 46, online: British Columbia Government <http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/final/tfn_fa.pdf>. See also *ibid* at 45 and the similar clauses in the *Maa-nulth First Nations Final Agreement* (9 December 2006) at 16, online: BC Treaty Commission <http://www.bctreaty.net/nations/agreements/Maanulth_final_initial_Dec06.pdf>.

While the question remains to be conclusively determined (perhaps in future litigation), we believe that such clauses should be effective in confining the duty to consult within the bounds expressly agreed to by the parties. The majority decision in *Little Salmon* did not hold otherwise. It stated that "[t]he duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people."[85] The context and wording of this passage make clear that while the Crown cannot contract out of its duty to act honourably, it can determine in a treaty the extent of the duty to consult. As stated by the Court, "[i]ndeed, the parties themselves may decide therein *to exclude consultation altogether* in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown."[86] This quotation underscores the danger of confusing or conflating the honour of the Crown and the duty to consult. The honour of the Crown and the duty to consult are related, but not synonymous.

C. THE CROWN'S JUSTIFICATION OBLIGATION

Prior to the development of the Crown's duty to consult and, if necessary, accommodate, much of the post-*Canadian Charter of Rights and Freedoms*[87] jurisprudence focused on the test for proving Aboriginal rights and title and proving infringements of such rights and title. If an Aboriginal group established both an Aboriginal right or title and an infringement, the onus shifted to the Crown to establish whether that infringement could be justified.

In *R v Sparrow*,[88] the Court held that legislation that affects the exercise of Aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under section 35(1) of the *Constitution Act, 1982*.[89] The first question to be asked is whether the legislation in question has the effect of interfering with an existing Aboriginal right. If a prima facie interference is found the analysis moves to the issue of justification. This test involves two steps. First, one must determine whether there is a valid legislative objective. If a valid legislative objective is found, the analysis proceeds to step two: examining the honour of the Crown in dealings with Aboriginal peoples. Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include: has there been as little infringement as possible in order to effect the desired result; is fair compensation available in a situation of expropriation; and, has the Aboriginal group in question been consulted with respect to the conservation measures being implemented. This list is not exhaustive.

A similar analysis was undertaken by the Court in *Delgamuukw*. In that case, the Court addressed how the justification test first laid down in *Sparrow* and elaborated on in *R v Gladstone*,[90] required a "modified approach"[91] in the case of Aboriginal title. After reviewing the proof required to successfully prove a claim for Aboriginal title, the Court moved on to

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85 *Little Salmon*, *supra* note 2 at para 61.
86 *Ibid* at para 46 [emphasis added].
87 Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
88 [1990] 1 SCR 1075 [*Sparrow*].
89 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
90 [1996] 2 SCR 723 [*Gladstone*].
91 *Delgamuukw*, *supra* note 51 at para 2.

consider the issue of justification. The Court began by noting that "general principles governing justification"[92] (as per *Sparrow* and *Gladstone*) operate with respect to an infringement of Aboriginal title. The Court further provided that the first step of the justification test is the same in respect of Aboriginal rights; that is, the legislature must still have a valid legislative objective allowing the infringement. It is in the second step of the test where a modified approach is necessary. As stated by the Court, "[t]he manner in which the fiduciary duty operates with respect to the second stage of the justification test … will be a function of the nature of aboriginal title."[93] This means that in considering whether the Crown has acted honourably in its dealings vis-à-vis the infringement on Aboriginal title, regard must be had to the unique features of Aboriginal title, namely the exclusive use, right to choose, and the economic component.

Again, a consistent theme that arises in the justification analysis is maintaining the honour of the Crown. Like the Crown's fiduciary obligations and the Crown's obligations in respect of (negotiating and implementing) treaties, the honour of the Crown illuminates the Crown's obligation to justify infringements of Aboriginal rights and title.

D. INTERRELATIONSHIP OF THE DUTY TO CONSULT WITH THESE OTHER ELEMENTS

In creating and elaborating the Crown's duty to consult and, if necessary, accommodate, the courts clearly envisioned that these other critical elements of the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations would continue to co-exist and fulfil a distinct role and purpose. Like the duty to consult, all of these Crown obligations (fiduciary obligations, treaty obligations, and justification) are related to, but not synonymous with, the honour of the Crown. Each has a distinct (and limited) purpose; the overarching goal of reconciliation is not served by attempting to stretch any of them to fulfil a purpose properly served by another. This is particularly true of the duty to consult, which (perhaps because it is the most recently developed of the elements discussed above) has recently been the source of greater litigation and controversy.

