

ABORIGINAL PRACTICE POINTS

Federal Court judicial review and Aboriginal consultation cases

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Key Points

- The government's duty of consultation and accommodation is an enforceable legal duty—with both a process and a substantive component—for B.C. First Nations with unextinguished aboriginal rights and title prior to a Treaty or aboriginal title court action: *Haida Nation v. B.C. (Minister of Forests)*, 2004 BCCA 462 and *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, 2002 BCCA 59.
- The Supreme Court of Canada upheld the BCCA decision in *Haida* (2004 SCC 73), thus confirming the doctrine's application to Federal Government decisions for non-treaty nations. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, the court confirmed that the duty extended to Treaty situations.
- The BCCA has confirmed the exclusive jurisdiction of the Federal Court in respect of challenges to federal Crown decisions based on alleged failures of consultation: *Tcheachten First Nation v. Canada (A.G.)*, 2007 BCCA 133. The Federal Court will increasingly become the forum for claims for breach of the duty to consult and accommodate when Canada contemplates conduct that might adversely affect rights or title claimed by a First Nation.
- The duty to consult and accommodate is expansive and should focus on addressing effects upon aboriginal interests. The obligation arises in relation to an activity and at the earliest stages of contemplation of that activity. Consultation must also be meaningful: it requires consideration of First Nation input and must involve the real possibility of changing or cancelling the proposed activity.
- The duty of consultation and accommodation is continuous, and is not tied to a specific decision but rather to the contemplation of 'conduct' that will infringe. The duty is that of the Crown itself, not a specific decision-maker or tribunal, and arises from a constitutional context, not a statutory one. Conversely, the Federal Court judicial review processes are specific to a discrete regulatory decision and are based on the statutory obligations of a specific tribunal.
- Rule 302 of the Federal Court Rules limits an application for judicial review to a single order in respect of which relief is sought. This Rule may not be helpful in the context of consultation issues, which often arise in multi-decision large scale processes. Section 18 of the *Federal Courts Act* appears to provide for similarly limited judicial review processes by focusing on a single decision of a statutory tribunal. The question may arise as to whether the Federal Court process lends itself to effective resolution of First Nations consultation questions in a timely manner.
- While the objective of the Federal Court Rules is the timely hearing of matters, First Nations consultation disputes inevitably require a substantial document record, and interim injunctions will not normally be available. Construction follows soon after permits and irreversible physical changes will render the consultation moot, or involve the vesting of commercial rights and commercial expenditures that create a practical barrier to unwinding the decisions.
- If the Federal Court is to play a meaningful role in assisting First Nations in resolving consultation questions, a solution to the disjuncture between the substantive law on consultation and the law governing jurisdiction and procedure in the Federal Court must be found. This disjuncture can effectively limit the substantive law on consultation set out by the Supreme Court of Canada.

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I. Introduction

In 2002, the BC Court of Appeal in *Haida Nation v. B.C. (Minister of Forests)*, 2004 BCCA 462 and *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, 2002 BCCA 59, decided that the government's duty of consultation and accommodation was an enforceable legal duty—with both a process and a substantive component—for First Nations in BC with unextinguished aboriginal rights and title prior to a Treaty or aboriginal title court action. These two decisions were a major step forward in aboriginal law, and provided for the first time, a practical legal framework to work towards reconciliation of aboriginal and Crown title in BC.

Initially, the impacts of this decision were confined largely to BC, and largely to provincial decisions involving lands and natural resources. In November 2004, the Supreme Court of Canada upheld the BCCA's decision in *Haida* (2004 SCC 73), confirming the doctrine's application clearly to Federal Government decisions for non-treaty nations. Shortly thereafter in 2005, the Supreme Court of Canada in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 confirmed the duty extended also to Treaty situations, thus applying more widely across the rest of Canada. We are all still finding our way forward through the implications of this law, which will undoubtedly develop over time.

II. The Role of the Federal Court

In *Haida*, the SCC confirmed that the Courts had an important role to play as arbiters of the process:

Parties can assess these matters, and if they cannot agree, tribunals and courts can assist.¹

The availability of judicial review to solve these issues, rather than lengthy trials requiring proof of aboriginal title, is the key to its efficacy as a meaningful remedy.

