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CASE COMMENTS

MUNICIPALITIES AND THE DUTY TO CONSULT ABORIGINAL PEOPLES: A CASE COMMENT ON *NESKONLITH INDIAN BAND V SALMON ARM (CITY)*

SHIN IMAI† AND ASHLEY STACEY‡

The duty to consult and accommodate has become one of the most important principles of Canadian Aboriginal law. Since *Haida Nation v British Columbia (Minister of Forests)*,[1] the Supreme Court of Canada has sought to clarify the boundaries of consultation in order to ensure that developments affecting Aboriginal rights proceed with a degree of certainty. It is clear that the Crown bears the responsibility for consultation and a failure to consult may result in overturning or staying decisions of the Crown until consultation has taken place. Such consultation is grounded in the honour of the Crown, which is a core constitutional principle informing all interactions between Aboriginal peoples and the government.[2]

In a recent decision, *Neskonlith Indian Band v Salmon Arm (City of)* ("*Neskonlith*"),[3] the British Columbia Court of Appeal was asked to decide whether the constitutional duty to consult could be imposed on a municipality. The Court (per Newbury J.A.; Hall and Smith JJ.A. concurring) noted that there were powerful arguments, "both legal and

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1 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

2 *Ibid* at para 16. See also *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 32, [2010] 2 SCR 650 [*Rio Tinto*].

3 2012 BCCA 379, 354 DLR (4th) 696 [*Neskonlith* BCCA], aff'g 2012 BCSC 499, [2012] 3 CNLR 196 [*Neskonlith* BCSC].

practical", against inferring such a duty on the municipality.[4] As the municipality was not the Crown, and the municipality did not have an obligation to consult, the planned project could go ahead. Presumably, the Crown would still have the duty to consult. However, based on the Court's reasoning, the the Neskonlith Indian Band was left to pursue the Crown's failure to consult in some other forum, while the municipality was free to proceed whether or not the Crown had fulfilled its duty to consult and accommodate.

We argue that the Court of Appeal asked the wrong question and came to a result that is ultimately not supportable. In our view, the result of an inquiry into who has the duty to consult does not also answer the question about whether consultation is necessary before a project can proceed. These are two separate questions. Irrespective of who must consult, this duty must be met before proceeding with a project that actually or potentially infringes Aboriginal rights.

In this commentary we first discuss the legal and practical implications of the Court of Appeal's decision. We then explore alternative possibilities: imposing a duty to consult directly on a municipality, requiring the Crown to fulfill the duty alone, or requiring municipalities to work with the provincial Crown when consultation is required. Finally, Ontario's new *Mining Act*[5] regime is analyzed to provide a useful framework in which to explore the latter solution.

I. CASE SUMMARY

In *Neskonlith*, the City of Salmon Arm authorized the construction of a shopping mall on a flood plain. The project was so dangerous that a hazardous-development permit was required pursuant to Part 26 of the British Columbia *Local Government Act*.[6] The Neskonlith First Nation bordered on the development and sought to quash this permit, as they were concerned with the damage that could result should there be a flood. The First Nation argued that the municipality had a duty to consult. As the provincial Crown had empowered municipalities to make land use

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4 *Ibid* at para 66.

5 RSO 1990, c M.14.

6 RSBC 1996, c 323, Part 26 [*LGA*].

decisions, this delegation of power must necessarily have been accompanied by the delegation of the provincial duty to consult.

At the initial hearing before the British Columbia Supreme Court, Leask J. reasoned that the duty to consult lay only with the Crown. As municipalities were not the Crown, municipalities did not have such a duty. Since the municipality had the authority to approve the construction of the mall, construction could continue. Justice Leask concluded: "[T]he honour of the Crown is non-delegable and the final responsibility for consultation rests at all times with the Crown. Procedural aspects of the duty to consult can be delegated, but in order for the province to do so, the power must be expressly or impliedly conferred by statute."[7]

The Court of Appeal upheld Leask J's ruling, relying on two main cases to reach its decision. In *Haida Nation*, where the issue was whether the duty to consult lay with a forestry company, the Supreme Court of Canada said:

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development .... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.[8]

In the second case relied on, *Rio Tinto*, the issue was not whether a private developer had the duty to consult but whether a regulatory body or tribunal had a duty to consult.[9] The Supreme Court of Canada held that a legislature may delegate its duty to consult but in the absence of express or implied authorization to do so, no such duty existed.