VI. THE INTERRELATIONSHIP OF THE DUTY TO CONSULT AND THE REQUIREMENTS OF PROCEDURAL FAIRNESS

The interrelationship between administrative law and the duty to consult is not novel. In *Haida*, the Supreme Court of Canada rejected the government's argument that prior to proof of a right it owed nothing more than a "broad, common law 'duty of fairness', based on the general rule that an administrative decision that affects the 'rights, privileges or interests of an individual' triggers application of the duty of fairness."[94] When the Court came to outline the scope and content of the duty to consult and accommodate, however, it drew a link between the flexible contents of natural justice and the contents of the duty to consult: "Precisely what is required of the government may vary with the strength of the claim and

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92 *Ibid* at para 165.
93 *Ibid* at para 166.
94 *Haida*, *supra* note 3 at para 28, citing *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at para 14 [*Cardinal*].

the circumstances. But at a minimum, it must be consistent with the honour of the Crown."[95] And again, later: "In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law."[96]

At a glance, the above comments by the Court are somewhat confusing; the Crown's obligations towards First Nations where asserted Aboriginal rights have the potential to be affected is more than simply the common law duty of fairness, but in fulfiling its obligations, regard may be had to the procedural safeguards of natural justice mandated by administrative law which some would say is the duty of fairness by another name. As some commentators have noted, "no meaningful distinction now exists between the rules of natural justice and the duty of fairness. Rather, the precise procedural content of the duty of fairness will depend upon the particular administrative and legal context in which it is being applied."[97]

In our opinion, the Court's statements become clearer when they are understood in relation to the question the Court was responding to. With respect to the Court's rejection of a common law duty of fairness, the Court was addressing the *what* question: what is the Crown's legal duty in respect of First Nations in situations such as that which arose in *Haida*? The Court's ultimate answer to this question was that the honour of the Crown imposes a duty on the Crown to consult Aboriginal peoples in order to provide interim protection of their asserted Aboriginal rights prior to settlement. As will be discussed below, understanding the effects of the Court's finding on the *what* question permits a true appreciation of the interrelationship between the common law duty of procedural fairness and the Crown's duty to consult.

On the other hand, the Court's comments at paragraphs 38 and 41 address the *scope and content* question: what contents of the duty to consult are appropriate to this case? It was in this context that the Court provided a direct link to the contents of procedural fairness. Taken together, we believe an accurate summary of the interrelationship articulated in *Haida* is that, while the obligation on the Crown in respect of Aboriginal peoples is not one of procedural fairness arising from the common law, the flexible procedural safeguards of administrative law are nonetheless relevant and useful in understanding what is required to adequately discharge the Crown's duty to consult.

The Court's recent articulations in *Little Salmon* leave the impression that its previous statements on the interrelationship between procedural fairness and the duty to consult were not fully appreciated in the aftermath of *Haida*. In *Little Salmon*, the First Nation took the position that "a bright line"[98] had to be drawn between the duty to consult and administrative law principles, and "[a]t the hearing, counsel for the LSCFN was dismissive of resort in this context to administrative law principles."[99] In addressing this argument, the majority referred to the Court's previous statements in *Haida* and reiterated the relationship between the

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95 *Haida*, *ibid* at para 38.
96 *Ibid* at para 41.
97 Donald JM Brown & John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (consulted on 8 February 2012), (Toronto: Canvasback Publishing, 2011) at 7:1331 [footnotes omitted].
98 *Supra* note 2 at para 45.
99 *Ibid*.

contents of procedural fairness and the duty to consult, stating: "Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation."[100]

In our opinion, at a high level, the practical result arising from the Court's reaffirmation of the connection between administrative and Aboriginal law is likely to be that those working in the realm of Aboriginal law can now with confidence turn to the well-established body of administrative law to assist them in determining what is required to maintain the honour of the Crown in a given situation. Nevertheless, in order to fully appreciate the interrelationship between procedural fairness and the duty to consult, regard must be had to their similarities and differences.

A. DIFFERENT TRIGGERS, SIMILAR PRACTICAL PURPOSES

As was held in *Haida*, the Crown's obligation vis-à-vis Aboriginal peoples in cases such as *Haida* is not simply that of a duty of common law procedural fairness but also a duty to consult, grounded in the honour of the Crown. The difference in the nature and source of these duties has a significant impact on when the Crown's obligations arise. As stated in *Haida*, the "duty [to consult] arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[101] In contrast, the duty of procedural fairness arises when a public authority makes an administrative decision (which is not of legislative nature) that "affects the rights, privileges or interests of an individual."[102]

When compared in a general sense, the duties appear to arise in similar context; both are triggered when a public authority seeks to render a decision that will affect rights. Upon further investigation, however, the triggers are not as similar as they appear. Differences include:

- the duty to consult applies to contemplated conduct whereas procedural fairness applies more narrowly to decision-making;
- the duty to consult applies only where Aboriginal rights under section 35 of the *Constitution Act, 1982* are at stake whereas procedural fairness applies more broadly to any rights, privileges, or interests;
- the duty to consult is triggered where the conduct has the potential for infringement, whereas procedural fairness is triggered where the decision will actually affect the party's interest; and
- the duty to consult is owed to the group in question as a result of the "special relationship between the Crown and Aboriginal peoples as peoples,"[103] whereas procedural fairness is owed to individuals.

