

The Duty to Consult and Accommodate: Overview of the Current Law

**By Dominique Nouvet
Woodward & Company**

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The Duty to Consult and Accommodate: Overview of the Current Law¹

A. Introduction

The law of consultation and accommodation is currently the most rapidly evolving area of Aboriginal law. Since the Supreme Court of Canada rendered judgment in the leading consultation case of *Haida Nation v. British Columbia (Minister of Forests)*² in 2004, the courts have rendered dozens more decisions on the Crown's duty to consult and accommodate.

The central role of *Haida* in Aboriginal rights law was to be expected. Before *Haida*, an Aboriginal group seeking to protect its rights in the face of proposed development in its traditional territory had to prove them in court. Proving Aboriginal rights and title is extremely expensive and time consuming, which means that for many groups, this is not even an option. Moreover, if the activity in question was imminent, the Aboriginal group's only option was to seek an injunction to protect the land and resources until the litigation was complete. However, the courts have typically refused to grant such injunctions. Therefore, an Aboriginal rights or title action has never been a very promising strategy for protecting unproven rights which stand to be infringed in the near future.

In *Haida*, the Supreme Court of Canada acknowledged that if Aboriginal rights actions were the only option for protecting asserted rights, the promise of s. 35 of the *Constitution Act, 1982*, i.e. the protection of Aboriginal and treaty rights, would ultimately be a hollow one for many Aboriginal groups. It recognized that reconciliation, the core objective of s. 35, could not be achieved if the Crown were free to make decisions about the land and natural resources without regard to legitimate Aboriginal rights claims. Thus, the Supreme Court of Canada recognized a distinct legal obligation to ensure that the government takes *asserted* rights into account in its decision-making. This legal obligation, the duty to consult and accommodate, immediately became central to Crown-Aboriginal relations.

¹ Prepared by Dominique Nouvet, associate at Woodward & Company.

² *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.

This paper reviews the key elements of the duty to consult and accommodate, with an emphasis on those aspects likely to be of particular relevance to mining projects. Although few of the consultation decisions so far concern mining – most concern forestry activity or land dispositions – the jurisprudence establishes a number of general principles that inform the duty to consult and accommodate for all types of Crown decisions.

B. Key Elements of Duty to Consult and Accommodate

1. What Triggers the Duty

The duty to consult and accommodate is triggered when either asserted or established s. 35 rights are at stake. Established rights include proven Aboriginal rights as well as historical treaty rights, where the nature and scope of the treaty right are not in dispute.³

Mining projects have the potential to affect s. 35 rights in a number of ways. Aboriginal title includes the right to decide the uses to which the land and resources will be put. This includes the right to decide whether to extract minerals from the ground.⁴ In addition, mining projects have major impacts on the ground, altering the landscape and potentially compromising natural resources such as wildlife, wildlife habitat, and water. Therefore, mining activities on Aboriginal title land that have not been approved by the group holding title would constitute a serious infringement of Aboriginal title.

Mining projects will also have a negative impact on any s. 35 harvesting rights: the mining site, the waste disposal sites, the roads leading to the mine, work camps associated with the mine will all reduce the land base available for harvesting and cause some disruption to wildlife, wildlife habitat, and potentially fish and fish habitat. Mining projects may also take away important plant areas and thereby reduce opportunities for plant gathering (e.g. berry picking or medicinal plant gathering).

³ For example, while there is no doubt that the Douglas Treaties on Vancouver Island include a fishing right, the existence of a commercial dimension to that right remains in dispute.

⁴ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 122.

Finally, mining projects may interfere with s. 35 cultural rights. Cultural rights would include the right to pursue spiritual and cultural activities on the land and to preserve and use sacred sites. The extent to which the courts are willing to recognize such rights remains to be seen. However, if an Aboriginal group has a deep cultural attachment to a particular area of land, and engages in cultural practices on that land, a mining project stands to interfere with this relationship with and use of the land. This interference may be extremely disturbing to the Aboriginal group and disruptive to its culture. While these impacts are less tangible than infringements of Aboriginal title or harvesting rights, they are just as real to the Aboriginal group and may also constitute infringements of s. 35 rights.

It appears that the duty to consult also applies to modern treaty rights, unless the modern treaty expressly precludes consultation,⁵ though the Supreme Court of Canada has yet to rule on this issue. Moreover, the courts have yet to decide whether the common law principles developed in *Haida* apply where modern treaty provisions identify some kind of consultation obligation on the part of government but do not expressly impose all components of the common law duty to consult.

The duty to consult applies not only to decisions or conduct which will have an immediate impact on lands and resources, but also to *strategic, higher level decisions*, such as the transfer of a tree farm licence to a new owner,⁶ the approval of a multi-year forest management plan for a large geographical area,⁷ or the establishment of a review process for a major gas pipeline.⁸ On this logic, the grant of a mineral tenure by the Crown should also require the Crown to consult with Aboriginal groups. Indeed, in the decision of *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, the Ontario Court of Appeal suggests, without deciding, that the staking

⁵ The Yukon Court of Appeal confirmed that there is a presumption that the duty to consult and accommodate applies to s. 35 rights in modern treaties in *Little Salmon/ Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, 2008 YKCA 13. This is consistent with the Supreme Court of Canada's assertion that the honour of the Crown infuses not only treaty-making (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 17 and 19), but also treaty implementation, and that Crown-Aboriginal reconciliation is an ongoing process (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 32).

