IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Adams Lake Indian Band v. British Columbia,*
2011 BCSC 266

Date: 20110304
Docket: S105040
Registry: Vancouver

Between:

Adams Lake Indian Band

Petitioner

And

Lieutenant Governor in Council, The Thompson-Nicola Regional District and Sun Peaks Mountain Resort Municipality

Respondents

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Petitioner:	R.J.M. Janes J.D. Shockey V. Mathers
Counsel for the Respondent, Lieutenant Governor in Council:	P.G. Foy, Q.C. E.K. Christie
Counsel for the Respondent, Sun Peaks Mountain Resort Municipality:	G. Tucker J.L. Williams
Place and Date of Hearing:	Vancouver, B.C. January 24-28, 2011
Place and Date of Judgment:	Vancouver, B.C. March 4, 2011

INTRODUCTION

[1] The Adams Lake Indian Band (the "Band") is one of three bands that form the membership of the Lakes Division of the Secwepemc aboriginal people. The Secwepemc Nation claims as part of their traditional territory a large area of the Province located in the south central interior plateau. Their claim extends to an area covering close to 180,000 square kilometres. The traditional territory of the Lakes Division bands is located in the southern portion of the lands claimed by the Secwepemc Nation and includes a 4,139 hectare parcel of land known as the Sun Peaks Controlled Recreation Area ("Sun Peaks"). Sun Peaks is 40 kilometres northeast of Kamloops. The Secwepemc Nation claims aboriginal rights and title to the lands encompassing Sun Peaks and has made its claims known to the federal and provincial governments since 1860 when James Douglas was Governor of the colony of British Columbia.

[2] Sun Peaks is a mountain resort that includes both the developed areas at the base of the resort lands and the recreational ski areas located at the higher altitudes. Until the 1990s, Sun Peaks was a small ski hill operated under the name of Tod Mountain. In 1993, the Provincial government entered into a master development agreement ("MDA") with Tod Mountain Development Ltd. (now Sun Peaks Resort Corporation) that contemplated a phased expansion of the ski hill by the development of resort facilities and recreational improvements. To facilitate this expansion, the MDA permitted the purchase of Crown lands within the traditional areas claimed by the Lakes Division and the Band in particular. The MDA was to be in place until 2044 unless terminated earlier pursuant to its provisions.

[3] The MDA brought about a rapid and extensive expansion of the ski resort that included the construction of several new ski lifts, a golf course, hotels, a snow making reservoir, cottages, condominiums, a community centre, trails, access roads, a conference centre, and many retail outlets. Large tracts of land were cleared and new roads opened up to service the growing community of full time and part time residents. An increasing number of tourists visited Sun Peaks as it became known as a year round mountain resort.

[4] With the expansion of the ski resort came increased conflict with the Lakes Division bands who claimed that the MDA was inconsistent with their title to the land and with their traditional use and occupation of Sun Peaks. The complete absence of consultation with the surrounding aboriginal bands in regard to the expansion of the ski resort inflamed the already tenuous relationship between the Lakes Division bands and the Provincial government. Efforts to negotiate directly with the Sun Peaks Resort Corporation were also met with little success. This situation led to several legal and "self-help" actions by the Secwepemc Nation, including the Band, to protect their claim to the lands within Sun Peaks. The protests and blockades by the aboriginal people led to injunctions and criminal prosecutions by the provincial Crown. These incidents were widely publicized by the Canadian and international media.

[5] In the midst of this climate of mistrust and acrimony, the residents of Sun Peaks sought to attain status as an incorporated municipality. The process towards incorporation began in 2005 when a committee of volunteers, who were residents of Sun Peaks, formed the Sun Peaks Incorporation Study Committee (the "Governance Committee") to investigate

the feasibility of incorporation as a mountain resort municipality. Incorporated status was granted to Sun Peaks by the issuance of Letters Patent pursuant to Order in Council No. 158/2010 on March 25, 2010. From June 28, 2010 onward, Sun Peaks became Sun Peaks Mountain Resort Municipality (the "Municipality").

[6] There is no dispute that pursuant to the Provincial government's recent policy objective to restore relationships with aboriginal people in B.C., efforts were made to consult with the Band in regard to the incorporation of Sun Peaks as a municipality. However, the Band's petition challenges the decision of the Lieutenant Governor in Council to grant incorporated status to Sun Peaks pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*Judicial Review Procedure Act*] on the ground that incomplete and inadequate consultation with the Band preceded the decision. The Band maintains that the Provincial government failed to comply with s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Constitution Act*] which mandates a course of conduct to maintain the honour of the Crown with respect to its dealings with aboriginal people and the rights claimed by aboriginal people. An integral part of the honour of the Crown is the duty to consult. The Provincial government maintains that there was adequate consultation and accommodation of the concerns identified by the Band through the consultation process. The Municipality argues the duty to consult, if one existed, was minimal and thus any efforts by the Provincial government would satisfy the duty. The Regional District does not take any position and did not attend the hearing of this petition.

[7] The parties filed lengthy written submissions addressing the facts and the law in support of their arguments and the court obtained a transcript of the proceedings to ensure that all of the issues raised by the parties could be fairly considered. I have not referred to every argument raised by the parties in my judgment; however, I have considered all of the arguments raised by the parties in respect of the issues addressed in my reasons for judgment.

RELEVANT LEGISLATION

[8] The *Judicial Review Procedure Act* governs the Band's application. Pursuant to s. 5(1) of this Act, the court's jurisdiction regarding the exercise, refusal to exercise, or purported exercise of a "statutory power of decision" is as follows:

> ... the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of the matter to which the application relates.

[9] Section 1 of the *Judicial Review Procedure Act* defines "statutory power of decision" as, "a power or right conferred by an enactment to make a decision deciding or prescribing (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or (b) the eligibility of a person to receive, or continue to receive a benefit ...". Section 1 of the *Judicial Review Procedure Act* defines "statutory power" as including the power to make a regulation, rule, bylaw or order and to exercise a statutory power of decision. Lastly, s. 1 of the *Judicial Review Procedure Act* defines tribunal as "one or more persons, whether or not incorporated and however described, on whom a statutory power of decision is conferred."

[10] Section 35(1) of the *Constitution Act* provides that, “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

[11] The procedure for establishing a mountain resort municipality is found in s. 11 of the *Local Government Act*, R.S.B.C. 1996, c. 323 [*Local Government Act*]:

> 11 (1) If a vote under section 8 is in favour of incorporation, the minister may recommend to the Lieutenant Governor in Council incorporation of a municipality as a mountain resort municipality.
>
> (1.1) The minister may not recommend incorporation of a mountain resort municipality under subsection (1) unless the minister is satisfied that
>
> > (a) alpine ski lift operations, year-round recreational facilities and commercial overnight accommodation are offered within the area of the proposed municipality, or
> >
> > (b) a person has entered into an agreement with the government with respect to developing alpine ski lift operations, year-round recreational facilities and commercial overnight accommodation within the area of the proposed municipality.
>
> (2) Despite section 8, in the case of an area that is a mountain resort improvement district, the minister may recommend incorporation of a new mountain resort municipality to the Lieutenant Governor in Council, in accordance with the letters patent of the improvement district.
>
> (2.1) Despite section 8, in the case of an area that is not a mountain resort improvement district, the minister may recommend to the Lieutenant Governor in Council incorporation of the residents of the area into a new mountain resort municipality if the minister is satisfied that a person has entered into an agreement with the government with respect to developing alpine ski lift operations, year-round recreational facilities and commercial overnight accommodation within the area.
>
> (3) On the recommendation of the minister under subsection (1), (2) or (2.1), the Lieutenant Governor in Council may, by letters patent, incorporate the residents of an area into a mountain resort municipality.
>
> (3.1) Letters patent under subsection (3) that, on the recommendation of the minister under subsection (2.1), incorporate a mountain resort municipality may do one or more of the following:
>
> > (a) include exceptions from statutory provisions;
> >
> > (b) specify the effective period or time for an exception;
> >
> > (c) provide for restriction, modification or cancellation by the Lieutenant Governor in Council of an exception or its effective period;
> >
> > (d) appoint or provide for the appointment of one or more individuals to be the members of the municipal council of the municipality.
>
> (3.2) For a mountain resort municipality incorporated under subsection (3) on the recommendation of the minister under subsection (2.1), the Lieutenant Governor in Council may, on the recommendation of the minister and by letters patent, provide for further exceptions, conditions and appointments.
>
> (3.3) Appointments may be made under subsection (3.1) (d) or (3.2) until the general voting day for the first election of members to the municipal council.

(4) [Repealed 2008-42-37.]

(5) Section 17 applies with respect to the incorporation of a mountain resort municipality under this section.

PRELIMINARY ISSUES

A. Proper Parties

[12] The Ministry of the Attorney General of British Columbia ("Attorney General") received notice of the Band's petition and is the appropriate representative of the Lieutenant Governor in Council. In this capacity, the Attorney General has a right to be heard. However, the Attorney General argues that it is also a necessary party to any proceeding in which the validity of an Order in Council is challenged, and therefore, the proceedings are defective for failure to properly name the Attorney General. In support of this position, the Attorney General relies upon s. 16 of the *Judicial Review Procedure Act*; Brown and Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (consulted on July 2010), (Toronto: Canvasback Publishing, 2009), at para. 4:4300; *Carrier-Sekani Tribal Council v. Canada (Minister of the Environment)* (1992), 93 D.L.R. (4th) 198, 5 Admin L.R. (2d) 38 (F.C.A.) at paras. 28-29, leave to appeal to SCC refused, [1992] S.C.C.A. No. 360; and *Vancouver Island Peace Society v. Canada*, [1994] 1 F.C. 102 (T.D.) [*Vancouver Island Peace Society*], aff'd (1995), 89 F.T.R. 136 (C.A.), leave to appeal to SCC refused, [1995] S.C.C.A. No. 103.

[13] The Band argues that while it must give notice to the Attorney General, it is only the Lieutenant Governor in Council that is a party to the petition. Section 15 of the *Judicial Review Procedure Act* provides that the decision maker is a party to the petition at their option. The Band maintains the Lieutenant Governor in Council exercised his statutory authority under s. 11 of the *Local Government Act* to issue letters patent to create a mountain resort municipality. The Band argues that the role of the Attorney General is to represent a ministry of the government in proceedings and this role is identified in s. 2(i) of the *Attorney General Act*, R.S.B.C. 1996, c. 22 [*Attorney General Act*]. Lastly, the Band argues that the authorities cited by the Attorney General involve proceedings against the Federal government where s. 23 of the *Crown Liability and Proceedings Act,* R.S.C. 1985, c. C-50 [*Crown Proceedings Act*] permits proceedings against the Crown to be in the name of the Attorney General.

[14] There is no statute or rule in force in B.C. that requires the Attorney General to be named as a party to any proceeding that questions a decision of the Crown made by the Lieutenant Governor in Council. Section 2(i) of the *Attorney General Act* reposes in the Attorney General the duty and power over, "regulation and conduct of all litigation for or against the government or a ministry in respect of any subjects within the authority or jurisdiction of the legislature." This provision does not require the Attorney General to be named as a party in all proceedings against the government. Section 16 of the *Judicial Review Procedure Act* requires that all applications for judicial review, regardless of the parties, must be served on the Attorney General and the Attorney General is entitled to be heard in the proceeding. However, s. 15 of the *Judicial Review Procedure Act* accords the right of party status only to the decision maker "in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power...". It is acknowledged that the Lieutenant Governor in Council had the authority to exercise the statutory power in s. 11 of

the *Local Government Act* to grant incorporated status to a mountain resort municipality. It is this exercise of statutory power that is questioned in this proceeding. The fact that the exercise of statutory power took the form of an order in council does not alter the identity of the decision maker. Nor does it require the petitioner to name the Attorney General as a party to the proceedings.

[15] The authorities cited by the Attorney General reflect a practice in the federal jurisdiction when proceedings are taken against the Federal Crown and this practice appears to be based upon s. 23(1) of the *Crown Proceedings Act.* Moreover, the practice in regard to the parties named in actions against the Federal Crown varies depending on the court in which the action is commenced: *Vancouver Island Peace Society* at para. 34. Thus these authorities are not persuasive with regard to the party status of the Attorney General in this Province.