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100 *Ibid* at para 47.
101 *Haida*, *supra* note 3 at para 35.
102 *Cardinal*, *supra* note 94 at para 14.
103 *Little Salmon*, *supra* note 2 at para 122, Deschamps J.

Collectively, these differences translate into determining whether it is the duty to consult that is triggered, the requirements of procedural fairness, or both. The possibility that a situation may give rise to both a duty to consult an Aboriginal group and a duty of procedural fairness to an individual was addressed in *Little Salmon*: "[T]he impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual (including Larry Paulsen) may be relevant."[104]

While the existence of the duties is dependent on different requirements, once established their practical purposes are not dissimilar. While the overarching purpose of the duty to consult was expressed in *RTA* as protecting unproven or established rights from "irreversible harm"[105] pending settlement, in *Little Salmon*, the majority articulated the purpose from a more practical lens: "The purpose of the consultation was to ensure that the Director's decision was properly informed."[106]

Similarly, in *Baker v Canada (Minister of Citizenship and Immigration)*,[107] a leading case on procedural fairness, the Court stated:

> I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.[108]

Thus, while the triggers of the Crown's duty to consult and procedural fairness differ, once triggered, their practical purposes are much the same. In light of this, it is not surprising that the Court has found that, in discharging the duty to consult, regard may be had to the procedural safeguards of natural justice.

B. DIFFERENT SCOPES, SIMILAR CONTENTS

Much like the difference in triggers, the degree and depth of procedural safeguards required in respect of both the duty to consult and procedural fairness vary depending on specific factors. As stated in *Haida*, "the scope of the duty [to consult] is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[109] In contrast, the scope of procedural fairness depends "on an appreciation of the context of the particular statute [under which the decision is being made] and the rights affected."[110]

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104 *Ibid* at para 47.
105 *Supra* note 1 at para 41.
106 *Supra* note 2 at para 84.
107 [1999] 2 SCR 817 [*Baker*].
108 *Ibid* at at para 22.
109 *Supra* note 3 at para 39.
110 *Baker*, *supra* note 107 at para 22.

While the factors to consider in determining the scope of each duty are different, it is notable (and not surprising) that the nature of the right being affected and the degree of impact are relevant to both assessments. In *Baker*, the Court noted that one of the specific factors to be considered in respect of the rights affected is "the importance of the decision to the individual or individuals affected."[111] The Court continued, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated."[112] Similarly in *Haida*, the Court provided that the scope of the duty to consult is greatest 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."[113]

Once the scope of the obligation on the Crown (whether it be a duty to consult or the requirements of procedural fairness) is determined, the next question becomes the specific contents of the duty owed to the Aboriginal group (in the case of the duty to consult) or the individual (in the case of procedural fairness). As is the case with the practical purpose, the content of the duties is another area where striking similarities exist. In *Haida*, the Court referred to the concept of a spectrum, where at the lower end the duty to consult may require the Crown "to give notice, disclose information, and discuss any issues raised in response to the notice."[114] Similar requirements are necessary where the scope of procedural fairness is at a minimum.[115]

At the higher end of the spectrum are situations where the Crown may be required to provide the Aboriginal group "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."[116] Similar requirements are necessary where the level of procedural fairness exceeds the minimal requirements. In these cases, "the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered."[117] In sum, the contents of procedural fairness and the duty to consult display remarkable similarities.

But what of the duty to (if necessary) accommodate First Nations' interests? To date, there has been little articulation from the Supreme Court of Canada as to the content and limits of accommodation.[118] In *Haida*, the Court explained that accommodation is not a separate duty from consultation, but is instead an extension of it: "the effect of good faith consultation may

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111 *Ibid* at para 25.

112 *Ibid*.

113 *Supra* note 3 at para 44.

114 *Ibid* at para 43.

115 See e.g. *1657575 Ontario v Hamilton (City of)*, 2008 ONCA 570, 92 OR (3d) 374 at para 29, wherein after finding that the requirements of procedural fairness were minimal, the Ontario Court of Appeal identified notice of the decision being made and of the procedure for making it and an accurate statement of the reasons it was being contemplated as adequate procedural safeguards.

