Aboriginal Rights:

Consultation Update: Emerging & Persistent Issues

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Consultation Update: Emerging & Persistent Issues

Centre for Constitutional Studies/Legal Education Society of Alberta

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I. Introduction

Haida Nation v British Columbia (Haida Nation)[2] ushered in a new era in aboriginal law. Prior to the articulation of the duty to consult and accommodate aboriginal peoples in this case, the Supreme Court described the purpose of s 35 of the *Constitution Act, 1982* as "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[3] In *Haida Nation,* the Court's purpose statements shifted to a more dynamic approach, describing reconciliation as a process that "begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense."[4] More recently, the Supreme Court restated the "grand purpose" of s 35 again, this time as "the reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."[5] These statements show that, in contrast to the emphasis on history in s 35's first 20 years, the *Haida Nation* era is determinedly forward-looking, moving towards reconciliation through dialogic processes and negotiations.

Haida Nation envisioned the duty to consult as existing along-side negotiation processes aimed at a more fulsome settlement of aboriginal rights claims. While modern treaty processes continue to inch-along,[6] the duty to consult has spawned numerous 'sub-treaty' and treaty-like negotiation processes and agreements[7] and lots of work for aboriginal relationship consultants, consultation conference organizers, and impact-benefit agreement negotiators. It has also spawned many questions about the "end game" of all of these consultation and negotiations processes. As Ria Tzimas asks, "Is dialogue through consultations and modern treaty negotiations intended to make *some* room for

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[2] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 SCR 511.

[3] *R v Van der Peet*, [1996] 2 SCR 507 at para 31.

[4] *Haida Nation, supra* note at 2 para 32.

[5] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103.

[6] With respect to the BC Treaty process, this inching along might be better described as moving from crisis to crisis. For a recent survey of some of the issues plaguing this process, see James M. Lornie, *Final Report with Recommendations regarding the Possiblity of Accelerating Negoationa with Common Table First Natons that Are in the BC Treaty Proces, and Any Steps Required*, submitted to the Minister of Aboriginal Affairs and Northern Development, 30 November 2011. See also Murray Browne, "The Promise of Delgamuukw and the Reality of Treaty Negotiations in British Columbia" in Maria Morellato, ed., *Aboriginal Law Since Delgamuukw* (Aurora, ON: Canada Law Book Co., 2009) 465-505.

[7] See, e.g., British Columbia's "incremenetal" treaties (online: <http://www.gov.bc.ca/arr/treaty/incremental_treaty_agreements/default.html >) and reconciliation protocols (online: < http://www.newrelationship.gov.bc.ca/agreements_and_leg/reconciliation.html>).

Aboriginal participation in the overall socio-economic growth and well-being of the country? Or, is reconciliation intended to enable a more profound reshaping of the Crown-Aboriginal relationship?"[8]

Eight years after *Haida Nation*, the legal parameters and the institutional structures around this new direction remain incomplete and formative. The Supreme Court has decided only two additional duty to consult cases since the *Haida Nation* trilogy[9] — *Beckman v Little Salmon/Carmacks First Nation* (*Little Salmon/Carmacks*)[10] and *Rio Tinto Alcan v Carrier Sekani Tribal Council* (*Rio Tinto Alcan*)[11] – and has accepted only one leave application in a consultation related matter since then.[12] *Rio Tinto Alcan* refined the structure of the duty set out in the trilogy, focusing on the threshold test and the role of tribunals in relation to duty. *Little Salmon/Carmacks* clarified that the honour of the Crown applies to the interpretation of modern treaties and is capable of grounding consultation obligations beyond those specified in the terms of the agreement. It also re-iterated the centrality of the honour of the Crown in this area of law, confirming the status of this principle as constitutional.[13] Both cases emphasize that the duty to consult fits within the Canadian constitutional framework and rely heavily on administrative law principles. The discussion below will illustrate that the fit of the duty within Canadian constitutional and administrative law remains uncomfortable, with many edges remaining to be smoothed. The emphasis on public law principles also suggests that the expansiveness of *Haida Nation* has been clipped; that the Supreme Court's picture of reconciliation does not generally require a significant restructuring of Canadian public law – or, perhaps, that the duty to consult is not the instrument for delivering such change. But if all of the energy and attention is focused on the duty to consult, how will the larger restructuring be effected?

This paper will first provide an overview of the duty to consult and the state of the law that emerged from the Supreme Court's decisions in 2010. It will then consider the particular issues of the role of tribunals and agencies and the identification of the parties to a consultation.[14] The first issue is 'persistent' in that related statements from the Court in 2010 have not resolved the issues. The second issue, regarding the parties to the consultation, emerges from a long-standing gap in the

[8] E. Ria Tzimas, "To What End the Dialogue?" (2011) 54 SCLR (2d) 493 at 495.
[9] The trilogy included *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 [*Taku River Tlingit*] and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 [*Mikisew Cree*].
[10] *Supra* note 5.
[11] *Rio Tinto Alcan v Carrier Sekani Tribal Council,* 2010 SCC 43, [2010] 2 SCR 650.
[12] *Moulton Contracting Ltd. v Behn*, 2011 BCCA 311, leave to appeal to the SCC granted, 2012 CanLII 179819 (SCC) [*Moulton v Behn*].
[13] *Ibid* at paras 42 and 44.
[14] There are, of course, may other issues that could be usefully addressed. To list a few: the development of causation analysis in different elements of the duty to consult and related burdens of proof; the approach to preliminary rights assessments; the role of financial compensation in accommodation and related remedial authorities; and, the standard of review analysis in relation to consultation decisions.