[16] The Attorney General agrees that it is the appropriate representative of the Lieutenant Governor in Council and, in this capacity, is accorded an opportunity to be heard in this proceeding. There is no suggestion that the Attorney General, if named as a party, would bring a different perspective or a different argument on the issues in dispute than it has presented as the representative of the Lieutenant Governor in Council. In addition to the lack of prejudice to the Attorney General, no remedy has been argued other than a determination that the proceedings are defective.

[17] In my view, the Band has complied with ss. 15 and 16 of the *Judicial Review Procedure Act* by naming the Lieutenant Governor in Council as a party and by providing the Attorney General with notice of the proceeding. There is no rule, statutory provision or practice at common law that requires the Band to also name the Attorney General as a party.

B. Triable Issues

[18] The Attorney General argues that a petition is not an appropriate proceeding in which to resolve complicated and disputed questions of fact. In particular, the Attorney General argues that a judicial review petition is not the proper forum for resolving substantive claims of aboriginal rights and title. The Attorney General acknowledges that the Crown has knowledge of the Band’s claims to aboriginal title and rights in and about the lands situated within Sun Peaks for the purpose of the duty to consult. Further, the Attorney General does not dispute that there was a duty reposed in the Crown to consult with respect to the incorporation of the Municipality. However, the Attorney General argues that, if it is necessary to rely upon the affidavit evidence filed by the Band for the truth of their assertions to aboriginal title and rights concerning Sun Peaks, the proceeding should be converted to an action and placed on the trial list.

[19] The Attorney General also argues the affidavit evidence filed by the Band that suggests all of the Secwepemc people oppose development of Sun Peaks is in dispute. As a consequence, the Attorney General argues it should be disregarded by the court.

[20] The Municipality argues that if the court is unable to decide whether the Provincial Crown satisfied its duty to consult without determining the strength of the claims asserted by

the Band, the court should permit cross-examination on the affidavits filed or, alternatively, the proceeding should be converted to a trial.

[21] The Band agrees that a summary proceeding is not the appropriate forum for determining aboriginal title and rights and it is not its intention to seek a declaration that such title or rights exist in regard to Sun Peaks. However, the Band argues that the affidavit evidence is relevant to the court's assessment of whether the Crown conducted itself properly in the course of the consultation. The Band argues that evidence proving what the Crown had knowledge of, either real or constructive, is relevant to the question of when the duty to consult arises: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*] at para. 35.

[22] The Band argues that the Attorney General has mischaracterized its evidence in regard to the Secwepemc protest over the development of Sun Peaks. The Band argues the evidence does not purport to establish that every member of the Secwepemc Nation opposes Sun Peaks' development and expansion. However, evidence that there have been protests over its expansion is properly before the court to explain the context in which this dispute arose.

[23] Lastly, the Band argues that its evidence of traditional use and occupation in regard to Sun Peaks was in reply to the affidavit evidence filed by the Municipality, which suggests that historically the Band has not had a presence in the disputed area. This evidence is relevant to show what could have been considered by the Crown had it properly carried out the duty to consult. On the other hand, if this evidence is disregarded, the Band says that all evidence of this nature should be disregarded because it was not part of the material considered by the Crown during the consultation process.

[24] This preliminary issue raises complicated questions of mixed fact and law. The authorities relied upon by all parties clearly hold that the strength of the claim to aboriginal title and rights asserted by the aboriginal claimant is an important factor to consider when determining the content of the duty to consult. A weak *prima facie* case may lead to a conclusion that the duty to consult is at the low end and, conversely, a strong *prima facie* case may require a duty to consult at the upper end of the spectrum. As a consequence, evidence that tends to establish the strength of the claim asserted is potentially relevant to the issues in dispute in this case. In a summary proceeding, the court is very reluctant to assess the credibility of conflicting evidence based solely on affidavit material.

[25] The Attorney General has acknowledged a duty to consult and makes no submission concerning the strength of the claim asserted by the Band. The Crown has also recognized that Sun Peaks is within the traditional territory of the Band and the other Lakes Division bands. In a letter dated February 19, 2010, a representative of the Ministry of Tourism, Culture and Arts acknowledged that as a result of the location of Sun Peaks within the Band's traditional territory, "complete and meaningful consultation needs to take place in regard to the Sun Peaks Master Plan ...". The Attorney General's argument is that it fulfilled the duty to consult by any standard because the adverse consequences of the decision to incorporate the Municipality in terms of the asserted aboriginal claims were non-existent. However, the Attorney General also argues that even if it erred in assessing the content of the duty to consult on the facts of this case, the court must go on to evaluate the circumstances to

determine if an appropriate level of consultation occurred in any event: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Beckman*] at para. 39. This inquiry would inevitably lead to a consideration of the merits of the Band's claim to aboriginal title and rights even if it is only a preliminary assessment as described by Grauer J. in *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 [*Klahoose*] at para. 36.

[26] The Municipality's argument also draws the court into a substantive assessment of the strength of the claim. Several affidavits filed by the Municipality address the absence of any presence of the Band in and about Sun Peaks or its members' use of land for hunting, fishing and herb gathering. The Municipality maintains this evidence supports a conclusion that the Band has only a weak claim to aboriginal title and rights in regard to the lands within its newly created boundaries. The Municipality asks the court to find that either no consultation or minimal consultation was warranted based on this evidence.

[27] While the Band submits that the Province fundamentally erred in its approach to the consultation due to the failure to make a preliminary strength of claim assessment, their argument assumes the court will go on to examine what actually occurred to determine if the duty to consult was adequately fulfilled.

[28] From this brief overview of the positions of the parties, it is apparent that the court may be required to make a preliminary assessment of the strength of the claim asserted by the Band if the Province is found to have misapprehended the potential adverse impact of the incorporation decision on the rights claimed by the Band.

[29] For this purpose, I find the court is not in a position to make anything more than a preliminary, general assessment of the strength of the *prima facie* claim. The strength of claim evidence led by the Band includes oral histories and recollections about the use and occupation of Sun Peaks. The affidavit evidence filed by the Municipality disputes the accuracy of the Band members' recollections and oral histories. While it is generally inappropriate, without the benefit of *viva voce* evidence, to make critical findings of admissibility and credibility in respect of disputed facts, there is precedent for treating aboriginal oral history evidence at face value for the purpose of determining the strength of a *prima facie* claim: *Gitxsan First Nation v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 [*Gitxsan*] at para. 70. It is not my task to make a final determination regarding the Band's claim for aboriginal title and rights.

[30] Some flexibility must be accorded to the admissibility and weighing of evidence in support of aboriginal claims due to the inherent difficulty associated with its proof. This principle was recognized by the Supreme Court of Canada in *Mitchell v. Canada (Minister of National Revenue)*, 2001 SCC 33 at paras. 29 and 30:

> Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and

> traditions (*Van der Peet*, *supra*, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw*, *supra*).
>
> The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

[31] In my view, these principles are even more important to keep in mind when assessing in a preliminary fashion whether there is a *prima facie* aboriginal right or title at stake. As I will discuss below, the duty to consult in regard to unproven aboriginal rights and title is designed to preserve those rights, to the extent possible, pending a final determination. In this context, and from a policy perspective, it is advisable to adopt a more expansive view of admissible evidence to ensure preservation of the rights claimed.

[32] Accordingly, to determine the strength of the Band's *prima facie* claim on a preliminary and general basis, and for the purpose of defining the content of the duty to consult, I find it is appropriate to accept at face value the oral histories and recollections of Band members. In addition, the evidence led by the Band is admissible to establish the Crown's knowledge of the rights and title asserted by the Band. This evidence is also admissible as part of the background to the dispute. Lastly, the Province's assessment of the strength of claim subsequent to the conclusion of the consultation process and the evidence relied upon is admissible for the purpose of this inquiry.

[33] Turning to the Attorney General's submission with regard to the background evidence filed by the Band, I am not satisfied that it suggests that every member of the Secwepemc Nation opposes the development of Sun Peaks. Indeed, the affidavit evidence suggests that many members of the Secwepemc Nation seek to share in the economic benefits of the Sun Peaks development and to have a greater role in the decision making process surrounding its expansion. What is most prominent in the message articulated within the Band's affidavit evidence is a desire for an acknowledgement of the lack of consultation in the past and meaningful consultation and accommodation of its aboriginal rights in Crown decisions that relate to Sun Peaks going forward. Moreover, the affidavit evidence filed by the Attorney General clearly identifies a wide range of responses to development among the aboriginal groups that have an interest in Sun Peaks. Thus I see no reason to disregard the Band's evidence. I consider it is properly before me as part of the historical context of the Band's application for judicial review.

<u>C. Limited Authority of the Band</u>

[34] The Attorney General argues the Band has no authority to seek a declaration on behalf of the Lakes Division that there has been inadequate consultation in respect of the

incorporation decision. According to the affidavit of Chief Leon, Adams Lake Band, he is only authorized by the members of the Band to bring this petition. The Attorney General points to the fact that the Little Shuswap nation, also a member of the Lakes Division, signed a consultation agreement with the Crown and the Neskonlith nation, another member of the Lakes Division, is not a party to the proceeding.

[35] The Band argues that until there is a recognized body within the Lakes Division with whom the Crown acknowledges it must consult in regard to decisions affecting their traditional territory, each member of the Lakes Division has the capacity to represent the interests of the Lakes Division. The Band says the Crown recognized an obligation to consult separately with each of the three bands that make up the Lakes Division during the consultation process and carried out separate meetings in many instances. However, the underlying basis for their claims and the corresponding duty to consult is based upon the rights acquired by the Secwepemc Nation and, in particular, its Lakes Division. In support of its argument, the Band relies upon *Nemaiah Valley Indian Band v. Riverside Forest Products* (11 November 1999), Victoria 90/0913 (S.C.) [*Nemaiah Valley*] at paras. 10-14.

[36] The Band also argues the fact that one of the Lakes Division members accepted the consultation process as sufficient does not determine the sufficiency of the consultation for all members: *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 [*Huu-Ay-Aht-First Nation*] at para. 128.

[37] The declaration sought by the Band is described at p. 2 of its petition as follows: “this Court declare there has been inadequate consultation with the Adams Lake First Nation and the Lakes Division of the Secwepemc Nation before the approval of Order-in-Council 158/2010.” At p. 3 of the petition, the Band states that Chief Leon has been authorized by the members of the Band to bring this proceeding by a resolution of the Band’s council.

[38] In my view, the Band has authority to seek a declaration that the Crown failed to adequately consult with it concerning the decision to grant incorporated status to the Municipality insofar as that decision affected the rights and title asserted by the Lakes Division in Sun Peaks.

[39] As Vickers J. describes in *Nemaiah Valley*, aboriginal rights are recognized to be communally shared by all members of the group by reason of their membership in that group: at para. 12. All three band members of the Lakes Division claim overlapping and communally recognized rights and title to the disputed lands. Further, just as a favourable determination of aboriginal title would benefit all members of the group in *Nemaiah Valley*, the relief sought in this petition would support the rights claimed by all members of the Lakes Division in regard to Sun Peaks insofar as any accommodation that resulted from an enhanced consultation process would protect communal rights. Moreover, Chief Leon is a member of the Lakes Division and has the same interest as any other member of the Lakes Division in adequate consultation and accommodation by the Crown in regard to the decision to incorporate the Municipality.

[40] However, what distinguishes this case from *Nemaiah Valley* is the nature of the claim sought by the petitioner. This is not an action to determine aboriginal title and rights with respect to lands that are the subject of an assertion by the Lakes Division or the Secwepemc

Nation. Instead, this is a petition for a declaration that the Crown failed to adequately consult with respect to the impact of a decision to grant incorporated status to the Municipality based on asserted aboriginal rights and title. Throughout the consultation that occurred, each of the three Lakes Division bands maintained the Crown was required to consult individually with each band to satisfy its duty. While there were joint meetings, the concerns of each band were sought and recorded separately. Each band took different positions with respect to the adequacy of the consultation framework. At least one band, Little Shuswap, decided to accept the consultation process as framed by the Crown. Although a decision by one band does not determine the sufficiency of the consultation or the accommodation offered by the Crown, as reflected in the reasons of Dillon J. in *Huu-Ay-Aht First Nation*, it illustrates that the consultation had a discreet and distinct impact on each of the three member bands.