116 *Haida*, *supra* note 3 at para 44.

117 *Baker*, *supra* note 107 at para 32.

118 We note the recent decision of the British Columbia Court of Appeal in *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 333 DLR (4th) 31 at paras 180-81, leave to appeal to SCC refused, 34403 (23 February 2012) [*West Moberly*], wherein accommodation was discussed. A full discussion of this decision is outside the scope of this article.

be to reveal a duty to accommodate."[119]As to the actual nature and content of accommodation, the Court went on to provide that "[w]here a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns *may require taking steps to avoid irreparable harm or to minimize the effects of infringement*, pending final resolution of the underlying claim."[120] And again later:

> The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile"… "an adjustment or adaptation to suit a special or different purpose … a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation.[121]

It is clear from the Court's articulations that accommodation, where necessary, arises from the consultation process. Put another way, the knowledge and understanding of the Aboriginal interest acquired by the Crown through the consultation process may require the Crown to amend the contemplated activity to mitigate or avoid impact on the Aboriginal interests. In practical terms, accommodation may mean, in appropriate circumstances, making special arrangements to facilitate First Nations' participation in the consultation process, making adjustments to a project location to avoid or mitigate the potential impact on a significant site, or limiting construction to certain times of the year to avoid or mitigate the potential impact on a hunting right. Such accommodation is unique to the duty to consult and is not required in respect of procedural fairness.

The similarities between procedural fairness and the duty to consult extend to the decision-making process, or more specifically to decision-makers articulating the reasoning process that led to the substantive outcome. While generally not a requirement at the low end of either duty, decisions attracting a deeper level of procedural safeguard will likely attract a duty on the decision-maker to give reasons. In *Baker*, the Court found that "where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required."[122] Similarly, in *Haida*, the Court noted that consultation towards the high end of the spectrum may require "provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision."[123] The requirement to give reasons is not surprising given the purposes they achieve. As noted by the Court in *Baker*, reasons "foster better decision making by ensuring that issues and reasoning are well articulated and, therefore,

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119 *Supra* note 3 at para 47.
120 *Ibid* [emphasis added].
121 *Ibid* at para 49.
122 *Supra* note 107 at para 43.
123 *Supra* note 3 at para 44. See also *West Moberly*, *supra* note 118 at para 144, wherein Chief Justice Finch of the British Columbia Court of Appeal found that to be considered reasonable, the consultation process would have to provide an explanation to the First Nations of how their position was fully considered. Where the First Nation's position is rejected, persuasive reasons justifying the denial must be provided. Chief Justice Finch went on to state: "Without a reasoned basis for rejecting the petitioners' position, there cannot be said to have been a meaningful consultation" (*ibid*). See also *Baker*, *supra* note 107 at para 39.

more carefully thought out"[124] and "allow parties to see that the applicable issues have been carefully considered."[125]

There is great uncertainty as to whether the similarities between procedural fairness and the duty to consult end once the decision is made and reasons have been rendered. In *RTA*, the Court, in the context of addressing remedies available for past grievances, made several references to the remedy of damages in respect of a breach of the duty to consult.[126] A meaningful discussion of these sections and their possible interpretations and implications is outside the scope of this article. We do however note that the strong parallels between procedural fairness and the duty to consult discussed above may be of use in interpreting the Court's comments in *RTA*. Further, the uncanny similarities in the content of the duties and their identical practical purpose (in assuring informed decision-making) leads us to believe that the Crown's duty to consult is at its core procedural, not substantive. We are supported in this conclusion by the findings of the Court in *Haida* and *Little Salmon*.

In *Haida*, the Court was clear that the duty to consult did not give First Nations a right of veto. Despite this finding, arguments continued to be brought forth that, in taking an action that was contrary to an Aboriginal group's interest, the Crown was necessarily acting dishonorably. Such was the situation in *Little Salmon*, wherein the First Nation argued that consultation could not have been adequate, for if it were the Crown would not have approved the land grant. In dismissing the First Nation's argument, Justice Binnie stated:

> The First Nation goes too far, however, in seeking to impose on the territorial government not only the procedural protection of consultation but also a substantive right of accommodation. The First Nation protests that its concerns were not taken seriously — if they had been, it contends, the Paulsen application would have been denied. This overstates the scope of the duty to consult in this case. The First Nation does not have a veto over the approval process. No such substantive right is found in the treaty or in the general law, constitutional or otherwise.[127]

Of note is the inclusion of the words "in this case" in the above passage. Their inclusion raises doubt as to whether the duty to consult would ever give rise to a specific substantive outcome. While a discussion of this issue is outside the scope of this article, we do nonetheless draw the reader's attention back to the definitive words in *Haida* that the First Nation does not have a veto over the activity being contemplated. We further note that allowing Aboriginal groups a substantive right to a certain outcome would appear to conflict with the overarching purpose of reconciliation and the practical purpose of informed decision-making. After all, as stated in *Haida*: "Balance and compromise are inherent in the notion of reconciliation."[128] Similarly, what is the point of informed decision-making if the outcome is already dictated?