⁶ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

⁷ *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642.

⁸ *Dene Tha' First Nation v. Canada (Minister of Environment)* 2006 FC 1354. The trial level decision was affirmed by the Court of Appeal but that decision appears to be unreported.

of mineral claims is an activity that triggers the Crown's duty to consult with Aboriginal groups whose s. 35 rights may be affected by eventual mining activity.⁹

Aboriginal interests and concerns which do not flow from s. 35 rights do not trigger the duty to consult.¹⁰ Thus, while the Crown may be willing to consider these other interests and concerns, and while the parties may be able to reach an accommodation agreement about a particular decision by addressing these other issues, the Crown has no constitutional duty to consult unless asserted or proven s. 35 rights are implicated by its proposed decision or course of action.

2. Duty to Consult and Accommodate is Variable

The Supreme Court of Canada held in *Haida* that the duty to consult lies on a "spectrum."¹¹ The scope of the Crown's duty varies along this spectrum and essentially depends on the level of risk that the proposed decision carries for s. 35 rights. The two key risk factors are a) the strength of the s. 35 rights claim, and b) the severity of the potential harm to the right.¹² The more substantiated the asserted Aboriginal or treaty right which might be affected by the decision, the more onerous the Crown's duty to consult and, if appropriate, accommodate. Similarly, the more serious the potential harm to the s. 35 right from the proposed decision, the more onerous the duty to consult and, if appropriate, accommodate. The lower courts consistently consider these factors in consultation cases and identify whether the duty of consultation in the particular case is limited or deep. Therefore, both the Crown and the Aboriginal group need to be very aware of these factors in the course of their consultations.

At the lower end of the consultation/accommodation spectrum, the Crown's duties will be "to give notice, disclose information, and discuss any issues raised in response to the notice."¹³ At the higher end of the spectrum, the Crown will need to work with the Aboriginal group to try to find a satisfactory way of accommodating the group's reasonable concerns.

⁹ *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* 2008 ONCA 534 at paras. 61-62

¹⁰ *Ta'an Kwacha'an Council v. Yukon*, 2008 YKSC 60 at paras. 58-59; in *Ahousaht First Nation v. Canada*, 2007 FC 567, the Federal Court states that impacts of proposed Crown decisions to an Aboriginal group's modern treaty negotiation process does not trigger the duty to consult (para. 32).

¹¹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 43.

¹² *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 39.

¹³ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 43.

A proposed mining project may attract consultation obligations of any level. For example, if the Aboriginal group has a very weak claim to Aboriginal title for the project area, or if the Aboriginal group claims harvesting rights but the project lies on the periphery of its territory and the group has many other preferred and available lands available for harvesting closer to its community, the duty to consult may be fairly low. In contrast, a mine that would destroy lands to which the Aboriginal group has a strong Aboriginal title claim, or that would have significant environmental effects over a large portion of the group's reasonably asserted territory would attract high consultation obligations. Ultimately, each situation must be judged on its own facts.

3. Key Purpose of Consultation

The Supreme Court of Canada has stated that whether the Crown's obligations lie on the low or high end of the spectrum, the Crown must engage in consultation with the goal of substantially addressing the Aboriginal group's concerns.¹⁴ Responsiveness is a key requirement of both consultation and accommodation."¹⁵

4. Duty of Good Faith

Both the Crown and Aboriginal groups must always engage in consultations in good faith.¹⁶ For the Crown, this will mean sharing all necessary information, giving the Aboriginal group the opportunity to respond to that information, listening to the Aboriginal group's concerns, and being willing to respond to those concerns and modify the proposed decision or course of action where it is reasonable to do so based on the strength of the rights claim and the severity of the potential infringement.¹⁷ In short, the Crown must intend for consultation to be meaningful, not just an opportunity for the Aboriginal group to "blow off steam."¹⁸ It must be willing to alter its proposed course of action based on what it hears from the Aboriginal group.¹⁹

¹⁴ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 42; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 67.

¹⁵ *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74 at para. 25.

¹⁶ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 42.

¹⁷ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 42; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 64.

¹⁸ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 54.

¹⁹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 46.

Aboriginal groups must also engage in the consultation process in good faith. As a general rule, this means sharing relevant information and discussing the proposed decision or course of action with an open mind about the likely impact of the decision and the possible ways of accommodating their s. 35 rights.²⁰ If an Aboriginal group's only objective is to prevent a particular project from being approved, the courts will not normally consider this to be a good-faith effort, because the Supreme Court of Canada has emphasized that the consultation process does not give Aboriginal groups a veto over Crown decision-making.²¹ However, it is suggested here that it may at times be reasonable for an Aboriginal group to oppose a project, and this is one of the matters discussed further below, in Part C of this paper.

The Supreme Court of Canada stated in *Haida* that the duty of good faith does not preclude "hard bargaining."²² It is suggested here that this principle is problematic in cases where the balance of power already weighs heavily in the Crown's favour. Where the Aboriginal group has no obvious leverage and, in particular, lacks the funds to pursue their rights in court, hard bargaining can essentially amount to a "take it or leave it" approach, which would not uphold the honour of the Crown. However, it does not seem as though any court has questioned the right of the Crown to engage in hard bargaining to date.