[41] The issue of authority to bring an action is a question of mixed fact and law best determined by the trial judge: *Nemaiah Valley* at para. 13. The facts in this case support a conclusion that, while the aboriginal rights to be protected and fostered are communally shared among all members of the Lakes Division, the duty to consult was owed to each band individually. Thus the Band has authority to seek a declaration that the Crown has failed to fulfill its duty to consult with the Band in regard to aboriginal title and rights that are communally shared with all of the members of the Lakes Division.

D. Admissibility of Evidence

[42] The Band seeks to file an affidavit attaching a letter received by the Band on January 13, 2011, after it filed this petition. The letter is from the Ministry of Natural Resources and concerns an application by the Sun Peaks Development Corporation for a licence to cut timber in Sun Peaks. The letter contains a preliminary strength of claim analysis prepared by the Crown and an outline of the consultation process contemplated. The Attorney General argues this evidence is not admissible because it is concerned with a separate and distinct consultation unrelated to the incorporation decision. In my view, this evidence is relevant to the petition because it describes the Crown's assessment of the strength of the Band's claim in regard to the same lands in dispute in this case. Consequently, the strength of the claim remains the same regardless of the decision being contemplated by the government.

[43] The Municipality seeks to adduce additional affidavit evidence that purports to respond to strength of claim evidence led by the Band in reply to the Municipality's initial affidavit evidence addressing the strength of claim. In addition, the Municipality seeks to adduce affidavit evidence addressing the passing of a firearms by-law that was included in the Band's legislation brief. The Band objects to this evidence because it has had no notice of it and on the basis that it could have been presented to the court as part of the Municipality's original reply submission. This is not new or unforeseen evidence that has come to light after the petition was filed.

[44] The Municipality may adduce affidavit evidence concerning the firearms by-law as this evidence was included in the materials presented to the court after the filing of its affidavits. The strength of claim evidence contained in the late filed affidavits is admissible for the limited purposes described above. It contains evidence of the same nature as the original reply affidavits filed by the Municipality and would not therefore have unduly prejudiced the Band. The only affidavit that must be excluded from the record in fairness to the Band is the

affidavit of Bill Rublee dated January 18, 2011. This evidence purports to be an expert opinion addressing the impact of Sun Peaks' development on the environment. The Band did not receive proper notice of this expert opinion and it is not filed in reply to an expert opinion led by the Band in its case. I decline to exercise my discretion to admit the evidence pursuant to Rule 11-7(6) for these reasons.

STANDARD OF REVIEW

[45] The Band argues that the standard of review in regard to whether the consultation was adequately carried out is correctness. If the Crown has appropriately measured and carried out the duty to consult, its subsequent actions or decisions are evaluated by a standard of reasonableness. In this regard, the court asks whether the decision was within the constitutionally acceptable range of outcomes. In support of its argument, the Band relies upon *Beckman* at para. 48.

[46] The Attorney General argues that *Beckman* did not establish a standard of correctness in respect of the efforts made by the Crown to carry out the duty to consult. While the existence of a duty to consult is a question of law and the decision maker must be correct, this determination also involves questions of fact, of which the court owes a degree of deference to the decision maker: *Haida* at paras. 61-63; *Klahoose* at para. 34; *Huu-ay-aht First Nation* at para. 95, *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212; *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 [*Ke-Kin-Is-Uqs*]; and *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 [*Dene Tha'*] at paras. 93-94. Thus where the question of pure law and facts are intertwined, the standard is reasonableness. The Attorney General argues that the process of consultation should be assessed against a standard of reasonableness.

[47] The Attorney General agrees that the standard of correctness applies to the determination of whether the duty to consult is triggered as well as to the scope and extent of the duty in regard to legal and constitutional limits. In other words, the standard of correctness applies to the decision maker's conclusion as to the level of consultation required to meet the duty and whether that level was reached prior to the decision; however, the standard of reasonableness applies to the conduct of Crown officials during the consultation process.

[48] The standard of review in cases involving the duty to consult, whether viewed from a constitutional or an administrative law perspective is in part based on a standard of correctness and in other respects is based on a standard of reasonableness. Generally speaking, questions of law are judged by the standard of correctness and questions of fact by the standard of reasonableness. However, because the duty to consult and accommodate depends on the particular circumstances, questions of law are often intertwined with questions of fact. The statement of Chief Justice McLachlin in *Haida* at para. 39 illustrates why it is far simpler to articulate the standard of review than to apply it:

> The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case

> supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

[49] The existence of the duty to consult is a legal question judged by the correctness standard; however, this determination may involve an assessment of facts to which a degree of deference may be owed to the decision maker: *Haida* at para. 61. While the manner in which the government carries out its consultation, and what it does to accommodate aboriginal rights and interests is examined based on a standard of reasonableness, the standard of correctness applies to the government's assessment of the seriousness of the claim and the impact of the infringement on such rights and interests. These two concepts are described in the following passage from *Haida* at para. 63:

> Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

[50] Chief Justice McLachlin's comments about the standard of review in *Haida* were not intended to be definitive on the subject; the discussion of the general principles of administrative law reflected only "suggest" applications: *Haida* at para. 60. However, subsequent judgments in this jurisdiction have interpreted the standard of review articulated in *Haida* as positioning the government's efforts to consult within the purview of the reasonableness standard. As most succinctly described by Madam Justice L. Smith in *Ke-Kin-Is-Uqs* at para. 180:

> The authorities are clear that the Crown's efforts at consultation and accommodation are to be measured against a standard of reasonableness, unless the Crown has misconceived the seriousness of the claim or the impact of the infringement. In that event, it would likely be a question of law assessed by the standard of correctness. The focus is on the process of consultation and accommodation, not the outcome.

[51] In *Beckman*, Binnie J. addressed the appropriate standard of review at para. 48 of the judgment as follows:

> In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?

[52] In my view, this passage from *Beckman* should not be interpreted as modifying the legal principles articulated in *Haida.* Binnie J. does not address the intermediate steps within

each legal question that may or may not involve issues of fact to which deference may be owed to the decision maker. Nor does Binnie J. articulate the distinction between the Crown's assessment of the content of the duty and its efforts to carry out the required level of consultation. Instead, I find this passage articulates the standard of review in a general fashion and in a manner that was deemed by the Court to be sufficient to decide the issues in dispute in the case before them.

[53] Thus for the purpose of this case, I find the Attorney General's description of the standard of review to be correct. The existence or extent of a legal duty (i.e. the duty to consult) is a question of law, judged on a standard of correctness, whereas the process of carrying out that legal duty falls to be reviewed on a reasonableness standard.

LOCAL GOVERNANCE PRIOR TO THE MUNICIPALITY

[54] Before the Municipality was incorporated, there were three primary local government bodies at Sun Peaks: Sun Peaks Resort Improvement District ("Improvement District"); Thompson Nicola Regional District ("Regional District"); and the Provincial government.

[55] The Improvement District had jurisdiction over the smaller developed area of Sun Peaks but not over the far larger area where the upper ski hills are located. The Improvement District is governed by a seven member unpaid board of directors that includes four elected members, two members appointed by the Province (one to represent the Sun Peaks Resort Corporation and a staff representative), and a member appointed by the Regional District. The Improvement District was created in 1995 and it is authorized to provide fire, water, sewer, drainage, street lights, snow removal, and parks and recreation services for Sun Peaks. To date, however, it has provided only street lighting and fire protection.

[56] The Regional District governs ten municipalities and ten unincorporated areas, including Sun Peaks. Sun Peaks is part of the larger P electoral area and area P has one out of 24 elected representatives on the governing board. The Regional District governs a broad range of activities within the controlled areas such as regional planning, land use, by-laws, building standards, search and rescue, waste management, and parks. The Regional District has no community plan for Sun Peaks; however, it does have a zoning by-law in place. The Regional District cannot pass a land use by-law or a community plan for Sun Peaks without the approval of the Province.

[57] The Province governs highways and road maintenance, education, social services, health care, tax collection and financial policies. A provincial staff member acts as the Approving Officer for subdivisions. The Province also provides police services through the RCMP.

[58] After incorporation, the Improvement District was dissolved and the Municipality took over its responsibilities. The Municipality acquired its own member on the board of the Regional District and thus continued to participate in the Regional District's shared, area wide services and functions. In addition, the Municipality took over all of the local services and functions previously performed by the Regional District. The Municipality also took over some of the Provincial responsibilities for road maintenance, tax collection and subdivision approval.

CHRONOLOGY OF EVENTS

[59] In November 2005, a group of volunteers residing in Sun Peaks formed the Governance Committee to investigate the feasibility of incorporating as a mountain resort municipality. However, it was not until June 2006 that the Governance Committee had any significant contact with the Ministry of Community and Rural Development. In December 2006, the Province provided the Governance Committee with a grant to cover the cost of a study into the merits of incorporation and the costs of conducting public meetings on the subject. The incorporation study, referred to as the Technical Report, was completed in early 2007. Neither the Band nor any of the other Lakes Division bands were consulted during the preparation of the Technical Report or its update in 2009. The Governance Committee also conducted a community survey in May 2007 to solicit public input with regard to incorporation. The survey asked whether the municipality should be required to consult with business groups and others such as First Nations; however, the Lakes Division bands were not asked to contribute their views about the survey or its results.

[60] On January 22, 2007, the Shuswap Nation Tribal Council wrote to the Regional District and to the Sun Peaks Resort Corporation expressing opposition to the incorporation of Sun Peaks and asking for a meeting to discuss "meaningful participation in the ongoing land use planning and development within our traditional territory." The Governance Committee sent this letter to the Ministry of Community and Rural Development and the Ministry in reply sent the Governance Committee a list of First Nations bands that should be provided with information about the incorporation process.

[61] On February 2, 2007, the Governance Committee sent a letter to all the potentially affected aboriginal groups, including the Band, to notify them of the upcoming public meetings in February and April for discussion of the proposed incorporation. The first meeting had already been held in January 2007. The letter also contained a brief overview of the process for achieving incorporation status and indicated the Technical Report would be available at the end of April 2007.

[62] On March 2, 2007, Chief Leon sent a letter to the Regional District and the Sun Peaks Resort Corporation expressing opposition to the incorporation of Sun Peaks because the process failed to take into account their aboriginal title and rights in the lands and provided no accommodation for these interests. In reply, the Governance Committee wrote to Chief Leon to advise that the Band's concerns were going to be forwarded to the Provincial government for review.

[63] On April 4, 2007, the Band and the Neskonlith band sent a joint letter to the Premier expressing opposition to the incorporation of Sun Peaks. This letter said, in part:

> Adequate consultation has not occurred in regard to the Sun Peaks development from the outset of the project; in spite of tremendous negative impact the development has on our traditional territory and the ability of our members to exercise our Aboriginal rights and title on the land. ...as well, the lands were set aside as reserve lands for our three communities - the subject of a specific claim. ...
>
> Recently the Adams Lake and Neskonlith Band learned about an upcoming decision for municipal incorporation by Sun Peaks. By this letter, we put your government on notice that meaningful consultation about the decision for municipal incorporation must

> occur- the decision itself constitutes an interference but further, consultation about this decision provides an opportunity to engage in meaningful accommodation about the Sun Peaks project itself.
>
> These steps were not taken for the Sun Peaks project in general, and about this decision in particular. Recently the bands received a letter ... from the Sun Peaks Incorporation Study Committee, which did not provide sufficient time to respond or attend the February 10th, 2007 public meeting regarding the municipal incorporation study. This is not adequate consultation. Not only is the process, including timing, problematic, we note that the Courts have clearly stated that First Nations consultation is not the same as public consultation processes.
>
> ...
>
> If Sun Peaks becomes a municipality, our interests are directly affected - Sun Peaks will become empowered with a local government framework for "core areas of authority, including broad powers; taxation; financial management; procedures; and bylaw enforcement, municipal -provincial relations, with principles, consultation requirements and dispute resolution processes." ... Sun Peaks' interests are opposed to our own, and Sun Peaks' new authorities and powers will impact our Aboriginal title and rights and the outcomes possible for the Neskonlith Douglas Reserve claim ... resubmitted March 20th, 1997.

[64] Chief Leon and Chief Wilson of the Neskonlith band attended the last public meeting held by the Governance Committee. During this meeting the Technical Report was presented. The minutes of the meeting indicated that Chief Wilson and Chief Leon expressed anger and frustration about the failure to consult with them about the incorporation as well as the development of Sun Peaks generally. They both expressed the opinion that public consultation was not meaningful or adequate consultation. The Governance Committee responded that they did not have a mandate to consult with the bands affected by the proposed incorporation or to address their aboriginal claims. It was the Governance Committee's expectation that the Province would soon step in and begin a consultation process.