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124 *Baker*, *ibid*.
125 *Ibid*.
126 *Supra* note 1 at paras 37, 49.
127 *Little Salmon*, *supra* note 2 at para 14.
128 *Supra* note 3 at para 50.

VII. FORUM FOR AND ROLES IN CONSULTATION — WHO CHOOSES?

Other features of the relationship between administrative and Aboriginal law that the Court elaborated on in *RTA* are the ability to rely on pure administrative law concepts to identify the process in which consultation should be carried out and the Crown's various roles within that process. The Court's comments regarding process first appeared in *Haida*. In that case, the Court dropped several hints that an administrative process may be an appropriate means of addressing consultation issues: "The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases."[129] The Court went on to note that the choice of regimes and decision-making processes rested with the government stating: "It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts."[130]

While noting that "[t]o date, the Province has established no process for this purpose,"[131] the Court went as far as outlining what standard of review would apply to any administrative process that might be set up for such a purpose.[132] The Court concluded this discussion with another reference that suggests the parallels between this area of Aboriginal law and administrative review: "The focus … is not on the outcome, but on the process of consultation and accommodation."[133]

In *RTA*, this issue was revisited. The Court reiterated and further articulated the relationship between administrative and Aboriginal law in respect of forum and actors in consultation cases:

> The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal. Tribunals are confined to the powers conferred on them by their constituent legislation: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to consultation depends on the duties and powers the legislature has conferred on it.
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> The legislature may choose to delegate to a tribunal the Crown's duty to consult. As noted in *Haida Nation*, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.[134]

In practical terms, the right of the legislature to choose results occurs in one of four situations:

(1) The administrative body fulfils the role of engaging in consultation;

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129 *Ibid* at para 44.
130 *Ibid* at para 51.
131 *Ibid* at para 60.
132 *Ibid* at paras 60-63.
133 *Ibid* at para 63.
134 *RTA*, *supra* note 1 at paras 55-56.

(2) The administrative body fulfils the role of adjudicating the adequacy of consultation;

(3) The administrative body fulfils both of the above roles; or

(4) The administrative body fulfils neither of the above roles.

Invariably the last situation begs the question, can the Crown avoid its duty to Aboriginal peoples simply by choosing to not assign these roles? The answer is no. The Court was quick to reiterate that the honour of the Crown cannot be avoided: "It must be met."[135] As such, where the legislature has not assigned the role(s), or has done so but questions arise as to whether these roles are being adequately fulfiled, "Aboriginal peoples affected must seek appropriate remedies in the courts."[136]

The situation in *RTA* involved a Crown agent (BC Hydro) applying to a public decision-maker (the British Columbia Utilities Commission). What of the situation where a private actor is applying to a public decision maker? Just as the *RTA* case was granted leave to appeal by the Supreme Court of Canada, the Federal Court of Appeal was issuing its decision in *Standing Buffalo*. That case involved four separate judicial reviews in which a number of First Nations sought to challenge three decisions by the National Energy Board (NEB) to issue Certificates of Public Convenience and Necessity to three pipeline projects. In each of those applications, the proponent was a private actor, not a Crown agent. As articulated by the Federal Court of Appeal, the precise "novel question"[137] in *Standing Buffalo* was:

> [W]hether, before making its decisions in relation to those applications, the N.E.B. was required to determine whether by virtue of the decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, the Crown … was under a duty to consult the [First Nations] with respect to potential adverse impacts of the proposed projects on the [First Nations interest] and if it was, whether that duty had been adequately discharged.[138]

The NEB was of the opinion that, in adjudicating the pipeline applications before it, the Board did not have a duty to determine whether the honour of the Crown had been maintained in the *Haida* sense. It went on to acknowledge, however, that consultation with First Nations nonetheless took place through the application process. In particular, the NEB noted that, as its decision was to determine whether the application was in the public interest such a consideration includes a review of the proponent's consultation with Aboriginal groups. The NEB held that the proponent's requirement to consult with First Nations stemmed not from the honour of the Crown (a responsibility we know cannot be delegated to third parties), but from the statutory, policy, and filing guideline requirements imposed on

135 *Ibid* at para 63.
136 *Ibid*.
137 *Standing Buffalo*, *supra* note 2 at para 2.
138 *Ibid*.

proponents.[139] The Federal Court of Appeal in *Standing Buffalo* agreed and dismissed the appeals.