> The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in

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7 *Neskonlith* BCSC, *supra* note 3 at para 46.

8 *Haida Nation, supra* note 1 at para 53.

9 *Rio Tinto, supra* note 2 at paras 1–2.

> connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent[.][10]

Based on *Haida Nation* and *Rio Tinto*, the Court of Appeal concluded that municipalities lack the authority to engage in the complex constitutional process to consult, as the Province had not expressly delegated such powers.

II. LEGAL AND PRACTICAL IMPLICATIONS OF THE COURT OF APPEAL'S DECISION

What the British Columbia Court of Appeal took from *Haida Nation* and *Rio Tinto* was that some bodies did not have the obligation to carry out consultations. The consequence of being freed of this constitutional burden meant that there was no longer any constitutional requirement for that body to consult. This approach, which focuses on the nature of the body that is bound by constitutional obligations, is familiar in the analysis of the applicability of the *Charter of Rights and Freedoms*.[11] The duty to comply with the provisions of the *Charter* is restricted to the federal and provincial governments by section 32 of the *Constitution Act, 1982*.[12] Because private individuals or non-government entities are not bound by the *Charter*, the character of the entity that is engaging in the activity at issue will determine whether the *Charter* has any relevance. A private enterprise, for example, will not be bound by the free-speech provisions of the *Charter* in its treatment of its employees. If the *Charter* does not apply, then the entity may carry on ignoring the restrictions that would have been imposed had the *Charter* applied.

While there is a widely held perception that Aboriginal rights are listed in the *Charter*, in fact, this is incorrect. The rights in the *Charter* are set out under Part I of the Constitution Act, 1982.[13] Aboriginal peoples' rights are

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[10] *Ibid* at para 60.

[11] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Charter*].

[12] Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution*].

[13] *Charter*, *supra* note 11.

set out in sections 35 and 35.1 in Part II, under the heading "Rights Of The Aboriginal Peoples Of Canada".[14]

Section 35 rights have a different character than *Charter* rights. The Supreme Court of Canada in *Haida Nation* addressed fundamental issues concerning the political make up of our nation, the recognition of inherent Aboriginal rights, and the reconciliation of Aboriginal and non-Aboriginal people. It is the Crown's *sui generis* fiduciary duty towards Aboriginal people and the concept of the honour of the Crown that has led the Supreme Court of Canada and subsequent courts to view the Crown as a key player in consultation and accommodation.[15] The basis for this finding is largely rooted in the history of the Crown interposing itself in relationships between individual settlers and Aboriginal people. This was clearly articulated in the *Royal Proclamation of 1763*,[16] which prohibited the transfer of Aboriginal lands directly to non-Aboriginal individuals and required that land be surrendered to the Crown first. This policy was instituted because individual settlers were causing havoc with relations between the Crown and Aboriginal people:

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians . . . [17]

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[14] *Constitution, supra* note 12, ss 35–35.1.

[15] See *Haida Nation, supra* note 1, at paras 18–27 where the Court describes the Crown's fiduciary duty towards Aboriginal people and the honour of the Crown as it relates to consultation and reconciliation. See also *Rio Tinto, supra* note 2, at para 38 where the Court talks about the "'generative' constitutional order 'which sees section 35 serving a dynamic and not simply static function'".

[16] RSC 1985, App II, No 1.