5. Duty of Early Engagement

The Crown must initiate consultation process early on in its decision-making process, before that process has moved too far along.²³ This makes sense, particularly for large projects proposed by third parties, which will gain momentum as the proponent begins to interact with government officials, develops the details of the project, and secures financing and preliminary approvals. This fact was recognized by the British Columbia Supreme Court in *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*:

The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions. Once important preliminary decisions have been made

²⁰ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 65.

²¹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 48; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras. 65-66.

²² *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para 42; *Brown v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 at para. 24.

²³ *Musqueam Indian Band v. British Columbia*, 2005 BCCA 128 at para. 95 (per Justice Hall).

and relied upon by the proponent and others, there is clear momentum to allow a project.²⁴

The requirement for early consultation may include the duty to consult about the decision-making process that will be used to decide whether to approve a project. This was held to be the case in *Dene Tha' First Nation v. Canada (Minister of Environment)*, where Canada and Alberta had developed a unique regulatory and environmental review process for the proposed Mackenzie Gas Pipeline, a massive project.²⁵ Thus, at least in the case of major projects with customized review processes, Aboriginal groups who stand to see their s. 35 rights affected by the proposed activity are probably entitled to have input into the nature of the project review process.

6. Who Holds the Duty

The duty to consult and accommodate is held by the Crown, both federal and provincial. Although some activities require a single government decision, mining project typically require a number of approvals, potentially from both the federal and provincial government. A major mining project will also require an environmental assessment, potentially under both the *Canadian Environmental Assessment Act*²⁶ and the provincial environmental assessment legislation (e.g. British Columbia's *Environmental Assessment Act*)²⁷. If the proposed mining project triggers the Crown's duty to consult, it may not be obvious who is responsible for discharging this duty.

It is the Crown's responsibility to ensure that one or more officials, ministries, or agencies ultimately discharge the Crown's duty to consult. In the case of *Dene Tha'* no entity held a mandate to consult with and, if appropriate, accommodate, the Dene Tha' First Nation with

²⁴ *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 at para. 74.

²⁵ *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at paras. 107-110.

²⁶ *Canadian Environmental Assessment Act*, S.C. 1992, c.37

²⁷ *Environmental Assessment Act*, S.B.C. 2002, c.43

respect to the proposed Mackenzie Gas Project. The Federal Court ruled this to be as a breach of Canada's consultation obligations.²⁸

The British Columbia Supreme Court stated in *Hupacasath First Nation v. British Columbia (Minister of Forests)* that the Crown must be internally clear on who is responsible for discharging the Crown's consultation obligations and communicate its intentions in this regard to the Aboriginal group:

...it is incumbent on the Province to do its best to ensure that the mandate of the specific Ministry or agency with which a First Nation is interacting is made clear, and to ensure that responsibility for consultation and accommodation is not lost in the complexity of (sometimes shifting) governmental structures. The Crown's duty is to carry on a process that is as transparent as possible.²⁹

As discussed above, it is also well established that consultation must begin early on in the Crown's decision-making process. This means that where there is a series of decision-makers, consultation cannot begin at the final decision-making stage. The Federal Court has also ruled that the consultation process may not be terminated while a project proponent is still in negotiations with Crown officials about the terms on which its project could proceed: *Chicot v. Canada*.³⁰ In that case, the Aboriginal group was engaged in the regulatory review of a proposed extension to a large oil and gas project. As a result of the review process, certain mitigation measures were recommended to the minister, some of which would have helped reduce the impacts of the project on the Aboriginal group's s. 35 rights. However, the Minister proceeded to review those recommendations with the review board that had proposed them and in further, closed-door discussions, approved the project with less onerous mitigation measures (a "consult to modify" process, which was provided for by the relevant legislation³¹). The Federal Court ruled that this was a breach of the Crown's duty to consult.³² Thus, the Crown must entrust one or more individuals or entities with the task of consultation in a way that ensure both *early* consultation and *continued* consultation during critical stages of the decision-making process.

²⁸ *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at paras. 112-113 and 127.

²⁹ *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 at para. 147.

³⁰ *Chicot v. Canada (Attorney General)* 2007 FC 763

³¹ *Chicot v. Canada (Attorney General)*, 2007 FC 763 at para. 120.

³² *Chicot v. Canada (Attorney General)* 2007 FC 763 at paras. 123-124.

In the context of mining projects, the role of environmental assessment panels and agencies in the consultation process is particularly relevant, since so many mining projects trigger provincial and federal environmental assessments (“EAs”). Do EA panels (“EA Panels”) and EA agencies (“EA Agencies”) – such as the Canadian Environmental Assessment Agency or British Columbia’s Environmental Assessment Office – share in the Crown’s duty to consult and accommodate? Can they fully discharge the Crown’s duties to consult and accommodate?

Since the role for EA Panels or EA Agencies in the consultation process depends on their statutory mandate and powers, it is impossible to definitively state their role in the consultation process. Each situation must be judged on its own facts. That being said, it seems that EA Panels and Agencies will normally have a valuable role to play in consultation, but that they could not be fully responsible for the consultation process.