Aboriginal Rights:

Section 35(1) of the Constitution Act, 1982, the Duty to Consult, and the Government of Alberta's First Nations Consultation Policy

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Section 35(1) of the *Constitution Act, 1982*, the Duty to Consult, and the Government of Alberta's First Nations Consultation Policy[1]

Neil Reddekopp[2]

"Well, it may be all right in practice, but it will never work in theory."
Warren Buffett, on the attitude of the academic community to his approach to investing.

"In theory, there is no difference between theory and practice. But, in practice, there is."
Yogi Berra, on life in general.

INTRODUCTION AND ORGANIZATION OF PAPER

Even Canadians who are not familiar with the work of the Montreal music and comedy group Bowser and Blue will be aware that the same relationship between theory and practice referenced in the quotes above is reflected in numerous jokes regarding Canadian federalism. This observation transcends comedy, and was included in a 2005 column on Canadian politics in the prestigious journal *The Economist*.[3] This consideration alone would justify introducing this concept at the start of the present analysis of the relationship between the Crown's constitutional obligation to consult with and accommodate First Nations and the practical implementation of the Government of Alberta's policy in this area. But the relevance of the above quotations to this particular subject is far more substantial. The thesis of this paper is that Alberta's approach to First Nation consultation falls far short of fulfilling (or even acknowledging in any meaningful way) the Province's constitutional obligation in this regard, but (for reasons that are not reflective of any merits of the policy), the development and management of public lands and resources appears to operate smoothly and efficiently, without any serious legal challenges or significant delays in this process.

The first two sections of the paper are purely descriptive, summarizing respectively the current state of Canadian law regarding consultation and accommodation and Alberta's policy and procedures in the same area. The third and fourth sections are more analytical. The former evaluates Alberta's policy and practices in light of the state of the law, while the latter describes the current operation of land and resource dispositions and regulatory processes in Alberta. The fifth and final section of the paper addresses the question of whether the conceptual failings of Alberta's approach regarding consultation and accommodation should be a matter of serious concern given the absence of significant practical problems in the regulatory system.

Considerations of space and time necessitate limitations on the breadth of the discussion that follows. For example, leaving aside for the moment the precise conditions that give rise to the Crown's duty to consult, it can be stated generally that consultation relates to the potential existence of an Aboriginal right (most commonly the right to hunt, trap, fish, and gather) and the possibility that a decision or action by the Crown might have an impact on the exercise of this right. It will be seen that such an impact can occur in one of two ways. The first is through the direct regulation of a harvesting right such as the closure of territory, a seasonal ban on harvesting, or a limit on the methods that can be used for harvesting. This is the scenario that was addressed in *R v Sparrow*,[4] where the right to fish was affected by a limitation on the size of fishing net used.[5] The second, seemingly less direct, impact is the reduction in lands over which harvesting rights can be exercised by issuing dispositions that set aside lands for purposes that are legally or practically incompatible with the exercise of an Aboriginal right, which can range from harvesting to a claim of title. This second category of situations can be subdivided further, into decisions made or actions taken by the Crown on its own behalf and the disposition of lands to third parties for exploitation by the latter. In Alberta, examples of the former type include decisions to set aside historic sites, which are made by the Minister of Culture, pursuant to s. 16(a) of the *Historical Resources Act*[6] and the design of water management plans by a designate of the Minister of Environment and Sustainable Resource Development in accordance with s. 9 of the *Water Act*.[7] Examples of the latter include decisions by the Department of Energy regarding applications for petroleum and natural gas licences or leases pursuant to the *Petroleum and Natural Gas Tenure Regulation*[8] and decisions by the Department of Environment and Sustainable Resource Development in response to applications for licences of occupation for road construction and other purposes or for mineral surface leases under the *Public Lands Administration Regulation*.[9] While all of these activities necessitate consultation by the Crown with Aboriginal people, the form of this consultation varies according to the type of activity. This paper focuses on the last scenario discussed, the disposition of Crown lands for use by third parties and the approval of applications by the recipients to develop the disposed resources.

THE STATE OF CANADIAN LAW ON CONSULTATION AND ACCOMMODATION

For the type of consultation discussed herein, the starting point is the decision by the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*,[10] in which the Haida Nation challenged the validity of the approval by the British Columbia Minister of Forests of the transfer of a Tree Farm Licence on lands to which the Haida Nation had filed an Aboriginal title claim.[11] Although the case reached the Supreme Court almost 15 years after consultation was first raised in *Sparrow*, McLachlin CJC recognized that *Haida* was the first opportunity to consider the issue of consultation