[65] On April 5, 2007, the Governance Committee formally asked the Province to assume responsibility for consulting with the affected aboriginal groups. On May 14, 2007, Ida Chong, Minister for Community Services, advised the Governance Committee and the affected aboriginal bands that the Ministry would be consulting with them before any decision was made about incorporation. While there were two other issues to be clarified by the Province (responsibility for local roads and financial assistance available to an incorporated municipality), it is apparent that the Governance Committee put their investigation on hold until the Province had completed its consultation with the affected aboriginal groups. This decision was supported by Ida Chong.

[66] It was not until July 2007 that the Band was provided with an internet link to the 2007 Technical Report coincident with Cathy Wilson's first telephone contact with the Lakes Division bands in regard to the consultation process. Ms. Wilson was the Director of the Ministry of Community and Rural Development's Government-First Nations Relations Branch. She became one of two primary contacts for the Band with respect to the consultation process.

[67] The first consultation meetings were held on July 18 and 19, 2007. The Ministry's representatives met with each band separately. During this meeting Ms. Wilson explained the process and implications of incorporation and advised the Band that the Ministry wanted to engage in consultation with the affected bands to identify any potential impacts on aboriginal rights or title. Ms. Wilson's notes indicate that Chief Leon discussed the traditional uses of Sun Peaks by the Band members and the historical grievances the Band had with the development of Sun Peaks and the lack of accommodation and consultation to date. He also raised concerns about the incorporation decision such as the inadequate consultation to date; the need to jointly define the consultation framework, which should be resourced by the government; and the fact that the incorporation would create a new government body with jurisdiction over lands where their aboriginal title and rights are not known or adequately assessed.

[68] In separate meetings, all of the Lakes Division bands expressed concern about the failure to consult during the development of the MDA with Sun Peaks Resort Corporation; the unsuccessful attempts made to consult with the Sun Peaks Resort Corporation pursuant to a protocol negotiated in 1997; and the lack of financial capacity to fully engage in the consultation process. The Lakes Division bands all requested copies of the MDA and any environmental assessments prepared prior to the MDA. In addition, Chief Wilson asked for the Ministry's consultation policy and its guide to municipal incorporation. Internet links for the latter documents were provided to the Lakes Division bands on July 25, 2007. On August 3, 2007, Psyche Brown emailed a copy of the MDA to the Lakes Division bands and advised them that no environmental studies could be located. Ms. Brown was the Manager of the Major Projects - Resort Development sector of the Ministry of Tourism, Culture and the Arts (the "Ministry of Tourism"). Ms. Brown became another primary contact for the affected aboriginal groups during the consultation process with the government.

[69] In September 2007, the government decided that the Ministry of Tourism would lead the consultation process with the Lakes Division bands because it believed that most of the bands' concerns related to the development of Sun Peaks generally rather than to incorporation specifically. The proposed consultation process would cover issues concerning the Sun Peaks development, proposed amendments to the MDA, and implementation of the Resource Timber Administration Act, which contemplated a transfer of authority over timber resources within Sun Peaks. While consultation about the incorporation of Sun Peaks would be included in this process, these discussions were to be jointly led by the Ministry of Community and Rural Development and the Ministry of Tourism. Specifically, the consultations would be led by Ms. Brown and Ms. Watson. The Lakes Division bands had also expressed a desire to address all of the issues in dispute together in a single consultation process and were thus content with the government's proposal for consultation.

[70] On December 6, 2007, Ms. Brown wrote to the bands and invited them to participate in a consultation process about Sun Peaks resort generally. The terms of reference drafted by Ms. Brown included the following topics:

1. Historical and traditional First Nations use.
2. Current First Nations use.

3. With acknowledgment of current commitments under the MDA, assessment of the impacts of proposed changes to the MDA, timber administration and governance [incorporation] on aboriginal interests.

[71] Ms. Brown advised the bands that she expected consultations to complete within six to twelve months and anticipated they would meet once per month. Between January and May 2008, Ms. Brown attempted to arrange meetings with the bands. While she was unsuccessful, it should be noted that the Lakes Division bands were also involved in a lengthy consultation process with the Ministry of Forests during the spring of 2008.

[72] In April 2008, the Deputy Minister of Community and Rural Development, Dale Wall, wrote to the Governance Committee and advised them that the incorporation decision was going to be part of the consultation process addressing the other decisions affecting Sun Peaks generally, including amendments to the MDA and the timber administration question. Mr. Wall indicated that the consultation process would likely complete by November 2008, including ratification by the First Nations and the Province.

[73] On May 5, 2008, Ms. Brown met separately with representatives of the Lakes Division bands. It does not appear that there was any discussion of substantive issues during this meeting. Immediately after this meeting, the Band wrote to the Minister of Community and Rural Development expressing concern about Mr. Wall's description of the consultation that had already occurred in regard to incorporation in his letter to the Governance Committee as described above.

[74] In a letter from Chief Wilson, on behalf of the Neskonlith band, dated May 6, 2008, concerns were expressed on behalf of the Lakes Division bands. (I note that Chief Leon sent an identical letter to the Minister on May 12, 2008.) Chief Wilson said that during the July 2007 meetings the bands advised the government that they were not yet prepared for consultations on the incorporation and merely listing the bands' concerns was not adequate consultation. Chief Wilson also stated that the first step was to agree on a process for consultation and secure adequate funding to permit meaningful participation by the bands in the process. While these concerns were brought to the government's attention in July 2007, no framework agreement had been negotiated to date. Chief Wilson specifically addressed the impact of incorporation on the claimed aboriginal title and interests as follows:

> ... When the Master Development Plan was approved in 1997, the Province took the position, since rejected by the Supreme Court of Canada, that it had no legal obligation to consult with us or accommodate our interests. Municipal incorporation could further entrench Sun Peaks' rights under the Master Plan. Indeed, the Summary of the Technical Report states that the letters patent of the municipality might enshrine special governance provisions to "preserve and respect" the Corporation's rights.

[75] Chief Wilson advised the Minister that the sacred circle discussions currently underway within the Lakes Division bands should also be included in a framework for consultation because the lands affected by the Ministry of Forests' plans included one-third of Sun Peaks. Lastly, she emphasized that a global framework for all of the consultations had to be a priority before consultations could begin.

[76] On May 28, 2008, likely in response to Chief Wilson's May 6, 2008 letter, Ms. Brown emailed the Lakes Division bands a draft consultation framework. The action plan forming part of the draft consultation framework included the signing of a consultation agreement describing the scope of discussions, a meeting schedule, funding, and responsibilities of the parties as the first step in the process. Next, there would be a gathering of information on traditional, environmental and socio-economic impacts to First Nations based on the agreed upon scope of consultation by the First Nations, the government, and other agencies. During this process, gaps in the information would be identified and further information would be sought by accessing outside sources and expertise. Once the information gathering process was complete, the parties would identify the impacts and benefits of the resort development on aboriginal interests and the potential future impacts based on the MDA. Next, the parties would investigate financial authority for compensation and negotiate accommodation agreements as appropriate. The timeframe for completion was October 2008.

[77] Mr. Wall also responded to the bands' May 2008 correspondence. Mr. Wall's undated letter indicates agreement with the bands concerning the key steps in the consultation process, namely: identifying the participants; jointly developing a framework for meaningful consultation; undertaking a process of information gathering and exchange that ensures First Nations have the information necessary to assess the impact of the proposed decision on their interests; and identifying options to mitigate or compensate for the specific impacts identified. Mr. Wall also confirmed that the government intended to address all of the issues surrounding Sun Peaks, including the sacred circle areas, in a single consultation process.

[78] Ms. Brown resumed her attempts to schedule a meeting with the Lakes Division bands to settle the terms of a consultation framework agreement. She advised the bands that the Governance Committee was hoping to schedule a public vote on the incorporation in the fall of 2008 and thus they were running out of time. A meeting was finally arranged for July 31, 2008. Chief Wilson and Chief Leon attended this meeting together and the attendees discussed options for a consultation framework agreement and their expectations for the consultation process. The Chiefs provided Ms. Brown with an accommodation agreement developed for an unrelated consultation and another meeting was scheduled for August 8, 2008. On August 6, 2008, Ms. Brown emailed the bands a draft consultation agreement that she advised was based on the accommodation agreement the Chiefs had given to her at the earlier meeting. Of particular importance, the draft provided as follows:

> This Agreement is to enable the Parties sufficient time, information and resources to fully engage in the Negotiations of an Accommodation Agreement to reach their respective general objectives on the following terms and conditions:
>
> 1. Purpose: The purpose of this Agreement is to establish a reliable framework for government -to- government consultation and negotiation and to provide funding to the Bands to engage in meaningful dialogue and Negotiations to reach an appropriate Accommodation Agreement between the parties in respect to the Resort.

[79] The draft defines Accommodation Agreement as "a long term definitive agreement after "efficient and good faith negotiation." By the terms of the Agreement, the Province acknowledged "the Bands' asserted interests in the Crown land included in the Resort Master Plan, as well as its asserted aboriginal rights, aboriginal title, employment and economic

opportunities, protection of cultural and heritage resources, and environmental quality and stewardship."

[80] At the August 8, 2008 meeting, the consultation framework agreement was discussed briefly but primarily Chief Leon and Chief Wilson requested more information about the impact of incorporation on their interests. There were no substantive issues discussed. Ms. Brown agreed to schedule a meeting in September 2008 that would involve a comprehensive discussion of the process of incorporation, the changes it would bring in terms of local government, and any impact on the bands' interests. A representative from the Ministry of Community and Rural Development (Ms. Watson) was to attend to discuss mountain resort municipalities and Ms. Brown hired a lawyer, Michael Vaughan, who specializes in municipal law, to attend the meeting.

[81] This information meeting occurred on September 8, 2008. Chief Leon did not attend but he sent two representatives for the Band. Ms. Watson provided information regarding regional districts and the difference between a regional district and a municipality. She also advised the bands that the existing MDA would have to be respected by the municipality. Ms. Watson answered questions from the bands concerning municipal boundary extensions, the process of incorporation, funding for the study of incorporation available to the bands (none existed), First Nations' voting rights in a municipality, impact on trap lines, and the inability to share tax revenues. In addition, Ms. Watson explained the powers of the Province to require a mountain resort municipality to form advisory committees, including First Nations representation.

[82] During the meeting, the bands expressed concern that the larger issues of aboriginal title had to be determined before incorporation could go ahead and Ms. Watson expressed the view that a municipality could not address federal or provincial issues such as aboriginal title. The bands said they required funding to investigate the impact of incorporation on their interests and that incorporation should not go ahead until the MDA and other Sun Peaks issues had been addressed in the consultation. Ms. Watson informed the bands that incorporation was not tied to these other issues even though they were included in a single consultation. Although Ms. Watson asked for a detailed summary of the bands' concerns and their funding requirements, she never received this information.

[83] Ms. Brown followed up the September 8, 2008 meeting with a summary of the matters discussed and provided the bands with contact numbers for Mr. Vaughn, Ms. Watson and the other government representatives who attended the meeting if they wanted more information about the impact of incorporation. In October 2008, Ms. Brown sent additional information to the bands about road construction jurisdiction within a municipality. On October 14, 2008, Ms. Brown met with the chiefs of the Lakes Division bands and she was given a draft agreement to negotiate an accommodation that was essentially the same as her draft; however, the funding estimate included in the draft was $250,000 for all three bands that had to be specifically accounted for as expended from trust. At this meeting, the Little Shuswap band indicated a desire to break away from any joint consultation with the other bands due to the slow progress to date.

[84] On November 3, 2008, Ms. Brown and Ms. Watson met with the chiefs of the Lakes Division bands and provided them with a revised draft consultation agreement which was in

an entirely new format. The agreement contemplated a consultation with respect to three proposed decisions: (1) the proposed MDA amendments to extend the term by ten years and to permit Sun Peaks Corporation to authorize recreational activities without government permission; and (2) the proposal to transfer the authority to administer timber resources on Crown lands within Sun Peaks to the Ministry for Community and Rural Development. Although the incorporation process was not included as a proposed decision, the purposes of the agreement included consultation on this matter. The consultation with respect to incorporation was scheduled to complete by March 31, 2009. The consultation about the proposed decisions was to complete by July 31, 2009. $10,000 in funding was offered by the government to cover the costs of the consultation; however, Ms. Brown advised that additional funding could be made available. The bands felt the funding was inadequate but agreed to work with the proposed form of agreement. The bands were particularly concerned that there was no government funding available for the review of the consultation framework agreement. Funding would only be provided after they signed the agreement.