Given the application of this constitutional duty across Canada to many federal decisions, it is obvious the Federal Court will become involved this important remedy to protect aboriginal peoples, and ensure the Honour of the Crown has been met.

Indeed, two notable judgments regarding aboriginal consultation have come through the Federal Court: *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *supra* and *Dene Tha First Nation v. Minister of Environment et al.*, 2006 FC 1354.

In BC, there was an initial spate of judicial review litigation following the 2002 BCCA decision, examining the application of the doctrine to various types of government decisions. The Federal Government is now beginning to attempt to adapt to and understand the far-reaching implications of this doctrine, and may be slow to revise its processes. A similar initial group of court cases can be expected in Federal Court.

The BC Court of Appeal has recently confirmed the exclusive jurisdiction of the Federal Court in respect to challenges based on alleged failures of consultation to federal Crown decisions in *Tcheachten First Nation v. Canada (A.G.)*, 2007 BCCA 133. The Federal Court will thereby increasingly become the forum for aboriginal claims against Canada for failures to consult and accommodate.

Is the Federal Court ready for this important new role? This paper examines some practical and legal limitations of Federal Court that may arise, and perhaps need to be addressed to effectively meet this opportunity.

Despite *Mikisew* and *Dene Tha*, there is, we suggest, a potential disjuncture between the Rules and procedures of the Federal Court and the sort of hearing they enable, and the law on aboriginal/Crown consultation, as set out in *Haida* and subsequent jurisprudence. This disjuncture potentially reduces the value of the Federal Court as a forum in which the constitutionality of Crown action can be effectively adjudicated and enforced. As well, we note that the operational nature of consultation puts strains upon timely access to the Court.

III. Federal Court: The Primary Forum for Federal Crown Consultation Cases

As noted above, this discussion is timely. The BC Court of Appeal's recent judgment in *Tcheachten First Nation v. Canada (A.G.)*, *supra* held that the Federal Court has exclusive jurisdiction to hear challenges based on alleged failures of consultation to federal Crown decisions. In other words, even where a First Nation might believe that the circumstances of their complaint might not be properly or effectively addressed by the Federal Court process (for any of the reasons we will explore below), if the Nation's complaint is against the Federal Crown, the Nation is nevertheless bound to pursue its remedy in Federal Court. This exclusive jurisdiction makes it doubly important to ensure that the current Federal Court process poses no barriers to First Nations who seek relief against inadequate consultation.

¹ *Haida* at para. 37.

IV. Law of Consultation—A Brief Reminder

A. Obligation Arises in Respect of Effects Upon Aboriginal Interests

The Supreme Court of Canada clearly stated in *Haida* that the Crown owes a duty of consultation to a First Nation where the Crown contemplates conduct that might adversely affect rights or title claimed by the First Nation.

The Court confirmed that this is a duty that arises from constitutional law, and is founded upon s. 35 of the *Constitution Act* and the Honour of the Crown.

The decision is deliberate in describing the expansive nature of this obligation. The decision also clearly establishes that the focus of the duty is on addressing effects upon aboriginal interests—that is, the scope of consultation is established from the perspective of the effects on these interests, and is not limited by what administrative or regulatory decisions may or may not also arise in the course of the proposed project:

The foundation of the duty in the Crown's honour and the goal of reconciliation, suggest that the duty 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 [para. 35].

... consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honorable process of reconciliation that s. 35 demands. *It preserves that Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation ... [para. 37]*

The common thread on the Crown's part must be *'the intention of substantially addressing [Aboriginal] concerns'* as they are raised ... through a meaningful process of consultation [para. 42]

Meaningful consultation may oblige the Crown to *make changes to its proposed action* based on information obtained through consultations [para. 46]

I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right [sic] and title [para. 76].