[17] *Ibid.*

Seen in this light, the objective of Haida Nation's insistence that the Crown bear the responsibility for consultation was to continue the legal and historical relationship between the Crown and Aboriginal people. The case meant to reinforce the notion that the Crown should not be able to shed the responsibilities associated with the honour of the Crown by delegating responsibilities to other parties. *Haida Nation* must be read together with *R v Sparrow*,[18] which permitted the Crown to infringe Aboriginal rights guaranteed in section 35 of the *Constitution Act, 1982*. Infringement could occur only by satisfying certain conditions dictated by the honour of the Crown, including having a proper legislative objective, infringing the right as little as possible, consultation, and, where appropriate, compensation.

The corollary is that, unlike breaches of rights mentioned in the *Charter*, Aboriginal rights under Part II do not provide for a sphere of activity by non-government actors that is beyond the reach of constitutional rights. Consequently, an analysis of the reach of the *Charter* to non- government entities in cases such as *RWDSU v Dolphin Delivery Ltd*,[19] is inappropriate for a section 35 analysis. The duty to consult that is grounded in section 35 protects existing or asserted Aboriginal and treaty rights that cannot be breached by government or by private actors. In other words, *Haida Nation* was not meant to stand for the proposition that only the Crown had the duty to consult and accommodate while other parties were free to infringe existing or potential Aboriginal rights without consulting, so long as they had legislative authority to proceed with a project.

The Court of Appeal's decision in *Neskonlith* also creates difficult implementation issues. While the Crown would continue to have the duty to consult, it would not be able to prevent a municipality from proceeding with a project. This is the case even if, during the consultation, the Crown discovered that an alternative method would avoid infringement of an existing or asserted Aboriginal right, or that accommodation of some type would be appropriate. In this type of scenario, it would be understandable that a First Nation would be frustrated as it watched a municipality proceed

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[18] [1990] 1 SCR 1075, 70 DLR (4th) 385.

[19] [1986] 2 SCR 573, 33 DLR (4th) 174.

with a project that was more intrusive than necessary, simply because the municipality had no obligation to listen to the First Nation. This type of situation would increase the possibilities of conflict rather than encourage reconciliation.

Perhaps more significant is the possibility that the Court's reasoning would extend to private parties such as resource extraction companies. British Columbia has a free-entry system that permits exploration to take place without any licence from the government.[20] Ontario used to have a similar system, and under that system litigation ensued when a mining company, Solid Gold, began exploratory activities in the territory of the Wahgoshig First Nation. Solid Gold refused to consult with the First Nation and argued that it was given direct authority under the Ontario mining legislation to prospect and stake without consultation.[21] The Superior Court found that Solid Gold had been delegated aspects of the consultation by the Crown and that its failure to consult justified the granting of an injunction to the First Nation.[22] However, based on the logic articulated in *Neskonlith*, mining companies in British Columbia would be able to explore without consulting, although the Crown would continue to have a duty to consult. It is not hard to imagine that First Nations would be troubled should a court permit exploration to take place, even if the Crown, having consulted, came to the conclusion that some accommodation would be appropriate.

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[20] A proponent need only obtain a Free Miner Certificate for a nominal fee (see *Mineral Tenure Regulations*, BC Reg 529/2004, Schedule B) and must be over 18 years of age and ordinarily resident or working in Canada, a corporation, or a partnership (*Mineral Tenure Act*, RSBC 1996, c 292, ss 7, 8(2), 11(1)). Claims are staked online at BC's Mineral Titles Online website (Mineral Titles Online, online: British Columbia <https://www.mtonline.gov.bc.ca/mtov/home.do>) by paying a registration fee. Thereafter, the proponent acquires rights to the minerals in the ground (*Mineral Tenure Act*, RSBC 1996, c 292, ss 14(1), 28).

[21] *Wahgoshig First Nation v Ontario*, 2011 ONSC 7708 at para 23, 108 OR (3d) 647 [*Wahgoshig*]. Leave to appeal was granted by Wilton-Siegel J. in *Wahgoshig First Nation v Ontario*, 2012 ONSC 2323, 112 OR (3d) 782 on the basis that Solid Gold may not have had a duty to consult and consequently may have been justified in carrying on the exploration activities. See Aston J.'s oral reasoning for rendering the appeal moot in *Wahgoshig First Nation v Solid Gold Resources*, 2013 ONSC 632, 74 CELR (3d) 8.