Early on in the EA process, an EA Panel or Agency may be responsible for deciding which components of the proposed project will be subject to the EA. This “scoping” decision is very important, as it determines whether the EA will cover all of the aspects of a project which stand to have an impact on Aboriginal or treaty rights. Equally important is the formulation of the terms of reference for the EA, a task which may also fall to the EA Panel or Agency. The terms of reference determine what information the project proponent will need to provide for the EA as well as the issues that the EA Panel or Agency will consider in reviewing the project and deciding whether to recommend its approval. Thus, the terms of reference are also critical to the question of whether an EA will have the potential to generate all of the information and analysis needed to understand the impact of a project on s. 35 rights.

Once an EA is underway, the EA Agency or Panel will likely have a mandate - if not a statutory obligation - to reach out to Aboriginal groups and solicit their input on the proposed project. The EA Agency or Panel should also be able to press the proponent for information about the expected environmental impacts of the project and the options for mitigating those impacts. In sum, the EA Agency or Panel may be able to generate valuable information from both sides to better understand the possible impacts of the project on any Aboriginal or treaty rights, and it may be in the best position to identify appropriate mitigation measures so as to reduce the impact of the project on s. 35 rights.

However, while an EA Agency or Panel may have a valuable role to play in gathering useful information about possible project impacts on s. 35 rights and in developing mitigation measures, this in itself does not necessarily complete the consultation process.

First, it may be appropriate for the Crown and the Aboriginal group to explore accommodation measures which lie outside the mandate of the EA Agency or Panel, such as compensation, or a commitment to protect other adjacent lands from any future development to ensure that the Aboriginal group retains a meaningful ability to exercise its harvesting rights. Other Crown officials will need to become involved in such discussions. Indeed, this was the case in *Taku River Tlingit First Nation v. British Columbia*. Although the Supreme Court concluded that the Crown had satisfactorily discharged its consultation and accommodation duties through the EA for the proposed mine, it noted that the Environmental Assessment Office had recognized that certain accommodation issues raised by the First Nation were outside its jurisdiction,³³ and that the Office had put the First Nation in touch with other government officials to discuss these concerns.³⁴ Moreover, the Supreme Court of Canada recognized that some accommodation measures were likely to be developed after the project had been approved, for example through the subsequent approval process for the mine's access road. Thus, the Crown had an ongoing duty to consult on certain issues.³⁵

Second, even if the EA Agency or Panel's mandate suffices to consider all reasonable accommodation measures, or to recommend that the project not be approved at all, the final decision-making authority typically rests with one or more ministers. Thus, the Crown may continue to consider the acceptability of the project or the terms on which it should proceed even after the EA Agency or Panel issues its recommendation. As noted above, the *Chicot* decision stands for the proposition that it would not be appropriate for an Aboriginal group to be excluded from the decision-making process at this stage if it has potential implications for the groups established or asserted s. 35 rights.

³³ *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74 at para. 12.

³⁴ *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74 at para. 36.

³⁵ *Taku River Tlingit First Nation v. British Columbia*, 2004 SCC 74 at para. 46.

Thus, EA Offices and Panels lack the discretion and power required to be fully responsible for the Crown's consultation and accommodation. Any role that they play may need to be supplemented with consultation between the Aboriginal group and Crown officials within one or more ministries.

The courts have not developed any rigid rules as to who, within the Crown, must take charge of consultation. No doubt the Crown will continue to enjoy flexibility on this issue, as it should. At the same time, Aboriginal groups are entitled to deal with someone (or some entity) that has a mandate to consult with them, and they are entitled to know who this person or entity is. Therefore, where a proposed project triggers a complex approval process, and it is not clear who is in charge of consultation, this is a matter that must be resolved as quickly as possible.

7. Format of Consultation

There is no rigid format for consultation processes. The courts will assess whether any impugned process was *reasonable*, not whether it was the ideal process or the process which they themselves would have adopted. Generally speaking, an Aboriginal group cannot insist on a particular consultation process.

However, as discussed above, the consultation process must allow for meaningful consultation with Aboriginal groups who may have s. 35 rights at stake. Moreover, the courts have expressly stated that the Crown cannot rely on a consultation forum for the general public to discharge its consultation obligations towards an Aboriginal group.”³⁶

The Crown may be allowed to discharge its consultation obligations primarily through a pre-existing decision-making process, including an environmental assessment process. This was the case in *Taku River*, where the Supreme Court of Canada cited the level of involvement of the First Nation in the provincial environmental assessment for a proposed mine in its territory in

³⁶ *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at para. 104. The Supreme Court of Canada implicitly makes this point in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 64.

support of its ruling that British Columbia had consulted adequately with this Nation.³⁷ However, as discussed above, it should not be assumed that the Crown can fully discharge its consultation obligations through the statutory environmental assessment process.

Moreover, British Columbia's *Environmental Assessment Act* has been significantly amended since *Taku River*, and the provisions that helped provide a meaningful role for Take River in the Crown's review of the proposed mine re-opening in that case have been removed from legislation. The British Columbia Court of Appeal recently noted this fact in *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*.³⁸

If a statutory decision-making process cannot ensure meaningful consultation, the Crown will need to adjust that process or supplement it with another forum: "the Crown's duty to consult cannot be boxed in by legislation."³⁹ In other words, legislation may establish a decision-making process, but the fact that Crown decision-makers adhered to this process does not in and of itself mean that they met their consultation obligations towards any affected Aboriginal groups. Ultimately, the content of the Crown's consultation duties flow from constitutional obligations, not the requirements set out in a regulatory scheme.