... the serious *impact of incremental strategic decisions* on those [Haida] interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims [para. 77]. [emphasis added in all quotes]

In *Mikisew*, the Supreme Court of Canada overturned the Federal Court of Appeal, confirming the Federal Court decision to quash the Minister's approval of a road through Wood Buffalo National Park as a "taking up" of land under Treaty 8 (the Minister's decision was pursuant to s. 8 of the *Canada National Parks Act*). The Court held that the Minister had not adequately consulted with the Mikisew Cree, whose hunting and trapping rights would be affected by the road construction and operation. There too, the Court's analysis is of the process by which the First Nation's interests may be affected, not of a discrete statutory decision:

Both the historical context and the inevitable tensions underlying implementation of Treaty 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 honorably. [para. 33]

B. Duty Arises at Early Stages of Planning

The obligation arises in relation to an activity, and it arises at the earliest stages of contemplation of that activity. We see that in describing the duty, the Court does not limit the obligation to single decisions, to statutory decisions, nor to final approving decisions in respect of a proposed project. This is significant: The duty to consult is in respect of injury to aboriginal interests in claimed rights and title; it is not in respect of discrete regulatory processes. For many regulatory decisions, the question for all practical purposes is not whether a proposed activity will proceed, but how it will. However, the law of consultation requires that “whether” must be asked in earnest.

Courts have held that in order for consultation to be meaningful, the obligation arises at the earliest stages in the government approval process in respect of a project (see, e.g., *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 at paras. 83-85). This understanding of the obligation at the planning and strategic level is reflected in the Federal Court decision of *Dene Tha*:

In my view, the question posed by the Dene Tha’ is whether the duty to consult arose at the stage of process design ... As the question posed by Dene Tha’ is a question of law focused on whether the duty to consult extends to a time period prior to any decision-making as to land use, the appropriate standard of review for this inquiry is correctness [para. 96].

... the conduct contemplated here is the construction of the [Mackenzie Gas Pipeline]. It is not, as the Crown attempted to argue, simply activities following the Cooperation Plan and the creation of the regulatory and environmental review process. These processes, from the Cooperation Plan onwards, were set up with the intention of facilitating the construction of the MGP. It is a distortion to understand these processes as hermetically cut off from one another. The Cooperation Plan was not merely conceptual in nature. It was not, for example, some glimmer of an idea gestating in the head of a government employee that had to be further refined before it could be exposed to the public. Rather, it was a complex agreement for a specified course of action, a road map, which intended to *do* something. It intended to set up the blue print from which all ensuing regulatory and environmental review processes would flow. It is an essential feature of the construction of MGP [100].

C. Consultation Must be Meaningful

The Court is clear in *Haida* that consultation has to be meaningful—it has to involve the consideration of First Nation input in respect of information provided to the First Nation, and it must involve the real possibility of changing or cancelling the proposed activity, depending upon this input. Limiting review of the Crown’s discharge of its obligation to a single statutory decision prevents reviewing the extent to which the First Nation has been meaningfully consulted with respect to the activity overall.

And in *Mikisew* the Court said:

Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along. [para. 54]

Thus, the Crown has an obligation to determine whether a proposed activity at its large scale has been adequately the subject of consultation and accommodation. Any modest to large-scale project will trigger a series of regulatory requirements, often under a series of different decision-makers, each aimed at ensuring that discrete interests are protected. However, aboriginal interests are not simply the sum of presently identified regulatory issues. Aboriginal interest in a proposed activity includes the extent that that activity, in its entirety—in its construction, operation, and eventual abandonment—may impact upon aboriginal rights and title and the (sovereign) exercise of those rights and enjoyment

of that title when “the distant goal of proof is finally reached.” The law of consultation is aimed at addressing this expansive interest. However, despite the expansive nature of the obligation, it is not always possible for aboriginal people to seek recourse at that level through judicial review in Federal Court.

V. Bringing Consultation Cases in Federal Court: Issues

It is clear from the above summary, that, in addition to its other characteristics, we can observe from the case-law of consultation and accommodation that:

- The duty is a continuous one, one that arises early in the planning process, and continues throughout the relationship (whether pre or post-treaty). It is not tied to a specific decision, but arises from the contemplation of ‘conduct’ that will infringe (i.e., it is the project, not the decision that infringes);
- The duty is that of the Crown itself, not a specific decision-maker or tribunal;
- It arises from a constitutional context, not a statutory one.

On the other hand, the Federal Court focus on judicial review can be said to have the following basic approach, which can be somewhat inconsistent with the needs in consultation cases:

- Specific to a discrete regulatory decision;
- Focused upon a specific Tribunal;
- Based upon the Statutory obligations of a tribunal.