[22] *Wahgoshig*, *supra* note 21 at paras 57–58.

It is interesting that three judges of the British Columbia Court of Appeal, sitting as the Court of Appeal of Yukon, supported a different logic than their fellow judges in the *Neskonlith* case. In *Ross River Dena Council v Yukon*, the Court (per Groberman J.A.; Tysoe and Hinkson JJ.A. concurring) rejected the Crown's argument that it had no duty to consult and, by extension, mining companies had no duty to consult under Yukon's free-entry mining exploration system.[23] Under that system, anyone can record a mining claim and there is no provision for the Yukon government to refuse to record, or to license the subsequent exploration activity for Class 1 exploration. The Court of Appeal found this statutory scheme to be unconstitutional and declared that the Government of the Yukon had a duty to notify and where appropriate consult and accommodate the Ross River Dene *before* allowing Class 1 mining exploration that could prejudicially affect Aboriginal rights.[24]

In sum, whether or not a project should proceed should not be decided by whether a particular entity or business has the duty to consult. Rather, the Supreme Court of Canada has decided that the constitutionally permissible manner in which to affect asserted Aboriginal interest in the land is through the mechanism of consultation by the Crown. If the Crown has failed to consult, then the precondition for taking actions that affect the Aboriginal interest has not been met. The fact that a municipality or a private business does not have the duty to consult does not put them in a better position than the Crown.

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[23] *Ross River Dena Council v Yukon*, 2012 YKCA 14 at para 56, 358 DLR (4th) 100; leave to appeal dismissed in [2013] SCCA no 106 [*Ross River Dena*]. The Court of Appeal decision was left intact and remains the law of Yukon.

[24] *Ibid*, at para 37: "The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First Nations can be reconciled with the Crown's right to manage resources. Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist" (emphasis added). The rationale is that legislative schemes cannot modify the Crown's constitutional duty to consult and accommodate. Legislative schemes that do so are contrary to the constitutional duty to consult and thus can be considered unconstitutional.

III. FILLING THE VACUUM: WHICH PARTIES SHOULD BE RESPONSIBLE FOR CONSULTATION?

We have argued that the duty to consult must be fulfilled by someone before a project affecting Aboriginal rights proceeds. One possibility is to make the municipality that provides approvals for the project directly responsible for fulfilling the duty to consult. Alternatively, the duty to consult could remain entirely with the Crown. However, as we explain below, neither of these solutions would suffice. In our view, municipalities should be required to work with the provincial Crown, as both parties would have important roles to play in the consultation process.

A. SHOULD THE DUTY TO CONSULT BE DIRECTLY IMPOSED ON A MUNICIPALITY?

One solution would be to require municipalities or other non-Crown parties to consult with Aboriginal peoples. This could be accomplished either by having the Crown delegate all of its consultation responsibilities to a third party or by having the Court impose consultation responsibilities directly on third parties. We do not believe that *Haida Nation*, nor any subsequent case, supports wholesale delegation. *Haida Nation* only talks about delegating "procedural aspects" to third parties.[25]

While there are strong legal arguments against this approach, the practical arguments are even stronger. If each municipality had to decide on how to consult and accommodate, they would not have the benefit of a central source, like a ministry of Aboriginal affairs, that could accumulate knowledge and experience in consultation. The duty to consult and accommodate could be a significant resource drain for smaller municipalities if deep consultation were required. Further, the consultation might result in the need for some accommodation that could fall under provincial jurisdiction, creating difficulties in implementation. This process would be inefficient and place burdens on both municipalities that had the capacity to consult and those that did not.