[85] During the November 3, 2008 meeting, the bands expressed a concern that the timeline in the draft agreement could not be met and proposed that the Minister delay the question of incorporation until the consultation had concluded. In response, Ms. Brown's notes indicate she said:

> ... it is important for us to all move forward with the consultation on incorporation as quickly as possible - this part of the consultation is more an exchange of information and further exploration of potential impacts to the Bands, which we would then carry forward. Then we will move on to consultation on the MDA /RTAA decisions, followed by any accommodation (mitigation or compensation).

[86] On November 20, 2008, the Little Shuswap band signed a consultation agreement that was identical to the government's draft except that incorporation was included as a "proposed decision".

[87] On December 19, 2008, Ms. Brown forwarded a budget to the bands for consideration. The draft contemplated that each band would receive up to $28,300 in funding for the consultation process. Ms. Watson and Ms. Brown met with Chiefs Leon and Wilson on January 5, 2009. During this meeting, Ms. Brown provided the chiefs with another copy of the MDA and maps of the proposed incorporation areas based on the larger Sun Peaks controlled recreation area and the smaller Sun Peaks Improvement District boundaries. The chiefs indicated a desire for co-management with the municipal council; input into environmental issues, particularly mining and fishing; and accommodation for past infringements. While Chief Leon preferred a veto right, he was also interested in an advisory role. His primary concern was receiving some benefit for the rights acquired by the municipality over their traditional territory and to share in the economic benefits generated in the area. Subsequent to this meeting, Ms. Brown provided the chiefs with a summary of the proposed changes to the MDA.

[88] Ms. Brown was scheduled to be away on vacation from February 2009 until April 6, 2009. As a consequence, she attempted to have the remaining bands sign the consultation agreement before she left and to schedule another meeting. Neither of these events transpired. While she was on vacation, another staff member attempted to accomplish these

objectives; however, he was not successful. The deadline for consultation on the incorporation process was changed to June 30, 2009.

[89] On March 4, 2009, Ms. Watson responded to Chief Wilson' s request for additional information about the services that a Sun Peaks municipality would take on after incorporation. Ms. Watson forwarded to Chief Wilson a list of all the services, which included roads, tax collection, subdivision approval, and formulation of an official community plan that was consistent with the MDA. She also offered to extend the completion date for the consultation.

[90] On May 15, 2009, Mr. Furey, Assistant Deputy Minister for the Ministry of Community and Rural Development wrote to Chief Leon and Chief Wilson outlining the consultation with respect to incorporation that he believed had occurred to date, the information provided to the bands during the consultation, the offer of funding, the failed attempts to negotiate a consultation framework agreement, and the potential concerns raised by the bands. The three concerns included by this letter are: (1) potential impacts on claimed aboriginal rights and title; (2) impacts on traditional use and sacred sites; and (3) the provisions of the 1993 MDA. On the question of aboriginal rights and title, Mr. Furey stated:

> The Province has a legal duty to consult with First Nations and, where appropriate, accommodate impacts on Aboriginal rights and title. To fulfill this obligation, MTCA and MCD have provided to the Neskonlith Indian Band extensive information on the incorporation process and worked to develop a Consultation Agreement ...
>
> During this consultation process the Neskonlith Indian Band raised concerns about the Crown land that is proposed to be included within a possible Sun Peaks resort municipality. The current study process is considering two boundaries ... The Neskonlith Indian Band has expressed a preference for the area outside of the SPMRID boundary to remain rural. This preference will reviewed by MCD as part of the next steps in the study process.
>
> Other concerns raised by the Neskonlith Indian Band regarding potential impacts of the MDA on Aboriginal rights and title may be better addressed in consultations with MTCA related to proposed amendments to the MDA.

[91] Addressing the MDA, Mr. Furey indicated that its provisions were outside the scope of the incorporation study process because if Sun Peaks became a municipality it would be required to comply with the terms of the MDA.

[92] On June 10, 2009, Ms. Brown met with Chief Wilson and her two consultants. Chief Wilson represented her band and Chief Leon. During this meeting the participants discussed the bands' view that the draft consultation agreement was too narrow in focus; that the incorporation decision should be delayed until all the consultation issues were concluded; that funding of $50,000 would be required; and that the bands wanted a copy of the updated Technical Report. The participants also discussed the issue of road access within Sun Peaks; the Sacred Circle area; socio-economic studies; accommodations such as revenue sharing; acquisition of Crown land by the bands; and outstanding concerns about incorporation. Ms. Brown advised the bands that in her view incorporation did not change ownership of the land and that the municipality would only be taking over the role now played

by the Regional District. The agenda for the next meeting included a discussion of options within incorporation; such as partnerships.

[93] Chief Wilson requested a meeting with the Minister of Tourism, Kevin Krueger, to discuss the incorporation study. This meeting was held on July 2, 2009. Chief Leon did not attend. Mr. Krueger advised Chief Wilson that the government believed the consultation process with regard to the incorporation decision was complete but that the consultation concerning the MDA would be ongoing and if incorporation issues arose in that consultation the government would address them. The Minister did not suggest that either the referendum vote or the decision to grant incorporation would be delayed pending the MDA consultations. Chief Wilson objected to the Minister's characterization of the process; she said the bands had not yet set up the framework for consultation and had not yet received the requested record of the consultation process to date. The bands believed that the MDA consultation would clarify the impact of incorporation on their interests and that they would support incorporation, "once it is determined how we got to this point." Somewhat inconsistently, Ms. Brown and Ms. Watson commented that the incorporation decision had not been made and that the parties had until December 2009 to engage in further consultation.

[94] While Chief Wilson questioned whether the economic impact of incorporation had been addressed, Ms. Watson reiterated that incorporation would not have an impact on federal or provincial jurisdiction over aboriginal claims. Nor would it result in a change of ownership in Crown lands. Ms. Brown indicated that the government to government discussions about the MDA would remain the same if Sun Peaks was incorporated and in that consultation the government was prepared to consider revenue sharing options. Chief Wilson responded that their concerns included who was going to control the municipality with an influx of people due to the expansion of the resort and the issue of non-resident voters. Their interests would be better served by having an "individual more discreetly involved in the process." Chief Wilson's concerns about the environmental impact of the resort expansion were deferred by Ms. Watson to the MDA consultation.

[95] Chief Wilson expressed a need to seek legal advice as to whether the duty to consult had been satisfied and, further, that the bands needed to review the material disclosed by the government to determine if more work was required. She committed to working on the framework process and the budget. The meeting ended with Ms. Watson advising that the updated incorporation study would be ready by the end of August 2009 and the referendum vote would be held in the fall.

[96] Although Ms. Brown contacted the Lakes Division bands on July 10, 2009 to organize consultation meetings in regard to the amendments to the MDA and the transfer of the timber administration, she did not attempt to set up meetings to discuss the incorporation after the July 2, 2009 meeting with Mr. Krueger. Moreover, due to the government's insistence that there would be no funding for the negotiation of a consultation agreement, the Band's view that the funds offered for the consultation process were inadequate to resource the information gathering studies necessary to properly understand the impact of the proposed decisions on their rights, the limited scope of the framework agreement proposed by the government and its deadlines for completion of the consultation, and the limited accommodations offered to date, the Band did not believe further meetings would be fruitful.

[97] On November 2, 2009, Mr. Furey again wrote to the Lakes Division bands to advise them of the November 27 and 28, 2009 public meetings scheduled to discuss the updated Technical Report. He also outlined the contents of the update. In addition, Mr. Furey described the accommodation the government was prepared to make with regard to incorporation as a result of its consultation with the Lakes Division bands as follows:

> In response to comments received during consultation with you, the Province proposes the creation of an advisory committee that would include First Nations representatives to provide advice to the new municipal council on land matters. In addition, the new municipality will need to consider consultation with First Nations in the development and amendments to the municipality's Official Community Plan, which will require the approval of the Minister of Community and Rural Development. ...
>
> The [MDA] will not be affected by a change in local governance. Should the Sun Peaks community incorporate as a mountain resort municipality, the Official Community Plan will need to be consistent with the MDA.

[98] In late November 2009, the bands were quoted in the local newspapers as saying the consultation process about incorporation was not yet complete. Ms. Brown attempted to discuss these comments with the chiefs but was not successful. She eventually forwarded an internet link to the updated Technical Report to the bands and questioned whether they would be attending the public meetings scheduled prior to the referendum vote. Chief Wilson and Chief Leon attended a public meeting and were given five minutes each to express their views on incorporation. In December 2009, Ms. Brown continued her attempts to arrange consultation meetings with the bands about the MDA amendments.

[99] On December 4, 2009, the Minister of Community and Rural Development ordered a referendum vote be held with respect to the incorporation decision and it was held on January 30, 2010. A majority of voters affirmed a desire to incorporate.

[100] On January 4, 2010, Chief Wilson wrote to Mr. Krueger and expressed her view that the incorporation consultation had not been adequate. It was her belief that without more complete information and an examination of all the issues surrounding the Sun Peaks development, the bands could not properly assess whether incorporation, the MDA amendments, or any other proposed government action would adversely affect their rights. The lack of any consultation record and environmental studies were highlighted as problems. She reiterated a concern that the $10,000 funding offer was inadequate to cover the cost of studying the issues. Chief Wilson also expressed a concern that the "real decision makers" had not been involved in the consultation until now. This is a reference to Mr. Krueger's decision to hold a discussion meeting on January 6, 2010.

[101] On January 7, 2010, Mr. Nordquist, a Band representative, requested that Ms. Brown provide a copy of the MDA, a consultation record and the strength of claim analysis that the government was producing. Ms. Brown responded, saying there was no consultation record or strength of claim analysis. The latter was in the process of being prepared.

[102] On January 29, 2010, Mr. Krueger conducted a telephone conference with representatives of Lakes Division bands, including Chief Leon. At this meeting Chief Leon and Chief Wilson distributed a joint statement. While the joint statement says that incorporation should not proceed until their aboriginal rights issues are resolved, the minutes

of the meeting indicate that the bands anticipated the consultation process would continue and to this end discussed more comprehensive consultation framework agreements. The joint statement indicated the bands were opposed to incorporation because it was aimed at further "third-party alienation of our lands." To that end, the statement called upon the government to act as follows:

> We therefore request that the province not attempt to make any unilateral decisions regarding the Sun Peaks Master Plan, municipal incorporation, tenure transfers, and by-law amendments, in the absence of the Aboriginal Title issue being addressed. Any meaningful dialogue has to involve federal representatives and decision-makers who can address Aboriginal Title issues and has to respect the indigenous prior informed consent requirement. All relevant information has to be provided and sufficient funds and time has to be allotted to study the potential impact of any proposed developments or changes on our Aboriginal Rights and Title. In conclusion:
>
> There should be no new municipalities created in Secwepemc territory without the agreement of the Secwepemc people and until there is recognition of our Aboriginal Title.

[103] On February 11, 2010, Chief Leon again wrote to the various Ministers about the proposed incorporation of Sun Peaks. In this letter, Chief Leon asked to be provided with a list of the documents the government was considering in preparation of an analysis of their aboriginal rights and title to the disputed lands. He also referred to the government's promise to provide the Band with a strength of claim analysis and the failure to fulfill this promise. In addition to his concern that insufficient information had been provided in regard to the impact of incorporation on aboriginal rights, Chief Leon described the problems the Band had identified:

> 1. The municipality will exercise land use powers that were previously reposed in the Province. Municipalities do not have a clear obligation in law to consult with First Nations when it proposes a by-law that affects aboriginal rights.
>
> 2. The 2009 Technical Report update indicates that the Province will be able to impose special governance provisions on the municipality that preserves Sun Peaks Resort Corporation's contractual interests and further erodes aboriginal interests. It is not suggested in the report that aboriginal rights can be preserved in the same fashion.
>
> 3. An advisory committee to the municipality does not reflect the constitutionally protected rights of the Band. It is a derogation of aboriginal rights to equate First Nations with stakeholders such as business and non-resident owners.