VI. The Port of Prince Rupert Litigation—A Case Study

It may be helpful to examine these issues in the context of a pair of cases relating to the construction of the proposed new container port at Prince Rupert, which has been opposed by the Lax Kw’alaams and Metlakatla Indian Bands (known together as the Coast Tsimshian).

A brief outline of the facts and timelines is helpful. As with most major projects, there are numerous federal agencies involved, including the Minister of Industry (announcement), Western Economic Development (funding), Minister of Transport (owner of Port lands), Environment Canada (CEAA Screening), Fisheries, Coastguard (Ocean Dumping Permit), etc. Transport Canada as the ‘proponent’ agency was assigned to take the lead on consultation with the Coast Tsimshian. A brief timeline:

April 2005	Announcement of Federal Support of the project (Minister of Industry) [no consultation]
September 2005	\$30m Funding Agreement signed between WED and the Prince Rupert Port Authority (said to be subject to consultation)
October 2005	Transport Canada consultation commences
October 2005	Coast Tsimshian commence <i>Reeve</i> Judicial Review (#1) challenging Funding Agreement
Oct-Dec 2005	Transport Canada/DOJ declare legal view that no consultation required on land component, Coast Tsimshian withdraw from consultation
January 2006	Coast Tsimshian commence JR #2 for declaration re legal position
January 2006	CEAA Environmental Screening concludes (Permits subsequently issued)
May 2006	Transport Canada declares consultation over
August 2006	<i>Leighton</i> JR #2 heard

In *Reece v. Canada (Minister of Environment, Western Economic Development)*, the Coast Tsimshian challenged the execution of the Funding Agreement, on the basis the decision to proceed was effectively made without prior consultation. In *Leighton v. Minister of Transport*, the same Applicants challenged the determination by the Crown (through the Minister of Transport and DOJ) subsequently that the Crown was not required to consult on the Land Component because it was built on prior facilities. The Coast Tsimshian sought a declaration of law to inform the consultation. The Crown proceeded with its planning process.

The *Leighton* judicial review (#2) came on for hearing first, before Mr. Justice von Finkenstein in Federal Court. The *Reece* judicial review (#1) could not be heard sooner because of a Crown argument on documents, and in fact is still pending. It is the decision of Mr. Justice von Finkenstein, and the subsequent progress of the cases, that illuminates the issues in this paper.

Mr. Justice von Finkenstein found that the Federal Crown's legal position in the consultation was wrong (2006 FC 1129). He agreed with the Coast Tsimshian that consultation had been inadequate...:

It is impossible to characterize the Crown's position that only the water component was subject to consultation, as anything but unreasonable ... [para. 22]

... [By] discussing solely the water component the Crown began the entire consultation and accommodation process, essentially a bargaining process, on a skewed basis. [para. 23]

I fail to see how the court can find the consultation and the accommodation offered to be reasonable where the process started out on such a misconception and minimization of the Coast Tsimshian's claim. Since the accommodation by definition is the product of a negotiation process, reasonable assessment of the claim disclosed by the Coast Tsimshian is required. [para. 24]

However, the Court found, based on s. 18.1, that it could not issue the relief sought. Because the Minister of Transport was not required to authorize the project (i.e., *there existed no statutory requirement for this authorization*), the First Nation's request for a declaration could not be granted:

The Minister of Transport is not required to authorize the conversion. As the lead minister for the project, he leads the consultation process. If the process is successful there will be an offer of accommodation. The Coast Tsimshian may accept it or may for to court to seek judicial review. However there is no decision required for the Minister of Transport to authorize the conversion process. At best he will decide that the offer of accommodation made by the Crown is adequate. *However, this application does not concern itself with that decision*, which yet has to be made, in any event. [para. 27]

The Court effectively suggested that the Coast Tsimshian had either brought the Application too soon (and should have waited for the subsequent permits, and challenged them) or too late (they should have challenged the original October decision directly). The Court accepted the Crown's argument that the Minister of Transport had no statutory decision, so despite Transport Canada having been responsible for the consultation on behalf of the Crown, no formal declaration on judicial review could be issued.

Query how a declaration of law, in advance of the decision, as contemplated by *Haida* ("the courts may assist") can then be brought when the statutory decision maker is not the consultation agent?