If the duty to consult and accommodate were also completely delegated to private enterprises such as mining companies, there would be a

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[25] *Haida Nation*, *supra* note 1 at para 53.

patchwork of practices and accommodations that would not benefit from the governments' overall supervision and monitoring. It could lead to a situation described in the *Royal Proclamation of 1763*, quoted above, where "Frauds and Abuses [are] committed in purchasing Lands of the Indians, to the great Prejudice of our Interests".[26]

B. SHOULD "THE CROWN" BE RESPONSIBLE FOR ALL CONSULTATION AND ACCOMMODATION?

One suggestion that has been raised informally in some circles is the idea that all consultation should remain with the Crown in order to preserve nation-to-nation relationships with First Nations. This solution is seen as a way of avoiding the myriad of government agencies, private companies, municipalities, and ministries that can become involved in projects.

We do not see this as an efficient solution. There would have to be a central office, such as a ministry of Aboriginal affairs, that would conduct all the consultations and implement accommodations. While such a ministry can be a repository for skills and knowledge, it cannot become an expert in all areas of potential activity. By necessity, the ministry would have to defer to the entity that is the actual project proponent for expertise, or gain the cooperation of a particular government ministry that would carry out the accommodation. Therefore, the variety of entities involved would not be eliminated. This solution would only provide a bureaucratic overlay that may lead to more opaque processes, as opposed to providing transparency. In fact, in our view, it would be better to have First Nations speak to the project proponents or decision makers directly, instead of through a government department.

C. THE CASE FOR PROVINCIAL CROWNS AND MUNICIPALITIES OR THIRD PARTIES WORKING TOGETHER ON CONSULTATION

The position that we feel is most consistent with the Constitution and with *Haida Nation*, is to have the Crown retain primary responsibility for consultation and accommodation but delegate parts of the process that are appropriate to the municipalities. Practically speaking, the delegation of parts of the responsibility makes sense since local governments are in the

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[26] *Royal Proclamation of 1763*, *supra* note 16.

best position to be able to assess the effects that a decision will have on a First Nation. The Neskonlith Indian Band argued this position. The relevant excerpt from their factum states:

> Local governments, as the decision-makers regarding land use decisions that could affect the exercise of Aboriginal Title and Rights, are in the best position to engage in the consultation process. They are located in the area where the proposed development is proposed to take place and have a better understanding of the local circumstances than centralized governments.[27]

On the other hand, keeping primary responsibility with the provincial Crown would permit the centralization of expertise, knowledge, and resources that could be used to assess the strength of the claim and provide supportive resources to the consultation process.

While this last solution seems like an obvious compromise, Newbury J.A. seemed concerned about municipalities' capacity to undertake consultation, as well as the possibility that imposing such a duty would create endless litigation. We explore both concerns.

1. DO MUNICIPALITIES HAVE THE CAPACITY TO CONSULT?

Justice Newbury questioned whether a municipality has the necessary infrastructure to actually conduct a consultation:

> I also suggest that despite the aspirational wording of s. 1 of the *Community Charter* noted earlier, municipal governments lack the practical resources to consult and accommodate. Such governments (of which there are 191 in British Columbia) range greatly in size and tax-base, and are generally concerned with the regulation of privately-owned land and activities thereon. Crown land and natural resources found thereon remain within the purview of the Province. It is precisely because the Crown asserted sovereignty over lands previously occupied by Aboriginal peoples that the Crown in right of the Province is now held to the duty to consult.[28]

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[27] *Neskonlith* BCCA, *supra* note 3 at para 64.

[28] *Neskonlith* BCCA, *supra* note 3 at para 71 [emphasis in original].

The question about the capacity to consult seems to be answered in the *Neskonlith* case itself, as the City of Salmon Arm did take good-faith steps to engage the First Nation in the process of reviewing the proposal. The Court of Appeal concluded that, had the City of Salmon Arm been required to consult, the initiatives it undertook would have satisfied the duty:

> The Neskonlith were treated respectfully by the City and its staff; they were given copies of all relevant materials; they were heard at various meetings; their expert reports were obviously reviewed with care by the owner's experts; and various modifications, including the reduction of the development to only 20 acres, were made by Shopping Centres to its plans in the process.[29]