The First Nations involved in *Standing Buffalo* sought leave to appeal the Federal Court of Appeal's decision. The Supreme Court of Canada placed the applications for leave in abeyance until a decision in *RTA* was rendered and granted the parties in *Standing Buffalo* intervener standing in *RTA*. Shortly after the decision in *RTA* was rendered, the Court dismissed the applications for leave to appeal.[140] As is its practice, the Court did not provide reasons in dismissing the applications for leave. As such, uncertainties remain as to whether, and if so how, the NEB's consultation process relates to the honour of the Crown.

Two situations can usefully be distinguished in connection with this issue. Sometimes, a tribunal's decision is not effective until confirmed by the Crown, acting through a minister or the Governor in Council. Other times, the tribunal issues the final decision which permits a private proponent to undertake an activity with potentially adverse effects on a claimed Aboriginal right or interest. Each situation will be discussed in turn.

Standing Buffalo was an example of the first situation. A subsequent example is described by the NEB in its TransCanada Keystone Pipeline Decision. In that example, the Board further explained how the NEB process could assist the Crown in determining whether or not it is honourable to approve a decision of Board.[141] The NEB's process is designed, in part, to elicit evidence of Aboriginal interests and can be relied upon by the Crown when assessing whether a proposed activity should be permitted, having regard to its impact on a First Nation. That is, the Crown, in satisfying itself that a First Nation has been adequately consulted and if necessary, accommodated, in respect of an application, can rely on the proponent's efforts and the First Nation's involvement in the NEB process. If the Crown contemplates conduct in relation to the activity and is satisfied that the direct consultation with the proponent and the access to the public decision-maker through participation in the regulatory process has upheld the honour of the Crown, there is no need for the Crown to undertake further consultation in connection with that activity. Where the Crown is of the opinion that the consultation undertaken is inadequate, it can initiate further consultation to ensure the honour of the Crown is upheld.

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139 See e.g. *Enbridge Southern Lights GP on behalf of Enbridge Southern Lights LP and Enbridge Pipelines Inc* (February 2008), NEB Decision OH-3-2007 at 10-11, online: NEB <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/441806/456607/499885/499563/A1D4Q5_-_Reasons_For_Decision.pdf?nodeid=499564&vernum=0>.

140 See *supra* note 2.

141 See *TransCanada Keystone Pipeline GP Ltd* (March 2010), NEB Decsion OH-1-2009 at 94-95, online: NEB <https://www.neb-one.gc.ca/ll-eng/livelink.exe/fetch/2000/90464/90552/418396/550305/604643/604441/A1S1E7_-_OH-1-2009_Reasons_for_Decision.pdf?nodeid=604637&vernum=0> wherein the NEB further explained:

> The Board is governed by a variety of legislative and common law requirements and is a court of record that operates independently and at arm's length from the government of Canada. It is not the same thing as "the Crown" because it is an independent tribunal that is not subject to direction by the Crown.… In respect of the Crown's Aboriginal consultation obligations, this legislative structure provides particular challenges not faced by federal departments directed by Ministers of the Crown. In light of the specific legislative structure established in 1959 by Parliament under the NEB Act, the Crown has determined that it will rely on the NEB process as a means to meet some or all of its consultation obligations in respect of matters that fall within the mandate of the NEB. This does not mean that the Crown has delegated its duty to consult to the Board. The Board has jurisdiction to consider whether a project is in the public interest and as a part of that consideration it weighs the costs and benefits of the project, including its potential effects on Aboriginal interests.

Implicit support for this approach can be found in *Haida*, wherein after finding that private actors are under no duty to consult or accommodate, the Court provided that "[t]he Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments."[142] Direct support for this approach is found in the Federal Court Trial Division decision in *Brokenhead Ojibway Nation v Canada (AG)*,[143] where, the Court stated:

> In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review: … Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated: see *Haida*, above, at para. 53 and *Taku*, above, at para. 40.[144]

In this scenario, the regulatory process (the NEB's decision to issue a Certificate of Public Convenience and Necessity) is followed by a Crown decision (the Governor in Council approval). The latter can rely upon the former.

The second situation arises where the applicant is a private (non-Crown) company, the decision of the adjudicative body is final, and where no other Crown conduct is contemplated. The NEB, under other parts of its mandate, and many provincial regulators are empowered to authorize activities of private proponents that may have adverse impacts on First Nation interests. These regulators may not themselves have any direct bilateral consultation responsibilities and there may be no other activity contemplated by the Crown that would trigger an independent obligation to consult.