Subsequent events confirm the dilemma. The Coast Tsimshian accepted the Court's suggestion and applied for an extension of time to challenge both the subsequent permitting decisions (in January 2006) and the original legal position (in October 2005). Those Applications were each opposed by the Crown on a number of interesting grounds, including that the permitting decisions could not be challenged because consultation was still ongoing (until May 2006), and that the May 2006 Decision that consultation was concluded (by Transport Canada) was the proper decision to challenge.

Assuming Mr. Justice von Finkenstein's decision is correct—that no declaration of law can be issued against the Minister of Transport because he has no statutory decision—this illustrates a number of catch 22s for First Nations. In a situation where approval-in-principle precedes

consultation, or where the Crown’s consultation is conducted by another agency, or where interim permitting occurs while consultation on the project continues, at what stage does the Court have jurisdiction to look at the whole of the consultation process?

Regardless of the merits of the particular case (which has not been finally determined yet), the general structural issues raised by the situation in *Leighton* and *Reece*, as we explore under the next headings—i.e., Rule 302, and the interpretation of s. 18.1—serve to create an unfortunate conundrum for First Nations who seek to challenge the adequacy of consultation in a large scale, complex, multi-agency project.

VII. Rule 302: Challenge to a Single Decision

R. 302: Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

This Rule is aimed at the efficient adjudication of the final decision of an administrative tribunal, but may not be helpful in the context of consultation. Consultation issues are not discrete problems of administrative law. Instead, they arise often in the context of multi-decision large scale processes by which tracts of land and resources to which aboriginal people claim rights and title are taken up or consumed.

This infringement of aboriginal title through the consumption of land and resources does not arise as the product of a single permitting decision or a single environmental impact determination. Multi-faceted projects are punctuated by various administrative applications and decisions which drive toward a single end. It is this end—the construction and operation of an international port, a mine, a pipeline, the logging of a watershed—that erodes the landscape in which aboriginal claims to rights and title remain outstanding.

Few major projects today require only one permit or governmental decision.² To focus on any single specific statutory decision would greatly narrow the scope of consultation (e.g., sewage permit, road permit, ocean dumping permit, fisheries permit, etc.). For the Court to examine the legality of governmental action in the context of a single permit, by a single agency, potentially creates an artificial and inadequate approach.

In land allocations and resource extraction, it is the cumulative impact of resource management that will create problems. As noted in *Haida*, in multi-layered resource planning, it may be the “impact of incremental strategic decisions” that cause the problem. At what level does the challenge arise?

Limiting judicial review to a single decision in this complex landscape of decisions, where the core complaint is of a failure to consult in respect of the process of the whole project, artificially frames the issue as though only a discrete decision were the problem, and limits the purview of the Court to respond to the underlying problem. When the complaint is framed in terms of a single decision, the Crown can argue that its obligation of consultation was met outside the scope of that frame, in another process, or in relation to another decision. And whether or not this is in fact the case, this moves the underlying complaint about failures in consultation beyond the Court’s purview in respect of the challenged decision.

First Nations can find themselves in a continually shifting landscape, in which they never get the benefit of a Court actually looking at the core issue (consultation) because the focus will always be on discrete statutory decisions that may in themselves be otherwise unimpeachable. Where First Nations are allowed only to challenge a single decision—but cannot challenge an overall decision to let a project proceed based on the consultation and accommodation that has occurred—the

2 This limitation was recognized in the environmental context, and arguably was the reason behind the *Canadian Environmental Assessment Act*. That Act contemplates multiple agency decisions for major projects, and so creates, by statute, a single window assessment process which precedes all other permits. No such statutory structure exists for aboriginal accommodation.

question of consultation is evaded and deferred, and in the meantime, projects advance through decision after decision, and toward completion, with consultation itself unaddressed.

It should be noted that Rule 302 does provide for exceptions—“Unless the Court orders otherwise” which may perhaps offer a solution in some cases. There is some caselaw under R. 302 which allows a challenge of two or more decisions if it can be shown to amount to “a continuing course of conduct.” However, it is also considered that where the decisions are made at different times, with a different focus, or involve different decision-making bodies, they cannot be said to fit the rule.³ That will almost always be the case in respect of multi-agency decision making subject to one consultation process.

VIII. Section 18.1: Focus on a Statutory Decision

Section 18 of the *Federal Courts Act* says:

- (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
 - (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal ...