Therefore, it can hardly be argued that all municipalities do not have the appropriate infrastructure. For those who do not have the infrastructure, however, there must be provincial mechanisms for addressing the gap, such as provincial legislation requiring local governments in British Columbia to engage in general community consultations. The *Local Government Act* also requires that, in preparing official community plans, a local government must consider whether consultation is required with First Nations. The relevant section states:

> **879.** (1) During the development of an official community plan, or the repeal or amendment of an official community plan, the proposing local government must provide one or more opportunities it considers appropriate for consultation with persons, organizations and authorities it considers will be affected.
>
> (2) For the purposes of subsection (1), the local government must
>
> (a) consider whether the opportunities for consultation with one or more of the persons, organizations and authorities should be early and ongoing, and
>
> (b) specifically consider whether consultation is required with

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[29] *Ibid* at para 89.

> ... (iv) first nations[.][30]

Justice Newbury also expressed concern about municipalities having to engage in an initial strength of claim assessment whenever an Aboriginal right was affected. It is unclear whether the City of Salmon Arm engaged in an initial assessment.[31] In any case, such an assessment would have been aided by the report describing the First Nation's strong economic ties and ecological values to their affected traditional territory, which was provided to the City and the project proponent by the affected First Nation itself. This makes sense given that the First Nation possesses special indigenous knowledge and is in the best position to provide evidence of the strength of their asserted Aboriginal title. The community consultation scheme provided in the *Local Government Act* also allowed the City to assess the strength of the potential adverse effects. Therefore, assessing the strength of the claim should not pose any concern to a municipality that would likely be provided the necessary information by the affected parties. This is consistent with McLachlin C.J.'s statement in *Haida* that Aboriginal claimants ought to bring forward and outline their claims by including the scope and nature of their asserted Aboriginal rights and the alleged infringements.[32]

We note that municipalities do engage in consultation on other issues. The location of social housing in a neigbourhood, the decision to license a casino, or the creation of a waste disposal site can result in an extensive process of consultation with citizens that can last for years. In the case of consultation with Aboriginal people, the *Neskonlith* case itself shows that a broad-brush approach to capacity is not appropriate as some, and perhaps all, municipalities clearly do have the capacity to consult at some level.

In this respect, municipalities are not being asked to do more than the private sector is already doing in practice. Most mining companies—of all

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30 *LGA*, *supra* note 6, s 879.

31 *Neskonlith*, BCCA, *supra* note 3 at para 88. The Neskonlith Indian Band took the position that the City did not conduct an assessment of their claim since it (the City) believed that municipalities were under no duty to consult. The Court held this was not determinative and relied on *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 39, [2010] 3 SCR 103.

32 *Haida Nation*, *supra* note 1 at para 36.

sizes—do consult as part of industry standards for responsible mining practices. In the initial decision in *Wahgoshig*, the Court noted that Solid Gold refused to consult, but that this stance was at odds with the guidelines set forth by the Prospectors and Developers Association of Canada.[33] Part of the guidelines includes a provision dealing with the consultation of Indigenous peoples:

> In all dealings with communities (see also Principle 5), explorers are encouraged to:
>
> a. Respect the rights and interests of local communities affected by exploration activities and the rights of indigenous and tribal peoples and communities consistent with international human rights standards . . .
>
> f. Consult with the affected community and appropriate levels of government to identify strategies to effectively manage the social consequences of exploration and potential development of a mine[.][34]

Principle 5 of the guidelines further stresses the need to engage affected Indigenous people on the basis that "respect, transparency, consultation and participation is fundamental to obtaining the social license that underpins the success of an exploration project".[35] In reality, according to the guidelines, there are concrete reasons to do so:

> Experience has shown that, if there is active engagement with stakeholders from the earliest stage of exploration and greater accommodation of local concerns and community participation in decision making, there is a concomitant decrease in the risk of social conflict.[36]

In *Wahgoshig*, Solid Gold raised a concern about being placed in serious financial jeopardy if it could not continue with its drilling, as it was under financial pressure caused by the need to maximize tax advantages through

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[33] *Wahgoshig*, *supra* note 21 at paras 57–59.