In these circumstances, the question should not be who will consult and how will the adequacy of consultation be adjudicated. Instead, the proper focus is whether the process maintains the honour of the Crown. In *Haida*, the Supreme Court stated: "It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts."[145] In our view, where the Crown has set up a regulatory scheme that will result in a final decision without further Crown conduct or decision making involved, the courts ought to look at the jurisdiction conferred on the regulator under the scheme from two perspectives. First, was the jurisdiction conferred on the regulator appropriate, given the potential impact of the decision being made on Aboriginal rights or interest? Second, did the regulator in question carry out its duties consistent with the jurisdiction it was given under its enabling statute?

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142 *Supra* note 3 at para 53.

143 2009 FC 484, 345 FTR 119.

144 *Ibid* at para 25. This statement was adopted by the Alberta Court of Appeal in *Tsuu T'ina Nation v Alberta (Environment)*, 2010 ABCA 137, 482 AR 198 at para 104.

145 *Supra* note 3 at para 51.

Importantly, the answer to both questions starts with an analysis of the statute. Does the statute confer an obligation on the regulator to conduct consultation itself, adjudicate the extent of consultation by the Crown, or consider the nature of the impact on Aboriginal interests resulting from authorizing the project to proceed? If the tribunal has one or more of those responsibilities, has it carried out its obligations in accordance with the requirements of the statute, including giving appropriate weight to any alleged adverse effects on Aboriginal interests?

Where the tribunal fails to properly perform its statutory duties, the courts will intervene to require compliance. Where the enabling legislation does not require Aboriginal interests to be fully considered, the question becomes whether the Crown acted honourably when it set up the regulatory schedule in the first place. If the scheme was established through identifiable government activities, those activities can be reviewed by the courts in appropriate circumstances. Whether legislation setting up the regulatory schedule can be reviewed in this way remains to be determined.[146] Thus, in our view, the consultation responsibilities of a tribunal must be determined on the basis of its enabling statute. If the tribunal itself is not charged with consultation and there is no other Crown actor, the process before, and the decision of, the tribunal may nevertheless assist the Crown in meeting its obligation to act honourably if its statutory mandate requires it to have sufficient regard to First Nation interests in the circumstances. If the tribunal's mandate does not give adequate prominence to the impact of activities it is considering on Aboriginal rights or interest, then it is the regulatory scheme itself that is flawed, and an aggrieved First Nation must seek whatever relief is available against the Crown in connection with the establishment of that regime.

The approach we have outlined stays true to the principles of administrative law when considering the mandate of a tribunal, but applies the constitutional principles of Aboriginal law set out in *Haida* and *RTA* by permitting judicial review of the regulatory scheme itself to ensure the honour of the Crown is being met. We do not believe that the mere fact that a regulatory scheme does not include a provision for the bilateral discussion normally associated with consultation implies the scheme cannot assist in meeting the honour of the Crown. It is true that quasi-judicial tribunals are bound by the principles of natural justice and therefore must receive information through their public hearing processes. They cannot meet individually with parties appearing before them or collect information on their own, as this would be inherently inconsistent with their quasi-judicial nature and function. Nevertheless, the process they employ often requires consultation with First Nations by the proponents before them and provides First Nations with direct access to the ultimate decision-maker. These processes (properly conducted) provide First Nations with the opportunity to obtain, lead, or elicit information, in order to bring forward concerns or issues directly to the decision-maker, and to have those concerns or issues given full, fair, and serious consideration by the decision-maker.

The Supreme Court of Canada has previously considered the adequacy of regulatory and administrative processes for seeking out and assessing potential impacts on First Nations. In

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[146] *RTA*, *supra* note 1 at para 44.

Quebec (AG) v Canada (National Energy Board)[147] the Court commented on the NEB's hearing process:

> Moreover, even if this Court were to assume that the Board, in conducting its review, should have taken into account the existence of the fiduciary relationship between the Crown and the appellants, I am satisfied that, for the reasons set out above relating to the procedure followed by the Board, its actions in this case would have met the requirements of such a duty. There is no indication that the appellants were given anything less than the fullest opportunity to be heard. They had access to all the evidence that was before the Board, were able to make submissions and argument in reply, and were entitled to cross-examine the witnesses called by the respondent Hydro-Québec.[148]

Other courts have recognized that a regulatory process may contribute to the fulfilment of the Crown's duty. In *Ka'a'Gee Tu First Nation v Canada (AG)*,[149] the Federal Court considered the regulatory review process under the *Mackenzie Valley Resource Management Act*[150] and found that, to a point, it discharged the consultation obligation:

> The consultation process provided for under the Act is comprehensive and provides the opportunity for significant consultation between the [private] developer and the affected Aboriginal groups. As noted above, the record indicates that the Applicants have had many opportunities to express their concerns in writing or at public meetings through submissions made by counsel on their behalf or by the Applicants directly. The record also establishes the Applicants were heavily involved in the process and that their involvement influenced the work and recommendations of the Review Board. In essence, the product of the consultation process is reflected in the Review Board's Environmental Assessment Reports. These reports, while not necessarily producing the results sought by the Applicants, do reflect the collective input of all of the parties involved, including the Applicants. The Environmental Assessment Report concerning the Extension Project clearly shows that many of the concerns of the Applicants were taken into account. While the Review Board ultimately endorsed the project, it did so only with significant mitigating measures and suggestions which were supported by the Applicants and which went a long way in addressing their main concerns.
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> Up until this point, the process, in my view, provided an opportunity for the Applicants to express their interests and concerns, and ensured that these concerns were seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. Up until this point in the process, I am satisfied that the Applicants benefited from formal participation in the decision-making process.[151]

In short, a regulatory hearing process can provide all the elements of consultation by ensuring that First Nations are provided with:

(1) Adequate notice;

(2) All necessary information in a timely way;

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147 [1994] 1 SCR 159.
148 *Ibid* at at 184-85.
149 2007 FC 763, 315 FTR 178.
150 SC 1998, c 25.
151 *Supra* note 149 at paras 118-19.

(3) The opportunity to engage in direct consultation with the applicant and/or attend regulatory hearing proceedings; and

(4) An opportunity to express their interests and concerns through submissions directly to the decision-maker.

These elements fulfil the requirements of the Crown's duty.[152] If properly conducted, the regulatory processes that provide these elements are adequate to maintain the honour of the Crown.

We appreciate that this approach will not satisfy those who believe a decision-making process cannot be honourable if it does not involve a direct, bilateral consultation process in which the Crown is directly engaged. We disagree and note again that such an argument conflates the honour of the Crown (which is always present) and the duty to consult (which only arises in particular circumstances). The focus needs to remain on the honour of the Crown. The inquiry should be on whether the regulatory process in question is adequate to maintain it.

The recourse to administrative law principles and the Court's stated willingness to see its general framework for the duty to consult further developed through court decisions "in the age-old tradition of the common law"[153] stands in sharp contrast to the Court's repeated invocations to the parties to negotiate and resolve substantive issues of Aboriginal rights and title at the negotiation table (through treaties or otherwise) rather than through judicial determinations. In numerous decisions dealing with substantive Aboriginal rights or title, the Supreme Court of Canada (and lower courts) has repeatedly emphasized that such claims are better subject to negotiation rather than litigation. For example, in *Delgamuukw*, the Supreme Court of Canada ended its decision with the following comment: "On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake."[154]

This distinction in approach between the duty to consult (to be developed by court decisions) and substantive Aboriginal rights (where negotiation is preferable) is more understandable when one clearly distinguishes between the purpose of (discussed in Part II) and the limitations on (Part III) the Crown's duty to consult and the other elements of the Crown's obligations to satisfy its constitutional duties to Canada's Aboriginal peoples (Part VI).

VIII. CONCLUSION

The recent decisions of the Supreme Court of Canada have provided significant further discussion, elaboration, and analysis of the purpose of the Crown's duty to consult and, if necessary, accommodate Aboriginal peoples before undertaking a decision or conduct that may adversely affect their interests. While the duty to consult fulfils a critically important

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152 See *Mikisew*, *supra* note 5 at para 64, citing *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470, 178 DLR (4th) 666 at paras 159-60.

153 *Haida Nation*, *supra* note 3 at para 11.

154 *Supra* note 51 at para 207.

role in defining, guiding, and developing the interrelationship of the Crown and Aboriginal peoples, the role of the duty to consult, properly understood, is but one of several important elements in the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations. This article has attempted (with support drawn from the recent Court decisions) to situate the Crown's duty to consult within the context of this overall scheme. While the role of the Crown's duty to consult and, if necessary, accommodate is both important and useful, the Crown's duty to consult should not be stretched in an attempt to fulfil other roles or serve other purposes. The Crown's duty to consult coexists with other elements of the overall scheme of satisfying the Crown's constitutional duties to Canada's First Nations, including the Crown's fiduciary obligations, treaty obligations, and the obligation to justify infringements of Aboriginal rights and title. The onus is on courts (and litigants) to choose the proper tool for the job in different circumstances. Each of these interrelated doctrines has a distinct role and purpose and each will fulfil their purpose better if the boundaries and overlaps between them are respected.