(s. 2 “federal board, commission or other tribunal” means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown ...)
- 18(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1
- 18.1(1) Application for judicial review—An application for judicial review may be made ... by anyone directly affected by the matter in respect of which relief is sought
- (2) An application for judicial review in respect of a *decision or an order of a federal board, commission or other tribunal* shall be made within 30 days after the time the decision or order was first communicated ...
- (3) Powers of Federal Court—On an application for judicial review, the Federal Court may
 - (a) order a *federal board, commission or other tribunal* to do any act of thing it has unlawfully failed or refused to do or as unreasonably delayed in doing; or
 - (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a *decision, order, act or proceeding* of a federal board, commission or other tribunal.

In *Leighton*, despite the fact that the applicants sought declaratory relief preventing unconstitutional action against a body subject to judicial review (the Minister), the Court interpreted its jurisdiction narrowly, as discussed above.

Such a restrictive interpretation put on the jurisdiction conferred upon the Federal Court under s. 18.1 may prove a hurdle for the Court in reviewing the process of consultation—despite the fact that the

process and the duty to consult both underlies and overrides any statutory decisions that may or may not be at issue, and despite the fact that the Supreme Court of Canada has emphasized that consultation is not about outcome, but about process, and that the courts can assist in reviewing this process.

3 See, for example, *Khadr v. Canada*, 2004 123 C.R.R. (2d) 7, *Truehope Nutritional Support v. Canada*, (2004) 251 F.T.R. 155.

Nor does restricted interpretation appear to accord with what the Supreme Court of Canada said in *Mikisew*:

Where, as here, the Court is dealing with a *proposed* ‘taking up’ it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. **The Court must first consider the *process* by which the ‘taking up’ is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister’s order on the process ground** whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights. [para. 59, bold emphasis added, italics in original]

IX. Focus on the Statutory Tribunal

The *Leighton* case also illuminates a third problem that arises under the current constraints of the *Federal Courts Act* and Rules, as they are interpreted in that case. Despite finding that the Minister of Transport was the lead minister for the project, and that he was the head of the consultation process, the Court held that since the minister had no overall statutory approving decision to make, the Court had no jurisdiction to review the adequacy of the consultation overall—even though the adequacy of that consultation should, according to *Haida* and *Mikisew* bear upon the validity of the myriad statutory decisions along the way.

The Crown is thus able to argue that the Minister in charge of consultation has been engaged in meaningful consultation that meets the Crown’s obligations (and so, individual statutory decisions by other decision makers are beyond rebuke on that point), but that this consultation is not amenable to review by the courts, because that Minister in charge of consultation had no decision to make.

Again, this ignores the fact that whatever representative of the Crown is charged with consulting with the affected First Nation in fact *does* face a decision that is at once fundamental to and overrides all other decisions relating to a proposed project: whether, in respect of the proposed project, the Crown’s obligation to consult with and where appropriate, to accommodate a First Nation has been met.

The focus on a ‘federal tribunal’ also creates difficulties in the application of Rule 302 (see above).

X. A Comparison—British Columbia

This problem does not seem to have arisen so squarely in BC Supreme Court. In part, this may be because of different wording in the BC *Judicial Review Procedure Act*:

- (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
- (a) relief in the nature of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

The focus in this legislation is more on the remedy, as opposed to s. 18.1, which is arguably more on the tribunal. The power to grant a declaration “in relation to the exercise of a statutory power” is more clearly applicable to a request for legal clarification in a consultation regime, and is not limited to a declaration against a particular decision-maker. Perhaps as a result, it has been interpreted widely when similar arguments have been made in BC.

For instance, in *Huu-ay-abt First Nation v. the Minister of Forests*, 2005 BCSC 697, which was a judicial review brought pursuant to the *Judicial Review Procedure Act* for a declaration in respect of a government aboriginal forestry program, the Crown argued that the court could not correct a ‘policy’ for a consultation/negotiation process independent of the statute, because no statutory

decision was in issue. The Court held that the Crown's obligation to consult and accommodate established by *Haida*:

is a corollary of s. 35 of the *Constitution Act, 1982*, in which reconciliation of Aboriginal and Crown sovereignty implies a continuing process of negotiation which is different from the administrative duty of fairness that is triggered by an administrative decision that affects rights, privileges, or interests (*Haida* at paras. 28-32). *The obligation is a free standing enforceable legal and equitable duty* (*Haida Nation v. British Columbia (Minister of Forests)* (2002), 99 B.C.L.R. (3d) 209 at para. 55, 2002 BCCA 14; *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)* (2004), 34 B.C.L.R. (4th) 280, 2004 BCSC 1320 at para. 73 ...