[34] The quotes are from a previous version of the Prospector and Developers Association of Canada's *Principles and Guidance*. The current version is worded slightly differently and can be found online at <http://www.pdac.ca/pdf-viewer?doc=/docs/default-source/e3-plus---common/home-principles-and-guidance---full-document.pdf> at 24–33, 41–50.

[35] *Ibid.*

[36] *Ibid.*

the use of flow-through shares. Specifically, funds were required to be expended by year-end or significant penalties would be imposed.[37] However, the concerns of speculators seeking a quick profit cannot drive the relationship between Aboriginal people and Canada. We would argue that *Haida Nation* requires consultation precisely to prevent the exigencies of short-term profit speculation in natural resources from damaging relations with Aboriginal people. To address the types of problems raised in the *Wahgoshig* decision, Ontario has taken steps, described below, to require mining companies to work with the province in ensuring that the duty to consult and accommodate is fulfilled.

2. Is there a Danger that Every Minor Issue Would Need to be the Subject of Consultation, Spawning Endless Litigation?

Justice Newbury was concerned that every decision made by a municipality "ranging from the issuance of business licenses to the designation of parks" would require consultation.[38] This is indeed an issue, and the Court notes:

> Daily life would be seriously bogged down if consultation—including the required "strength of claim" assessment—became necessary whenever a right or interest of a First Nation "might be" affected. In the end, I doubt that it would be in the interests of First Nations, the Crown or the ultimate goal of reconciliation for the duty to consult to be ground down into such small particles, obscuring the larger "upstream" objectives described in *Haida*.[39]

The Supreme Court of Canada has said that the content of the duty to consult varies on a spectrum depending on specific circumstances.[40] This determination is based on a preliminary assessment of the strength of the asserted Aboriginal right or title and the seriousness of the potential adverse effects on such a right.[41] At the low end, where the claim is weak or

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37 *Wahgoshig*, *supra* note 21 at para 67.

38 *Neskonlith* BCCA, *supra* note 3 at para 72.

39 *Ibid.*

40 *Haida Nation*, *supra* note 1 at para 43.

41 *Ibid* at para 39.

infringement is minor, the Crown may only be required to "give notice, disclose information, and discuss issues raised in response to the notice"[42] but little more. It is only in the case of a strong ***prima facie*** claim that a deeper consultation will be required, aimed at finding interim solutions with the possibility of accommodation.[43]

Further, not every decision requires consultation. The duty to consult arises when there is a potential that the contemplated conduct may adversely affect the asserted right in question.[44] Merely "speculative" impacts will not trigger consultation.[45] Decisions that do not have an impact on Aboriginal or treaty rights are not the subject of consultation: "The claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights."[46]

IV. A PROPOSED SOLUTION: USING CONSULTATION PLANS TO ALLOCATE RESPONSIBILITIES BETWEEN THE CROWN AND THIRD PARTIES

We have argued that municipalities and the provincial Crown ought to work together in the consultation process. We think that the mining sector can provide an example of how this relationship can be managed. In *Ross River Dena*, the Court of Appeal of Yukon suggested that the territory establish a regime:

> In order for the Crown to meet its obligations, it must develop a regime that provides for consultation commensurate with the nature and strength of the Aboriginal rights or title claim and with the extent to which proposed activities may interfere with claimed Aboriginal interests.[47]

Ontario's new *Mining Act* provides a useful framework in which to explore how to better incorporate consultation in municipal legislation.

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42 *Ibid* at para 43.

43 *Ibid* at paras 44, 47.

44 *Ibid* at para 35.

45 *Rio Tinto, supra* note 2 at para 46.

46 *Ibid* at para 45.

47 *Ross River Dena, supra* note 23 at para 7.

The new *Mining Act* not only emphasizes the importance of consultation at the early stages of a project's life, but also clearly stipulates the role and responsibilities of the provincial Crown and the exploration proponent. If local governments are to be delegated the duty to consult, it is important they understand what exactly is being delegated and the role provincial Crowns' play.