Consultation protocols may be an important aspect of the consultation process. In keeping with the approach of leaving the parties (and in particular the Crown) with a fair bit of discretion in establishing the consultation process, it seems that as a general rule, neither side may compel the other to enter into a consultation protocol.⁴⁰ However, at least one court which ruled that additional consultation was necessary also ordered that the parties adopt a consultation protocol in order to help facilitate this further consultation.⁴¹

³⁷ *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at para. 40 in particular.

³⁸ *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2008 BCCA 68 at para. 53.

³⁹ *Chicot v. Canada (Attorney General)* 2007 FC 763 at para. 121; see also *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999) 178 D.L.R. (4th) 666 (B.C.C.A.) at para. 177

⁴⁰ In *Ahousaht First Nation v. Canada*, 2007 FC 567, at para. 66 the Federal Court decided that Ahousaht was not entitled to demand a consultation protocol with the Department of Fisheries and Oceans.

⁴¹ This was done in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.) at para. 188.

Even if there is no legal requirement for a consultation protocol, such agreements may be beneficial to the consultation process: they may clarify the parameters of the discussion, manage expectations about the process, set a timeline for the consultation process, and clarify the roles of different government officials and/or the project proponent. Thus, consultation protocols will at times be desirable, particularly where there is a major, complex proposed activity at issue.

8. Information Sharing

The Crown must share available information openly with the Aboriginal group concerning the proposed decision/course of action. The Supreme Court of Canada stated in *Mikisew* that the Crown must share all “necessary” information.⁴² Information about a proposed decision or activity is necessary if it helps the Aboriginal group understand the nature of the proposed decision or activity and/or the possible impacts of the decision or activity on any proven or asserted s. 35 rights. In the case of a proposed activity on the land, this would include details about the timing of the project, its precise location, its duration, the nature of any disruption to the land or resources, the expected environmental impacts, and the volume of any resource that will be harvested. The economics of the proposed project may also be relevant, particularly where the Aboriginal group makes a reasonable Aboriginal title claim to the land at issue, as Aboriginal title includes the right to control and benefit from all economic activities on the land. There does not yet appear to be any caselaw discussing any limits to information-sharing with Aboriginal groups based on confidentiality concerns. For example, the proponent of a mining project may have some sensitive corporate information that is relevant to understanding the proposed activity, such as its cashflow projections. The issue of whether the Crown may withhold relevant information from an Aboriginal group on the basis of legitimate confidentiality concerns remains to be considered by the courts.

Aboriginal groups do not need to share their information with the Crown, but the extent to which they do so will influence the appropriate level of consultation. An Aboriginal group seeking deep consultation and accommodation measures should clearly articulate which rights it considers to be at stake, its basis for asserting those rights, and how it believes that the proposed decision or

⁴² *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 64.

activity might affect those rights. The more information an Aboriginal group can share, and the better it substantiates the existence of its claimed rights and the basis for its concerns about impacts on those rights, the greater the onus on the Crown to address those concerns in the decision-making process.

Just as the Crown or companies may in some circumstances wish to withhold information because they consider it too sensitive, Aboriginal groups may be reluctant to share confidential cultural information, such as the location of burial grounds or the names and purposes of medicinal plants. As just discussed, Aboriginal groups may choose not to share all relevant information in the consultation process, but in doing so, they risk that these interests or concerns will not be taken into account in the decision-making process. In *Chicot v. Canada (Attorney General)*, the Federal Court stated that Aboriginal groups must explore whether there are ways they can share their sensitive information with the Crown and project proponents while still keeping it from becoming public, and that unless they make these efforts, they will not be in a position to complain that their concerns were not taken into account.⁴³

9. The Nature of the Duty to Accommodate

The law on the duty to accommodate is far less developed than the law on the duty to consult. Thus far, Aboriginal groups and the Crown have reached more impasses about whether consultation is required and if so, on what terms. As the law on consultation becomes increasingly settled, we can expect more litigation about the *outcome* of consultation processes. It is important to note that the duty to accommodate is a potentially misleading shorthand expression. The Crown's duty is not to reach agreement with Aboriginal groups on accommodation, but simply to develop a reasonable accommodation proposal in respect of their proven or asserted s. 35 rights. Moreover, the duty to accommodate will not exist in every case: while the Crown must always initiate consultation with Aboriginal groups whose rights might be affected by a proposed decision or course of action, the obligation to accommodate any s. 35

⁴³ *Chicot v. Canada (Attorney General)*, 2007 FC 763 at paras. 129-130. This statement did not determine the outcome of this case because the Court had already ruled that the Crown had breached its duty to consult and accommodate

rights will depend on the strength of the Aboriginal rights claim and the severity of the potential infringement.