The courts may review government conduct to determine whether the Crown has discharged its duty to consult and accommodate pending claims resolution (*Haida* at para. 60). In its review, the court should not give narrow or technical construction to the duty, but must give full effect to the Crown's honour to promote the reconciliation process (*Taku* at para.24). *It is not a question, therefore, of review of a decision but whether a constitutional duty has been fulfilled* (*Gitksan Houses v. British Columbia (Minister of Forests)* (2002), 10 B.C.L.R. (4th) 126 at para. 65, 2002 BCSC 1701. [para. 94]

Following a review of consultation cases in BC, the Court noted in *Huu-ay-abt*:

In *Haida Nation* (2002), Lambert J.A. commented at para. 34 that it was unnecessary on the facts of that case to consider whether a statutory power was being exercised when forests are managed and operations continue by third parties under a tree farm licence.

It is apparent that the courts have not been pedantic or overly restrictive in the type of action it regards as a 'decision' when it comes to declaratory relief following review of whether the Crown has discharged its obligation to consult with First Nations (para. 99)

In *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 ad 459, 18 D.L.R. (4th) 481 ... the majority agreed that judicial review was available to *scrutinize policy decisions of government for compatibility with the Constitution*. *A preventative declaratory judgment* is available if a legal interest or right has been placed in jeopardy or uncertainty.

See also *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320.

XI. Effective and Timely Access

On a more practical level, aside from systemic legal barriers, the question may arise as to whether the Federal Court process lends itself to effective resolution of aboriginal consultation questions in a timely manner.

Justice delayed is, of course, sometimes justice denied.

The difficult challenge for the Courts in matters of aboriginal consultation is that these disputes almost always arise in the context of permitting for major resource projects⁴. For such projects, once permitted, construction will soon follow—and will impose non-reversible physical changes that will render the consultation moot, or involve the vesting of commercial rights and commercial

4 This is not always the case—some consultation that challenges will involve regulatory changes, e.g., hunting and fishing regulations, or will involve interim process decisions, such as *Dene Tha*, and *Saulteau First Nation v. Canada (Attorney General)*, 2007 BCSC 492 where there is a realistic prospect of unwinding the decision.

expenditures that create a practical barrier to unwinding the decision, and therefore frustrate post-decision meaningful consultation.

Interim injunctions will not normally be available in these cases⁵—either because of the oft-made DOJ argument that injunctions are not available against the Crown,⁶ or because of the balance of convenience argument where major project proponents can show significant financial losses from delay.

The clear Federal Court Rules timelines for Judicial Review, which appear designed to move matters along quickly (30 days to file, 20 days for documents, 30 days for Affidavits and 30 days for Affidavits in Response, etc.) actually can have the opposite effect. These timelines can provide the Crown or a proponent an opportunity to avoid dealing with the matter until it is too late.

In our experience, of particular concern has been the matter of documents. The Federal Court Rules may be well designed for a normal Tribunal Decision, where there is both a ‘record’ and a discrete ‘hearing’. However, by its nature, consultation is far from a discrete process.

In a ‘normal’ consultation case, there will have been a series of correspondence and meetings by one or more federal agencies with First Nations (and sometimes more than one First Nation). There may also be meetings with the proponent, which either the proponent or the Federal Crown wishes to rely upon. Typically, there may have been extensive internal emails and correspondence internally between government agencies, or externally with the proponent, dealing both with the substantive issues on the project raised by the First Nation, potential accommodation options, and in some cases, assessments of the strength of the aboriginal title or treaty claim involved. Some or all of this information may be necessary to resolve the issues. The existing case law on document production is not helpful on this question. (Note this problem is not unique to aboriginal issues, it also arises in general policy-based attacks on government decision-making such as environmental cases, human rights, etc.).