[104] Chief Leon also reiterated his desire to have all of the issues relevant to the Sun Peaks development addressed in the same consultation process and underlined the need for research to be carried out in regard to the strength of their claims and the potential impact of the Sun Peaks development on their aboriginal rights. He ended the letter with a request for a meeting to formulate a comprehensive consultation framework and asked that no decisions be made with respect to Sun Peaks until the consultation process was complete.

[105] On February 24, 2010, Chief Leon wrote to the Premier requesting that all decisions surrounding Sun Peaks be postponed until their aboriginal rights in regard to the lands were determined. He also articulated an additional governance concern as follows:

> The management of Sun Peaks and Resort Association have not set up true participatory processes... A "local government" would just further enshrine this oligarchy whose sole goal is to seek the further third party alienation of Secwepemc jurisdiction. Sun Peaks as a local government would actively seek to undermine Secwepemc lands for real estate speculation. The track record of Sun Peaks so far in dealing with Aboriginal Title issues has been dismal, with the management of Sun Peaks openly adversarial to Aboriginal Peoples who assert their Aboriginal Title and rights. To make Sun Peaks into a municipality would further remove checks and balances on developments in the area. Sun Peaks already has an extensive file with the Minister of Environment for violations of environmental regulations. ... Environmental, social and cultural costs are routinely externalized. To make Sun Peaks into a municipality would be to have the fox guard the henhouse.

[106] On March 5, 2010, the Assistant Deputy Minister of Tourism wrote to Chief Leon in response to his letter of February 11, 2010. Mr. Walters reiterated the government's position that the incorporation consultation was completed in July 2009 and that it had been adequate. The questions posed by the bands had been answered and the issues raised by the bands had been accommodated by the creation of a First Nations advisory committee and a requirement for the Provincial government to approve the municipality's land use plan and by-laws. He assured Chief Leon that the municipality had to respect constitutionally protected aboriginal rights and that the incorporation consultation could not address aboriginal title claims. He underlined the Band's primary concern was the development of the Sun Peaks resort and that this would be addressed in the ongoing consultation process with respect to the MDA. Lastly, he promised to provide a copy of the government's strength of claim assessment within two weeks.

[107] On March 10, 2010, Ms. Brown emailed the Lakes Division bands a document entitled, "Sun Peaks Resort: A Review of the Historical and Ethnographic Sources Relating to Aboriginal Use and Occupation." She advised the bands that this document will "inform the assessment of strength of claim" for the Sun Peaks area. She also asked for comments on the document. It was her understanding that any legal opinion secured by the government with regard to a strength of claim analysis would not be shared with the bands due to solicitor client privilege. This information was not included in her email to the chiefs.

[108] The Order in Council establishing the Municipality and the Letters Patent were prepared on March 9, 2010 and granted by the Lieutenant Governor in Council on March 25, 2010. By letter dated March 31, 2010, Mr. Furey advised Chief Leon of this decision. Chief Leon deposed that he did not receive notice of the incorporation decision until May 20, 2010 when another ministry communicated with the Band about a proposed road access linking Sun Peaks to the McGillvray Forest Service Road.

[109] On May 26, 2010, the Band's legal counsel wrote to the Minister of Community and Rural Development setting out the Band's position that the consultation with regard to incorporation could not have been adequate in advance of any assessment of the strength of the aboriginal rights claim. A request for such an assessment was reiterated in the letter. In response, the government asserted solicitor client privilege over their strength of claims assessment.

[110] On June 12, 2010, the first Mayor and counsellors were elected for the Municipality. Mr. Raine was elected Mayor along with three counsellors who were on the board of directors for the Sun Peaks Improvement District. Mr. Raine wrote to Chief Leon on July 28, 2010, inviting him to nominate a representative on the First Nations Advisory Committee. It was Mr. Raine's intention to be the municipal representative on the committee. He also commented on the Municipality's authority over First Nations issues, "As you know, the authority of the council on matters concerning First Nations is extremely limited, however, there are bound to be issues such as zoning and land use where the concerns of the First Nations can be considered by the municipality." The Band did not respond to this invitation.

[111] On September 20, 2010, the Municipality passed a by-law prohibiting the discharge of a firearm or a bow and arrow or a crossbow within the limits of the Municipality. The by-law was passed without consultation with the Lakes Division bands and without notice to the bands. It is apparent that the by-law interferes with the aboriginal right to hunt in the area within the Municipality's boundaries that is claimed by members of the Lakes Division bands. Mr. Raine deposed that he learned after the fact that the by-law may affect aboriginal hunting and he met with Chief Leon to discuss exemption of band members from the by-law.

[112] On January 13, 2011, the Province wrote to Chief Leon giving notice that it had received an application from Sun Peaks Resort Corporation for a licence to cut timber within the boundaries of the Municipality. In this letter, the Province outlined the research material it considered to assess the aboriginal rights of the Band in the area affected by the licence, which included the affidavits filed in this action. A preliminary strength of claim assessment was also provided, as follows:

> The Adams Lake Indian Band has a strong prima facie claim to aboriginal rights to hunt and gather plants for both food and medicinal purposes within the proposed licence to cut areas. Adams Lake Indian Band may also have a prima facie aboriginal rights claim to use certain areas for cultural purposes. The TUS identifies an area of spiritual importance that overlaps with some of the forest management treatment units, but it is uncertain what cultural practices this may relate to. There is a weak prima facie claim to aboriginal title in the proposed licence to cut areas, as these areas are in locations that were likely only occupied for brief periods while hunting or gathering.

THE LETTERS PATENT

[113] On March 25, 2010, the Lieutenant Governor in Council passed Order in Council 158/2010, which issued letters patent to the Municipality, amended the letters patent for the Thompson Nicola Regional District to reflect the transfer of jurisdiction to the Municipality, revoked the letters patent issued to the Sun Peaks Resort Improvement District and transferred its powers and authority to the Municipality, and provided that the Improvement District's by-laws continued in force until the Municipality amended or replaced them. The letters patent establishing the Municipality did not come into force until June 28, 2010.

[114] The Municipality was incorporated under s. 11 of the *Local Government Act*, which applies exclusively to mountain resort municipalities. The boundary of the Municipality is the Sun Peaks Controlled Recreation area. The letters patent mandate the establishment of three advisory committees: business, non-resident owners, and first nations. The advisory committees cannot be dissolved before December 31, 2014 and the purpose of the

committees is to advise the municipal council on matters within its authority that relate to business, non-resident owners, and first nations. The letters patent require the Municipality to prepare an official community plan before June 28, 2012, and it must be approved by the Minister. In addition, any by-law addressing land use passed before the official community plan is approved must also be approved by the Minister. Lastly, the Minister may appoint one counsellor to the Municipal council. This provision is to ensure that there is a representative of the Sun Peaks Resort Corporation on the municipal council.

DISCUSSION

A. The Duty to Consult and Accommodate – Existence of the Duty

[115] The Provincial government, through its various ministries, has a duty to consult with aboriginal people and, where possible, to accommodate their interests to uphold the honour of the Crown. In *Haida*, the Supreme Court of Canada held that the honour of the Crown is always at stake when the government deals with aboriginal people. In all its dealings with aboriginal people the Crown must act honourably. The honour of the Crown is not just a platitude; it has concrete application to the relationship between the Crown and aboriginal people. As described by Sopinka J. in *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41:

> At the outset, it may be helpful to once again set out some of the applicable principles of interpretation. ... [T]he honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned. ... [A]ny ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians. A corollary to this principle is that any limitations which restrict the rights of Indians under treaties must be narrowly construed.

[116] The honour of the Crown must be interpreted generously to reflect the purposes underlying the entrenchment of aboriginal rights in s. 35 of the *Constitution Act*. That purpose is succinctly described in the following passage from *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*] at paras. 30-31:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples <u>were already here</u>, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.
>
> [Emphasis in original.]

[117] While the honour of the Crown requires that aboriginal rights be determined, it is recognized that this process may take years, if not decades, to complete. While the process of honourable negotiations to resolve these questions continues, the Crown may be obliged to consult and accommodate aboriginal interests that are asserted but not yet proven: *Haida* at paras. 31-34.

[118] The duty to consult with respect to unresolved aboriginal claims arises in an extremely broad range of circumstances. As McLachlin C.J.C. says in *Haida* at para. 35:

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J.

[119] In this case, the Municipality argues that Order in Council 158/2010 is a legislative act and as such it is not subject to the duty to consult. In addition, the Municipality argues that the court has no jurisdiction to grant an order quashing the Order in Council because it is a legislative act. The Attorney General agrees there is a duty to consult, but supports the Municipality's position that the court has no jurisdiction to quash the Order in Council. The Band argues the Order in Council is not legislative in character and, in any event, it is the exercise of a statutory power of decision that is being reviewed pursuant to s. 5 of the *Judicial Review Procedure Act*. Further, the Band argues that the court has jurisdiction to quash the Order in Council where it is preceded by inadequate consultation regardless of its legislative character.

[120] The arguments of the parties raise three issues:

(1) Whether the decision in this case is a legislative act;

(2) If the decision is a legislative act, is it beyond the scope of the duty to consult?

(3) If the duty to consult applies to a legislative act, what remedies are available in the event of a breach of this duty?

[121] Addressing the first issue, in *Sinclair v. Quebec (Attorney General)*, [1992] 1 S.C.R. 579 [*Sinclair*], the Supreme Court of Canada concluded that an Order in Council that issued letters patent for the amalgamated cities of Rouyn and Noranda constituted a legislative act for the purpose of s. 133 of the *Constitution Act*. Relying upon their judgment in *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, the Court held that since the purpose of s. 133 was to facilitate equal access to the legislatures, laws, and courts for both English and French speaking Canadians, this provision must apply to statutes in the strict sense and to all other instruments of a legislative character. In particular, the Court concluded in the reference that certain types of orders in council may have a legislative character. Additional indicia of legislative character were enumerated in *Sinclair* at 587 as follows:

1. The instrument embodies a rule of conduct;
2. The instrument has the force of law; and

3. The instrument applies to an undetermined number of persons.

[122] Having regard to the purposes of s. 133 of the *Constitution Act*, the Court in *Sinclair* held that the order in council and the letters patent constituted the exercise of a statutory discretionary power that was legislative in character: at 589 and 593.

[123] In my view, *Sinclair* goes no further than establishing that an order in council issuing letters patent to a municipality may be an instrument that has a legislative character. Certainly, Order in Council 158/2010 is not a statute in the strict sense. It was not an Act passed by the Legislature. Moreover, the steps leading to Order in Council 158/2010 were not legislative in character. Section 8 of the *Local Government Act* mandates that a public referendum in favour of incorporation be secured before the Minister may consider recommending incorporation to the Lieutenant Governor in Council. However, neither the Minister's discretion to make such a recommendation or the Lieutenant Governor in Council's discretion to grant incorporated status requires a legislative act or process. At its core, the Lieutenant Governor in Council is exercising a statutory power of decision and that decision was imbued with the force of law by a quasi-legislative instrument.

[124] It is in this context that I turn to the second issue; that is, whether the duty to consult arises with respect to the Order in Council or to any of the steps leading to it. In my view, the duty to consult cannot be ousted on the basis that the exercise of a statutory power became law by the issuance of an order in council. This was clearly the conclusion in *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137 [*Tsuu T'ina*]. In that case the provincial government argued there was no duty to consult with regard to a water management plan put in place by an order in council because of the legislative character of the order in council. The Alberta Court of Appeal held that the fact that the plan was adopted by an order in council did not insulate the development of the plan from the duty to consult: *Tsuu T'ina* at para. 57. Moreover, O'Brien J.A.'s comments at paras. 52 and 55 of *Tsuu T'ina* suggest that it is only the passing of the legislation or the pronouncement of the order in council that may not be caught by the duty to consult:

> In my view, the argument raised by the Crown does not go beyond consideration of whether or not the quashing of the Order in Council is a proper remedy. An inability to quash legislation, if that be the case, does not mean that consultation is not required when drafting plans for development of natural resources, nor does it preclude the availability of declaratory relief in appropriate circumstances.
>
> ...
>
> Accordingly, even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions. ...