10. Possible Types of Accommodation

If the right at issue is proven or reasonably asserted, and the proposed decision or course of action has a real potential to affect the right, the Crown must seek to develop reasonable accommodation measures. It is impossible to generalize on what appropriate accommodation would involve. The following are some general types of accommodation measures that might be reasonable in the case of proposed mining projects:

- Measures designed to mitigate the environmental impacts of the project (and, by extension, the impact on s. 35 rights), such as rerouting a proposed access road, authorizing construction for time periods when there will be reduced impacts on wildlife, reducing the size of a project, or storing mining tailings in the safest manner possible and/or in the manner that is least destructive of fish or animal habitat.
- Economic accommodation, either in recognition of reasonably asserted Aboriginal title (which includes the right to derive economic benefits from the resources in the Aboriginal title area, including mineral rights), or to compensate for negative impacts on other s. 35 rights; economic accommodation may come in many forms, including revenue sharing, compensation payments, employment opportunities in a proposed project or investment opportunities in proposed project.
- Environmental monitoring to assess the ongoing impacts of a project, ensure that its impacts do not exceed any pre-agreed environmental thresholds, or ensure that there is no leakage from any contaminated sites produced by the mining.
- A commitment by the Crown that no further mining activities will be approved in the area in question, or that a particular tract of land will be designated as a no-development zone, so as to ensure that the Aboriginal group retains meaningful harvesting opportunities and enjoys more certainty on this front.

By no means is the above list meant to be exhaustive.

It remains an open question whether accommodation might in some cases entail *not* approving a proposed project or course of action. This issue is discussed in Part C of this paper.

As with the consultation process generally, the Crown should be flexible in the accommodation measures that it considers. In *Wii'litswx v. British Columbia (Minister of Forests)*,⁴⁴ the British Columbia Supreme Court was critical of the fact that the Ministry of Forests' position on accommodation remained mostly unchanged during an extensive consultation process with the Gitanyow First Nation, particularly given that the duty to consult in that case lay on the higher end of the *Haida* spectrum. This no doubt factored into the Court's conclusion that the Crown had failed to propose a reasonable accommodation.

Aboriginal groups also hold obligations in trying to secure an accommodation of their s. 35 rights. They must be flexible in discussing accommodation options and be reasonable at all times. The Supreme Court of Canada stated in *Haida* that Aboriginal groups who have not yet proven their s. 35 rights do not have a veto in the consultation process,⁴⁵ and many subsequent cases have affirmed that principle.⁴⁶

It can be seen from all of this discussion that the duty to accommodate will vary tremendously from case to case. It is important to remember that any court challenge by an Aboriginal group to the adequacy of the accommodation proposed by the Crown will be reviewed on a standard of reasonableness, not correctness, with some leeway being accorded to the Crown in framing its accommodation proposal.

11. Role of Private Parties in Consultation and Accommodation

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

⁴⁴ *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1138 at paras. 243- 244.

⁴⁵ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 48.

⁴⁶ See for example *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1138 at para. 9; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] 4 C.N.L.R. 152 (Ont. S.C.J.) at para. 132.

As discussed above, the duty to consult arises from the honour of the Crown and s. 35 of the *Constitution Act, 1982*. Private parties do not share this constitutional duty.⁴⁷ However, in practice, private parties are regularly involved in consultation, including in the case of mining projects.

The courts occasionally order private parties to participate in consultation as part of the relief which they grant to Aboriginal groups who succeed in their judicial review or interlocutory injunction applications.⁴⁸ This was done in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, an Ontario case which pitted the rights of a mining company to do exploratory work pursuant to government authorizations against those of a First Nation which maintained that its s. 35 rights would be compromised by that activity.

In another recent Ontario mining case, *Frontenac Ventures Corp.* sought an injunction against Algonquin protesters who participated in a blockade to prevent mineral exploration work. The trial judge in that case granted the injunction but also encouraged the parties to enter into three-way mediation with the Ontario government.⁴⁹

Even prior to any litigation and court orders that may require their participation in the consultation process, private parties seeking to undertake activities on the land have a strong interest in seeing the Crown discharge its consultation/accommodation obligations. They may also have the ability to provide some or all of the accommodation needed to render their proposed project acceptable to the Aboriginal group. This is particularly true where the Aboriginal group seeks to secure some economic benefits from the activity that is proposed to take place on its traditional territory, or where it seeks to influence the design of the project so as to mitigate its environmental impacts.

⁴⁷ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 53.

⁴⁸ See for example *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283 at para. 127 and *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] 4 C.N.L.R. 152 (Ont. S.C.J.) and [2007] 3 C.N.L.R. 181 (Ont. S.C.J.).

⁴⁹ *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534 at para. 23.

Therefore, private parties may want to be involved in the consultation process. Indeed, private parties may want to initiate a dialogue with an Aboriginal group and seek its support (or at least, a commitment of non-objection) before even seeking government approval for the project, so that their application process is not delayed or thwarted by Crown-Aboriginal consultation. Thus, there is potential for positive dialogue and in some cases, even partnerships, between Aboriginal groups and private parties seeking to engage in activities on traditional Aboriginal territories. The agreements reached between private parties and Aboriginal groups in relation to particular projects are often called “Impact Benefit Agreements” or “Development Agreements.”

At the same time though, the fact that companies do not share in the legal duty to consult means that the Crown cannot wholly delegate its consultation obligations to companies, even if they would be willing to assume those obligations. The Supreme Court of Canada stated in *Haida* that the Crown may delegate “procedural aspects” of its consultation duties but that it cannot abdicate ultimate responsibility for the consultation process.⁵⁰ The precise extent to which the Crown may delegate aspects of the consultation process remains unclear.