As of 1 April 2013, certain early exploration proponents in Ontario are required to submit an exploration plan as well as apply for an exploration permit.[48] The exploration plan and permit process incorporates the consultation of Aboriginal peoples throughout. For example, once an exploration proponent submits their plan and permit application to the Ministry of Northern Development and Mines, potentially affected Aboriginal communities are given a copy of the plan and application. The Aboriginal communities can then submit comments to the Ministry within a prescribed time period. During this period, the proponent can incorporate comments or make relevant changes. Where permits are being issued, the Director of Exploration is required to consider whether consultation has occurred.[49] This scheme ensures that the Crown remains responsible for ensuring that consultation has occurred.

In order to apply this scheme to municipalities, legislation could require that local governments submit project plans to the Ministry, including plans of consultation with potentially affected Aboriginal communities. While the Court in *Neskonlith* was concerned with a municipality's capacity to consult, programs such as the Mining Act Awareness Program under the new *Mining Act* could be implemented. This program ensures that prospectors have a minimum understanding of the Aboriginal consultation requirements and the respective roles of each party.[50]

Under Ontario's new *Mining Act* both the Ministry and the project proponent clearly understand their roles and responsibilities. The Ministry is responsible for: (1) identifying the communities to be consulted, (2) the

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[48] *Mining Act*, *supra* note 5, ss 78.2–78.3. See relevant regulation *Exploration Plans and Exploration Permits*, O Reg 308/12.

[49] *Mining Act*, *supra* note 5, s 78.3(2)(b).

[50] See "Mining Act Awareness Program", online: Ministry of Northern Development and Mines <http://www.mndm.gov.on.ca> for program details.

scope of consultation and accommodation required, and (3) assessing the adequacy of consultation and accommodation. The project proponent is directly responsible for information exchange and discussions, such as describing the project to affected Aboriginal communities, gathering information directly from communities on how a project affects them, discussing with communities ways to minimize risks, and documenting and reporting to the Ministry.[51]

A similar system developed for municipalities will permit the Crown to calibrate the degree of responsibility based on the municipality involved and the scope of consultation required. If the consultation is at the low end, where only notice and information are required, there is no reason why a small municipality could not undertake the task. Where there is deep consultation required, as was the case in *Neskonlith*, the provincial Crown may have to provide greater assistance to smaller municipalities.

We are not suggesting that the Ontario mining regime can be applied without modifications to consultation involving projects, nor are we suggesting the balance between the duties of the Crown and the duties of the proponents is perfect. However, in our view, it does provide a conceptual framework for establishing a more specific municipal regime.

V. CONCLUSION

The honour of the Crown lies at the heart of Canada's relationship to Aboriginal people. It is embedded in Canadian history and permeates the law today. *Sparrow* sets out the framework for recognizing and respecting the rights of Aboriginal people but also the means for infringing those rights. Infringements are not to be made carelessly and require the Crown to satisfy conditions that are consistent with the honour of the Crown. *Haida Nation* elaborated on the implementation of the *Sparrow* principles in relation to potential infringements of asserted Aboriginal rights.

In *Neskonlith*, the British Columbia Court of Appeal was concerned about the imposition of the duty to consult on municipalities and paved the way for municipalities to implement projects without consulting Aboriginal

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[51] See "MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration", online: Ministry of Northern Development and Mines <http://www.mndm.gov.on.ca/sites/default/files/aboriginal_exploration_consultation_policy.pdf> for further details.

people. While there are legitimate questions about which entity has the responsibility for consultation, these concerns should not be addressed by abridging the right to be consulted. We have proposed an idea that will retain overall Crown responsibility and a government-to-government relationship with Aboriginal people, while also delegating appropriate aspects to those parties with the greatest expertise on the ground. In our view, this proposal will be more efficient than the alternatives: imposing a duty to consult directly on municipalities or imposing the entire responsibility for carrying out the consultation on the Crown.