[125] The Municipality relies on *R. v. Lefthand*, 2007 ABCA 206 [*Lefthand*], leave to appeal to SCC refused, [2007] S.C.C.A. No. 468 as an authority for the proposition that the duty does not apply to the passing of an order in council. In particular, the Municipality refers to para. 38 of *Lefthand.* Bearing in mind the statements by the Court of Appeal are obiter because there was no proven infringement of an aboriginal right, Slatter J.A. also concluded

that the processes leading up to the passing of legislation could attract the duty to accommodate: *Lefthand* at para. 39.

[126] The Municipality's submission on this issue is not supported by *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto Alcan*]. In that case the Supreme Court of Canada raised the issue of whether government conduct attracting a duty to consult included legislative action but declined to confirm or reject the views of the Alberta Court of Appeal in *Lefthand.* Nor is the Municipality's argument supported by *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722 [*Cook*]. In that case, Garson J. (as she then was) held that when the Minister engaged in negotiations leading to the signing of the final agreement with the Tsawwassen First Nation Band, he was not exercising a statutory power of decision but a prerogative power or a natural person power: *Cook* at para. 68. As a consequence, the Minister's actions could not be reviewed pursuant to the *Judicial Review Procedure Act.*

[127] The Municipality also argues that the duty to consult will only arise when the Crown's actions involve an alienation of Crown lands or the use and extraction of resources from land. In light of the very broad parameters of the duty to consult articulated in *Haida*, the fact that many of the authorities cited by the parties involve the sale of land or the loss of resources on lands claimed by aboriginal groups does not lead to an inference that the duty to consult is limited to these types of situations. Moreover, a change in governance necessarily has an impact on the lands claimed by the Band because it is the Municipality that will now exercise jurisdiction over Sun Peaks in a manner that may or may not adversely affect the aboriginal rights and title claimed by the Band.

[128] In my view, the decision of the British Columbia Court of Appeal in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 [*Musqueam Indian Band*], to suspend an order in council approving the sale of UBC endowment lands to permit consultation with the Musqueam band, and the reasoning in *Tsuu T'ina* described above, clearly support the Band's position that there is a duty to consult in the circumstances of this case. All of the steps leading to the decision to issue the letters patent appropriately engage the honour of the Crown *vis-à-vis* its dealings with the Band. The discretion exercised by the Lieutenant Governor in Council pursuant to s. 11 of the *Local Government Act* is a statutory power of decision reviewable pursuant to s. 5 of the *Judicial Review Procedure Act* and I find there is no justification for insulating Order in Council 158/2010 from the duty to consult simply because it has a legislative character. The Lieutenant Governor in Council, when exercising a statutory power of decision, must act within constitutional limits, including those imposed by s. 35 of the *Constitution Act*.

[129] The final issue is whether the legislative character of Order in Council 158/2010 limits the nature of the remedies available to the Band. I intend to address this issue after I have decided the substantive questions raised by the Band's application for judicial review.

<u>B. The Strength of Claim Analysis</u>

[130] In this case, the Attorney General acknowledges that the Province had an obligation to consult with the Band about the potential impact of the incorporation of Sun Peaks on its aboriginal rights and title to these lands. This acknowledgement, in my view, presumes a

belief that the Band's claims with respect to Sun Peaks were credible. The Attorney General does not deny that the Province had knowledge of the claims asserted by the Band and, based on the historical relationship between the parties, there can be no question that the Province was aware that the Band had asserted aboriginal claims in regard to Sun Peaks. The dispute between the parties is the scope and content of the duty to consult on the facts of this case and the Crown's obligation to make a preliminary assessment of the strength of the claims asserted in order to have a properly informed view of the scope of consultation.

[131] On my review of the authorities, it is well established that where the Crown has notice of a claim asserted by an aboriginal group and the duty to consult has been triggered, the Crown is obliged to make a preliminary assessment of the strength of the claim and the potential impact of the proposed decision on the asserted rights. The Crown's obligations also extend to providing the affected aboriginal group with an opportunity to comment on these preliminary assessments. This is necessarily a key step in the consultation process because the scope of the duty to consult is "proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.": *Haida* at para. 39.

[132] I disagree with the Attorney General's argument that it is sufficient if the Crown determines the level of impact on the rights asserted as a means of defining the extent and scope of the duty to consult. This characterization of the Crown's obligation to consult leaves out half of the equation. As McLachlin C.J.C. confirmed in *Haida*, "one cannot meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope.": at para. 36. The Attorney General's position is also inconsistent with several passages in *Haida* where McLachlin C.J.C. confirms that the stronger the rights claimed, the more stringent the duty to consult: *Haida* at paras. 37, 39 and 43. The importance of an assessment of the strength of claim, as informing the content of the duty to consult, is also affirmed in *Rio Tinto Alcan* at para. 36.

[133] In *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 [*Wii'litswx*], Neilson J. (as she then was) concluded that the Ministry of Forests had failed to reasonably assess the scope of the duty to consult and accommodate because of its misconceived view of the strength of the claims asserted by the Gitanyow to the forest lands affected by the Ministry's decision to replace forest licences in this area. At para. 147 of the judgment, Neilson J. held that the Crown was obliged to make a preliminary assessment of the strength of the claim and the potential impact of the proposed government decision on aboriginal interests at the outset of the consultation:

> The Crown's preliminary assessment of the strength of the claim and the potential adverse effect of government action on aboriginal interests must be made at the outset of the proposed consultation, if it is to inform the scope and extent of that process. In this case, there is nothing to indicate that the Crown made such an assessment before embarking on the consultation with Gitanyow with respect to the FL replacements.

[134] The failure to conduct a preliminary assessment of the strength of the claim and a minimization of the potential adverse impact on aboriginal interests led to a conclusion that the Crown underestimated the extent of the duty to consult. As Neilson J. says in *Wii'litswx* at para. 245:

> ... First, the Crown failed to make a proper preliminary assessment of the scope and extent of its duty to consult and accommodate. There is nothing to indicate that it attempted to make that assessment at the outset of the consultation, so that it could inform the process. Further, Mr. Warner's assessment at the end of the process unreasonably minimized both the strength of Gitanyow's claim and the potential adverse impact of the FL replacement decision on its interests. The inevitable conclusion is that this led the Crown to underestimate its obligation to understand and address Gitanyow's concerns in the course of the consultation about the FL replacement decision.

[135] Grauer J. in *Klahoose* followed *Wii'litswx* and held at para. 18 that the Crown was obliged to make a preliminary assessment of the scope of the duty to consult in the particular circumstances. Further, in light of Dillon J.'s reliance on the discussion of the content of the duty to consult in *Haida*, I am unable to accept that "or" is used in a disjunctive sense at para. 126 of *Huu-Ay-Aht First Nation* wherein it was noted: "[t]o fail to consider at all the strength of claim or degree of infringement represents a complete failure of consultation based on the criteria that are constitutionally required for meaningful consultation." Indeed, Dillon J., in the same passage, relies on the judgment in *Musqueam* at para. 91, and says, "...a practical interim compromise failed to meet the tests enunciated by the Supreme Court of Canada when it was not informed or conditioned by the strength of claim and degree of intervention analysis." The strength of claim analysis is central to the duty of consultation owed in the particular circumstances.

[136] In *Husby Forest Products Ltd. v. British Columbia (Minister of Forests)*, 2004 BCSC 142 [*Husby Forest*], Garson J. (as she then was) described the stages of consultation. The identification of the aboriginal rights and the strength of the claim is to be carried out by the government at the outset of the consultation process. In this regard, Garson J. says at para. 81 of *Husby Forest*:

> In summary, it was incumbent on the District Manager to consult with the aboriginal people in order to identify the scope of the aboriginal right that the Haida alleged would be infringed by the cutting permit, if granted. The content of that consultation at the first stage would then be to define the scope of the right claimed. The decision maker must then consider the strength of the claim in the area in question and whether or not the impugned activity would infringe on the aboriginal right claimed and identified. If he determined that the activity did so infringe then the decision-maker must consider the four questions in *Sparrow* in order to determine if the Crown has justified the infringement. Overlying these three stages is the duty to consult and seek workable accommodations.

[137] The authorities relied upon by the Attorney General wherein the Crown was not faulted for failing to make a preliminary assessment of the strength of the claims asserted by the aboriginal groups are situations in which the rights had already been well established. In *Beckman*, the Supreme Court of Canada was concerned with aboriginal rights already recognized in a treaty with the Federal government. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*], the strength of the claim was known because the affected lands had been surrendered in a treaty and the right to use the lands for hunting and fishing was expressly subject to a "taking up" limitation for other non-aboriginal uses. Moreover, at para. 63 of *Mikisew*, Binnie J. acknowledged both the strength

of the claim and the impact of the infringement on aboriginal rights as important contextual factors informing the level of consultation required.

[138] On the evidence before me, the Province did not conduct a preliminary assessment of the strength of the claim for aboriginal rights and title advanced by the Band for the purpose of its consultation about the incorporation of the Municipality. Nor did the Province provide the Band with an opportunity to comment on its preliminary assessment of the strength of its claims regarding Sun Peaks. Further, the Province did not make inquiries of the Band in regard to the nature and scope of the aboriginal rights and title they were advancing as part of the Secwepemc Nation. Accordingly, I find the Province failed to adequately fulfill the first stage of the consultation process.

C. The Impact of Incorporation on the Band's Aboriginal Rights and Title to Sun Peaks

[139] The seriousness of the potential adverse impact of the decision to incorporate the Municipality on the aboriginal rights and title to Sun Peaks advanced by the Band is the other primary factor that defines the content of the duty to consult and accommodate: *Haida* at para. 39. The Province must be correct in its assessment of the potential adverse impact on the rights and title claimed by the Band: *Haida* at para. 63.

[140] The Attorney General argues that there was no impact on the interests of the Band in regard to Sun Peaks stemming from the decision to incorporate the Municipality. Whatever wrongs were committed in the past in connection with the development of Sun Peaks cannot now support a claim of adverse impact: *Rio Tinto Alcan* at para. 49. The Attorney General argues that while there was a change in local government, there was no change in regard to the rights of the Band and the interests it claimed in Sun Peaks. The Municipality must comply with the MDA and its land use by-laws and its official community plan must be approved by the Province. The incorporation of the Municipality does not interfere with the Province's ability to consult with the Band in regard to the development of Sun Peaks. Although the Municipality has no independent legal obligation to consult, the Municipality, like the Regional District, must consider whether consultation with First Nations is required when it establishes or amends its official community plan. The Province will oversee any consultation to ensure the honour of the Crown is upheld: *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484 at para. 25. The Municipality supports the position of the Attorney General on this point.

[141] The Band argues that on the facts of this case the Province did not come to a conclusion that the incorporation decision would have no impact on its aboriginal rights and interests in Sun Peaks. Instead, the Band says the Province maintained the Municipality would respect aboriginal rights because it was constitutionally mandated and, further, their land claims are better addressed in other processes.

[142] In addition, the Band argues the incorporation of the Municipality is a structural or strategic high level decision that has both a potential for immediate and future adverse impacts on its aboriginal title and claim to Sun Peaks. The level of consultation is not determined solely by the changes brought about by the incorporation but it is also governed by the potential for future changes that may affect aboriginal rights. Because the Municipality will now have a distinct influence and authority over the nature of the development at Sun

Peaks, and the process by which decisions about development will be made and implemented, the Band argues incorporation may have a serious impact on their aboriginal rights. The Band argues that the court cannot look at the incorporation decision in isolation from the historical context of the MDA, the development of Sun Peaks, and the importance of the Municipality to the resort. The Band also argues that the incorporation has an impact on its ability to consult with government about proposed decisions that affect its interests because the Municipality will now have jurisdiction over a broad range of matters, only one of which is land use. In this regard, the Band points to the fact that a municipality has no constitutional duty to consult.

[143] Fundamentally, the Band argues, the court is not concerned with what has changed in terms of the local government but what impact the incorporation has or may have on the unresolved claims to aboriginal title and rights it is asserting. A change in the identity of the decision maker has just as much of an impact on the rights claimed as any substantive change in the nature of the authority exercised: *Gitxsan* at para. 82.

[144] The first question is precisely what adverse impacts are relevant to this inquiry. In *Rio Tinto Alcan*, the Supreme Court of Canada confirmed that the duty to consult is not confined to decisions or conduct that have an immediate impact on land or resources that are the subject of an aboriginal claim. A potential for future harm is sufficient: *Rio Tinto Alcan* at paras. 44 and 46.