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

⁵⁰ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 53.

C. Unresolved Issues

There remain many significant sticking points between Aboriginal groups and the Crown who are engaged in the consultation and accommodation process. This paper concludes by flagging a number of issues which remain to be fully considered by the courts.

How specific must the information provided by Aboriginal groups be?

The Crown and Aboriginal groups often differ about how specific Aboriginal groups need to be in describing *the nature or exercise of their rights*. For example, some Crown officials seek to know precisely where an Aboriginal group hunts or gathers its medicinal plants as well as which species have harvested where; they take the position that without such site-specific information, further discussions and accommodation measures are not warranted.

Logically, however, an Aboriginal group should not always need to provide precise, site-specific information in order to establish that the right in question stands to be harmed by a proposed activity, particularly where the right at issue is exercised over a large area rather than in discrete locations. A particular geographical area may represent an Aboriginal group's core hunting or trapping grounds. If a proposed development would involve major disruption to those harvesting grounds or a significant part of them – e.g. clear-cut logging or strip mining – it should be apparent that the hunting activities stand to be negatively impacted. The Aboriginal group may not have any more specific information to share - other than perhaps the species they prefer to hunt, the location of members' hunting cabins and hunting trails – but its general interest in preserving this core territory for hunting and trapping would still merit consultation and accommodation. However, this is a matter which has yet to be properly considered by the courts.

May consultation require the Crown to obtain an assessment of cumulative impacts?

A related issue is the extent to which Aboriginal groups can demand that the Crown take cumulative impacts into account before approving activities that have the potential to affect s. 35 rights. From the Aboriginal group's perspective, it may be critical to know the impacts of a

proposed project within the context of previous, ongoing, and planned activities on the land, because only then can the overall impact on fish, wildlife, plants and habitat – and by extension, on the group’s harvesting rights and/or Aboriginal title - be understood. A project which may not seem particularly significant on its own will become far more problematic if it is proposed for one of the last remaining undisturbed portions of an Aboriginal group’s territory, or if it will put stress on already vulnerable plant, fish or animal populations.

However, many Crown approvals are granted without any in-depth understanding of cumulative effects. Some projects reviews do not require any cumulative impact assessment. In other cases, an environmental assessment is carried out, but its parameters are such that it will not consider all of the cumulative impacts being experienced on the Aboriginal group’s territory or in its key harvesting areas, or the analysis of environmental impacts is not sufficiently rigorous or impartial to reassure Aboriginal groups that the impacts of the proposed project are truly understood.

It remains to be seen whether there are any situations in which Aboriginal groups can insist that the Crown, as part of the consultation process and pursuant to its duty to share necessary information, obtain a cumulative impact assessment for a proposed project in order to help everyone understand the likely effects of the project on s. 35 rights. The attempt of the Saulneau First Nation to secure a cumulative impact assessment for a sour gas test well was unsuccessful: *Saulneau First Nation v. British Columbia (Oil and Gas Commission)*,⁵¹ but perhaps in special circumstances (e.g. where the Aboriginal group’s traditional land base is already very compromised, or where a number of new projects are being proposed in the Aboriginal group’s traditional territory), the courts will conclude that the conduct of a cumulative impact assessment is a reasonable element of the consultation process.

Do Aboriginal groups have any right to consultation funding?

Another major unresolved issue is whether the Crown ever has a duty to provide funding to Aboriginal groups to enable them to consult. Many Aboriginal groups have very limited resources and cannot even adequately respond to basic social needs such as community housing

⁵¹ *Saulneau First Nation v. British Columbia (Oil and Gas Commission)*, [2004] 4 C.N.L.R. 284 (B.C.S.C.).

and health programs, let alone deal with all of the referrals that governments send them about proposed decisions and projects that may affect their s. 35 rights. The British Columbia Supreme Court recognized this fact in *Tsilhqot'in Nation v. British Columbia*:

It must be borne in mind that it is a significant challenge for Aboriginal groups called upon in the consultation process to provide their perspectives to government representatives. There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely or adequate fashion.⁵²

Accordingly, there is a legitimate argument to be made that, in some cases, the honour of the Crown will require the Crown to provide the Aboriginal group with a meaningful ability to consult by providing capacity funding. Of course, capacity funding could come from a project proponent who, after all, is the party seeking to profit from the natural resources or land. In *Platinex*, the Ontario Superior Court imposed upon the parties a consultation protocol, under which the Ontario government was obliged to provide reasonable consultation funding to the Kitchenuhmaykoosib Inninuwug First Nation.⁵³ The consultation protocol did not fix a particular level of funding (the parties were left to negotiate this) and Ontario had offered to provide funding as part of the consultation process, and therefore this ruling did not compel Ontario provide consultation funding against its will. However, Justice Smith commented that “[t]he issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a “level playing field.”⁵⁴ Since capacity funding is often a live issue in consultation processes, we can expect the courts to consider this issue further in due course.

What is the role of the consultation/accommodation framework for proven s. 35 rights?

There is no doubt that the consultation/accommodation framework has a role to play with proven or established s. 35 rights. This was confirmed by *Mikisew*, the case in which the Supreme Court

⁵² *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para. 1138

⁵³ *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 C.N.L.R. 221 (Ont. S.C.J.).