In our two most recent aboriginal consultation cases in Federal Court (Port of Prince Rupert and MacKenzie Valley Pipeline),⁷ it is interesting to note that the Crown made application in both cases to restrict the scope of document production. Both Applications were unsuccessful. Both Applications, however, delayed the hearing date by a substantial period (by four months, and one year). In both cases, the Federal Court Case Management Judge made Orders staying further proceedings until the document issues had been resolved.

The objective of the Federal Court Rules on Judicial Review is clearly the timely hearing of these matters. However, the complex nature of consultation cases inevitably requires a substantial document record.

Where the Crown fails to produce extensive documents, or provides affidavit evidence making conclusory statements that would be contradicted by undisclosed documents, cross-examination is required, which can further delay matters.

5 In *Haida*, the SCC recognized the difficulty faced by First Nations in gaining interlocutory injunction (see paras. 12-15). Note: the SCC Facts of both the Haisla and Squamish Nation Interveners contain a full examination of the sorry history of availability of Interlocutory Injunctions to First Nations.

6 In the recent BC Supreme Court decision *Saulteau First Nation v. Canada (Attorney General)*, *supra*, Mr. Justice Wilson found that the BC Supreme Court had clear jurisdiction to grant an Interlocutory Injunction on a failure to consult, because it was a constitutional issue (see also *Snuneymuxw First Nation v. BC*, (2004) 26 BCLR, 4th 360 BCSC). However, the Court went on to find against the Plaintiffs on balance of convenience.

7 *Leighton. v. Her Majesty the Queen in right of Canada et al.*, *supra* and *Grand Chief Herb Norwegian et al. v. Her Majesty the Queen in Right of Canada et al.*

In the *Reece* example, involving the Port of Prince Rupert terminal construction, the Coast Tsimshian initially filed their Application for Judicial Review of a legal question that arose on consultation in October 2005. A Case Management Judge was appointed in February. The Crown's document Application was heard in May 2006, with Judgment reserved to June 2006. Despite two requests by the Applicants for an expedited hearing through the spring and summer, the next Case Management Conference was not held until October 2006. The Crown's Application to add additional evidence (because of the lapse in time), and a related cross-examination issue, was not heard by the Prothonotary until February 2007. Judgment on that interim Application is still pending, and no hearing date is in sight. In the meantime, permitting decisions were made in January 2006. Construction commenced in April 2006, Federal funds were wholly disbursed, and construction is now largely complete, and the damage done.

Similar delays occurred in the MacKenzie Valley Pipeline litigation. The *Deb Cho* case (*Grand Chief Herb Norwegian, supra*) was finally resolved by a settlement (more than eight months after the case was brought, without a hearing date having yet even been set).

These were both specially Case-Managed proceedings, where the court was aware of the urgency.

In the *Dene Tha* litigation—even though Judgment was recovered more expeditiously there —because the Joint Panel had already held hearings, the Court was left with the dilemma expressed by the Court as follows:

[130] The difficulty posed by this case is that to some extent 'the ship has left the dock.' How does one consult with respect to a process which is already operating? The prospect of starting afresh is daunting and could be ordered if necessary. The necessity of doing so in order to fashion a just remedy is not immediately obvious. However, it is also not immediately obvious how consultation could lead to a meaningful result.

The final question of a just remedy in that case has yet to be determined.

These delays are hardly consistent with justice to First Nations and the Honour of the Crown. They do not help to meet the role of the Court as set out in *Haida*—"if they cannot agree, tribunals and courts can assist." More to the point, delays such as this do not usually occur, at least in the writer's experience, to the same extent in BC Supreme Court cases involving aboriginal consultation Judicial Review.

If the Federal Court is to play any meaningful role in assisting First Nations and the Crown in honorably resolving consultation questions, and obviously a solution to the "timely disposition" of matters must be found.

XII. Conclusion

This paper seeks to examine incongruities that have come to emerge between the Crown's obligations to consult with aboriginal people in certain instances, and the ability to enforce that obligation in Federal Court. There is, we have suggested, a disjuncture between the substantive law on consultation and the law governing jurisdiction and procedure in the Federal Court. Significantly, this disjuncture can function to effectively limit the substantive law on consultation as set out by the Supreme Court of Canada, by curtailing the recourse available to First Nations.