⁵⁴ *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] 3 C.N.L.R. 221 (Ont. S.C.J.) at para. 27.

of Canada confirmed that the Crown must consult with Treaty 8 beneficiaries prior to taking up land where the taking up may adversely affect their Treaty 8 rights to hunt, trap or fish. However, it is important to remember that the Supreme Court of Canada also ruled that the proposed taking up in *Mikisew* - the construction of a winter road - did not risk actually *infringing* the Treaty 8 right. The Court concluded that the Crown had the power to take up land under Treaty 8 and that, in most cases, such taking ups will not amount to infringements.⁵⁵ The Court ordered consultation not because there was a potential for infringement of Treaty 8, but because the honour of the Crown requires the Crown to ensure that it exercises its taking up power in a manner that is respectful of the competing harvesting rights of the Aboriginal Treaty beneficiaries.

Therefore, *Mikisew* does not address the situation where the Crown proposes to do something or approve a project which would directly infringe a treaty promise or an established Aboriginal right. It is suggested here that in those situations, it will not be enough for the Crown to consult with the Aboriginal group and provide some accommodation of the right. Instead, any infringement will need to be carried out in accordance with the justification framework which the Supreme Court of Canada developed in *R. v. Sparrow*.⁵⁶

The *Sparrow* framework imposes more significant restrictions on the Crown's decision-making process and powers than the duty to consult and accommodate developed in *Haida* and *Mikisew*, for two reasons.

First, the *Sparrow* test requires the Crown to show that it infringed the right in pursuit of a *valid legislative objective*. Thus, there is a threshold which prevents the Crown from infringing Aboriginal rights in the name of objectives that are not truly important.⁵⁷

⁵⁵ Presumably there is a point at which any further taking up would infringe the Treaty right because the Aboriginal group would lose the ability to meaningfully exercise its rights. This is implied in paragraph 48 of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

⁵⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075

⁵⁷ Admittedly, it remains to be seen how easy it is for the Crown to establish that an objective is "valid": *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 suggests that a wide range of economic activities would satisfy this test, while *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *R. v. Gladstone*, [1996] 2 S.C.R. 723 suggest that the objective must be "compelling and substantial" (e.g. conservation, or public safety). In *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, the only Aboriginal title case since *Delgamuukw*, the British Columbia Supreme Court adopted a relatively high standard to assess the validity of the legislative objective (at paras. 1096-1107).

Second, the *Sparrow* justification framework requires the Crown to show that its actions were consistent with its *fiduciary obligations* towards the Aboriginal group.⁵⁸ This is a relatively stringent requirement: the Crown must show that it impaired the Aboriginal or treaty right as little as possible to achieve its objectives, that it consulted adequately with the Aboriginal group, and that it accorded adequate priority to the right; depending on the right at stake and the nature of the infringement, compensation to the Aboriginal group may also be required.

As discussed above, the Supreme Court of Canada has expressly refused to characterize the duty to consult as fiduciary in nature, relying instead on the concept of the honour of the Crown. Presumably it did this because fiduciary duties are more onerous than the duty to maintain the honour of the Crown.

Therefore, it is important not to lose sight of the role of *Sparrow* as a framework for protecting proven Aboriginal rights and established treaty rights.

Will reasonable accommodation sometimes entail a decision by the Crown not to proceed with a proposed project?

Although the courts have so far stated very consistently that Aboriginal groups do not have a veto over proposed Crown decisions, it is important to remember that this has been in the context of *asserted* s. 35 rights (e.g. *Haida* situation) or in context of an established treaty right that did not stand to actually be infringed by the proposed decision (e.g. *Mikisew*).

Delgamuukw states that infringements of Aboriginal title may require the consent of the Aboriginal group holding the right.⁵⁹ Thus, where an Aboriginal group has proven Aboriginal title, or where title to an area is not really disputed, the courts may consider it acceptable for the Aboriginal group to flatly object to a project that would infringe that right. Similarly, if a

⁵⁸ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at pp. 116-119; and *R. v. Gladstone*, [1996] 2 S.C.R. 723 at paras. 54-55.

⁵⁹ *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 at para. 168. Given that *Delgamuukw* states that Aboriginal title is a right to exclusively occupy the land and to use its resources, one would expect Aboriginal consent to be required for almost any infringement of this right. Due to the limited litigation regarding proven s. 35 rights, it remains to be seen how high a bar the courts set for justifying the infringement of s. 35 rights.

proposed activity would actually infringe an established treaty right, the courts may consider it reasonable for an Aboriginal group to object to that infringement.⁶⁰

Also, there may be situations where the Aboriginal group has reasonable grounds to perceive that a proposed project will be extremely damaging to its rights and where the proponent is not proposing any mitigation measures that could meaningfully temper the impacts of the project. In that case, where the project proponent is itself not proposing any meaningful accommodation measures, it may be reasonable for the Aboriginal group to oppose the proposed activity. It remains to be seen how the courts will address all of these situations. Again, these are situations which will no doubt be considered by the courts over the years to come.

⁶⁰ In some cases, the province may also be constitutionally prohibited from infringing the treaty right by virtue of s. 91(24) of the *Constitution Act*.