[145] The duty to consult also extends to "strategic, higher level decisions" that may impact how and to what extent aboriginal rights may be exercised: *Rio Tinto Alcan* at para. 44. For example, the duty to consult arises in regard to the creation of a mechanism for determining future actions that may adversely impact aboriginal rights. In *Dene Tha'*, the Dene Tha' claimed the government breached its duty to consult because they were excluded from discussions that led to a plan for an environmental review process that would apply to the construction of the Mackenzie Gas Pipeline. Although the plan conferred no rights, it was characterized as a form of strategic planning that set up the means by which the environmental review process was to be managed for the entire project: *Dene Tha'* at para. 108. By depriving the Dene Tha' of an opportunity to have input into the terms of reference for the review process, the plan had a potential to adversely affect their aboriginal interests with respect to the pipeline project: *Dene Tha'* para. 114.

[146] *Rio Tinto Alcan* makes it clear, however, that past wrongs do not give rise to a current duty to consult unless the current decision has a "novel" adverse impact on a present claim or existing right: *Rio Tinto Alcan* at paras. 45 and 49. Within these parameters, there must be a purposive approach to the determination of the potential adverse impacts of a government decision on aboriginal claims. As McLachlin C. J. says in *Rio Tinto Alcan* at paras. 46 and 47:

> Again, a generous, purposive approach to this element is in order, given that the doctrine's purpose, as stated by Newman, is "to recognize that actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown" (p. 30, citing *Haida Nation*, at paras. 27 and 33). Mere speculative impacts, however, will not suffice. As stated in *R. v. Douglas*, 2007 BCCA 265, 278 D.L.R. (4th) 653, at para. 44, there must an "appreciable adverse effect on the First Nations' ability to exercise their aboriginal

right". The adverse effect must be on the future exercise of the right itself; an adverse effect on a First Nation's future negotiating position does not suffice.

Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on the lands and resources": Woodward*,* at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

[Emphasis in original.]

[147] Having defined the nature of the adverse impacts within the purview of the court's inquiry, I turn to the government's assessment of the potential adverse effects of incorporation on the aboriginal rights and title claimed by the Band. As noted above, the Province never carried out a strength of claim assessment nor identified the scope of the rights and title claimed by the Band. Thus it is difficult to understand how it could conclude there was no adverse impact. In any event, the Province embarked on a consultation process with the Band that included a discussion of the incorporation of Sun Peaks as a municipality. There was no suggestion in the Province's correspondence with the Band at the beginning of the process that the consultation would be a mere formality because there was no potential adverse impact on their aboriginal claims to Sun Peaks. Moreover, the fact the Province required the Municipality to create a First Nations advisory committee as an accommodation of the Band's interests suggests at least some adverse impact was contemplated in the exercise of the Municipality's jurisdiction. The later correspondence from the Ministry of Community and Rural Development, indicating they believed the incorporation consultation was complete, claimed that the Band's concerns had been heard and would be accommodated in the letters patent issued to the Municipality. Thus while it may be implied from the extent of the consultation and the accommodation offered by the Province that they believed the impact of the incorporation was minimal, I am unable to conclude the government assessed the impact as non-existent.

[148] I agree with the Attorney General that the change in local government from a regional district/improvement district form of governance to an incorporated municipality on its face placed the Band in no worse position that it was before incorporation. The Band's claim to aboriginal rights and title with respect to Sun Peaks was neither extinguished nor reduced by the change in local government. Incorporation did not involve the alienation of Crown lands or private property within Sun Peaks. Moreover, the Band's ability to protect its claims through involvement in local government decisions was actually improved by the creation of an advisory committee. The Band had no similar representation on the Regional District or the Improvement District.

[149] This superficial analysis, however, is not a sufficient inquiry into the issue of adverse impact. A close examination of the facts, even under this "before and after" comparison approach, reveals that from a practical perspective there were significant alterations in the spheres of influence and the balance of power, as between the Band and the Sun Peaks Development Corporation, with a corresponding reduction in Provincial government influence over the acts of the local government due to the independence gained through incorporated status.

[150] When the Municipality was incorporated, the Improvement District was dissolved and its authority and jurisdiction was inherited by the Municipality. The Improvement District had authority to provide fire, water, sewer, drainage, street lights, snow removal, and parks and recreation services. However, the actual services provided were fire protection and street lights. The Municipality also inherited parts of the authority and jurisdiction of the Regional District with respect to planning and zoning, economic development, building standards, electoral area administration, tax collection and the setting of tax rates, and the power to pass a wide variety of regulations governing use of firearms, parking, animal control, noise, building permits, etc. The *Community Charter* grants to a municipality considerable powers and independence to carry out its purposes, including: (1) providing for good government of its community; (2) providing services, laws and other matters for community benefit; (3) providing for stewardship of the public assets of the community; and (4) fostering the economic, social and environmental well-being of its community: 2009 Update Technical Report at p. 33. Lastly, the Municipality inherited the Province's responsibility to appoint an Approving Officer for sub-division approval, to set public road standards and provide maintenance and repair services, and to establish drainage standards, policies and works beyond roadways.

[151] As a consequence of these changes in jurisdiction, the Municipality acquired significant powers and authority over local governance that is beyond the supervision or control of the Province or the Regional District. The powers exercised by the Regional District prior to the incorporation of the Municipality, were monitored directly by the Province through the legislative requirement to obtain approval for land use by-laws. In addition, Sun Peaks, as an unincorporated rural area, had only nominal input into many other decisions made by the Regional District because its sole representative on the board of directors was the Electoral District P director who is elected to represent a large area, of which Sun Peaks is only a small part. Any by-law that affected only Sun Peaks could not be adopted without the approval of the Regional District's board of directors. The more limited powers of the Improvement District were monitored by the directors appointed to the board of trustees by the Province and by the legislative requirement to obtain the approval of the Province for numerous decisions, as well as a requirement to use provincially set financial policies: 2009 Update Technical Report at p. 14.

[152] The Municipality is not subject to the supervision of the Province except in regard to land use by-laws and the establishment of an official community plan. Thus the Municipality may potentially pass by-laws, make regulations, and establish financial policies that adversely impact the aboriginal rights and title claimed by the Band absent the supervision or control exercised by the Province and the Regional District prior to incorporation. An example of such a by-law is the Firearms By-law passed by the newly elected Municipal Council in the fall of 2010. This by-law had a direct and immediate impact on the Band's aboriginal right to

hunt within Sun Peaks. The Municipality did not consult with the Band prior to the passing of this by-law. Nor were First Nations interests considered in the municipal council's discussion of the by-law during the meetings preceding the adoption of the by-law.

[153] In addition, it is apparent that the incorporation of the Municipality pursuant to s. 11 of the *Local Government Act* significantly enhanced the ability of the Sun Peaks Resort Corporation to influence and control municipal policies and actions beyond the supervision of the Province. Prior to incorporation, the Province appointed one representative from the Sun Peaks Resort Corporation to the board of trustees governing the Improvement District. The Province has reserved to itself the authority to appoint a counsellor on the Municipal Council pursuant to the letters patent. The Province has appointed a representative of Sun Peaks Resort Corporation as its nominee on the council and passed Order in Council 157/2010 exempting this representative from the conflict of interest provisions in s. 108 of the *Community Charter* in respect to any remuneration he or she may receive from Sun Peaks Resort Corporation. In my view, this change has greatly enhanced the corporation's ability to control development within Sun Peaks. The corporation's representative has gone from being one of seven trustees, with very limited jurisdiction over a limited geographical area, to one of four council members and a mayor, with a considerably broader jurisdiction over the entire controlled recreation area of Sun Peaks.

[154] The appointment of a representative of the Sun Peaks Resort Corporation to the municipal council also potentially increases the corporation's ability to influence decisions made by the Regional District in a manner that favours development at Sun Peaks. Because the Municipality has the right to appoint a municipal representative to the Regional District's board of directors, it may choose to nominate the Sun Peaks Resort Corporation appointee for this position.

[155] Conversely, the Band's ability to protect its aboriginal rights and title to Sun Peaks is weakened by the transfer of local jurisdiction from the Regional District to the Municipality. Prior to incorporation, members of the Band who lived outside of Sun Peaks but within the Regional District could vote for the Electoral Area P representative on the board of directors. The Electoral P representative had a say in any local decision that affected Sun Peaks and was within the Regional District's jurisdiction. While after incorporation the Band members living outside of Sun Peaks retain the right to vote for the Electoral P representative, the Regional District no longer has jurisdiction with respect to local issues affecting only Sun Peaks.

[156] The significance of this change in the ability of Sun Peaks Resort Corporation to influence and control the policies of the Municipality cannot be underestimated due to the dependence of the Municipality on the resort for its continued existence and success. Section 11 of the *Local Government Act* <u>only</u> permits incorporation of a mountain resort municipality where there is a ski resort within the proposed municipality or there is an agreement to establish one. The importance of Sun Peaks Resort Corporation to the proposed municipality was recognized by the Governance Committee as reflected in the following passage from the 2009 Update Technical Report:

> The resort's success is due mainly due to the Corporation's vision. The company's development plan is not complete and could extend another 20 years or more. Three factors suggest that consideration should be given as to how the Corporation might

secure a role as an active participant in the local government that would manage the community:

> - The Corporation has a comprehensive, long term vision for the resort that should be acknowledged. What would help protect this vision?
> - It has assured development rights under the Master Development Agreement with the Province no matter what form of local government is in place. What could keep these rights a core feature of community planning discussions?
> - A municipal government could be charged with developing and administering community policies that include the management of land use development. What would help harmonize the local government's policies and the Corporation's vision?
>
> In short, the rights of a locally elected municipal council need to be balanced against the resort company's right to fulfill its master plan.
>
> Under new legislation, the Province could appoint a person to municipal council. This could be a Resort Corporation representative ... This would help ensure the company's interests are represented at the decision table during discussions about community policies...

[157] Moreover, the justification for considering incorporation was grounded in the desire to realize the full potential of Sun Peaks as a major mountain resort. At p. 78, the 2009 Update Technical Report underlines this objective:

> Why consider municipal status?
>
> Resorts have unique requirements. They provide a high quality of services and a broad array of amenities ... This requires the power to arrange and coordinate diverse aspects of the community, such as land use regulations, tourism promotion, infrastructure planning and financing, and regulatory functions like bylaw enforcement. The current local governance system does not provide this flexibility to the degree that might be needed to optimally help the community reach its full potential as a major resort.

[158] I also agree with the Band's submission that the increased independence of the new local government, particularly with regard to sub-division and zoning approval authority, enhances the ability of the Municipality to make decisions that favour its smaller electorate whose interests are generally aligned with the Sun Peaks resort. The advantages of independence were recognized by the 2009 Update Technical Report at p. 87:

> The increased autonomy would flow from the independent powers given to municipalities under the Community Charter and the Local Government Act. The main decision-makers - the municipal council - would be accountable to local electors. There would be less reliance on remote bodies like the Province and the TNRD [Regional District], where the decision makers are not elected by the Sun Peaks voters.

[159] As the Attorney General has identified in its submission, it is the development of Sun Peaks by the Sun Peaks Resort Corporation that is the focus of the Band's concerns with respect to the protection of the aboriginal rights and title it asserts over Sun Peaks. The Band maintains the continued expansion and development of the resort interferes with its

traditional use and enjoyment of the lands and is inconsistent with its claim to aboriginal title over the lands. Thus to enhance the power of the corporation to control and direct the policies of the Municipality to suit its vision of the future for resort development clearly has a potential to create an adverse impact on the interests claimed by the Band. This change is clearly a new and "novel" impact in regard to the past failures to consult about the development at Sun Peaks.

[160] In *Gitxsan*, Tysoe J. (as he then was) recognized that a change in the decision maker or the character of the decision maker may potentially lead to adverse consequences with respect to claimed aboriginal rights. In *Gitxsan*, the issue was a change in control of Skeena Cellulose Inc. who held the forest licence in dispute. The Province argued there was no adverse impact resulting from the change in ownership and thus there was no duty to consult. Tysoe J. rejected the Province's submission and held at para. 82 of *Gitxsan*:

> I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly. ...

[161] In this case, the change in the decision maker has already demonstrated a difference in philosophy about their relationship with the Band. The newly elected municipal council took the position in this proceeding that there was no duty to consult with respect to the incorporation decision and, in any event, the Band's claim to aboriginal rights and title to Sun Peaks was "sparse, doubtful and equivocal". This position is clearly out of line with the Province's assessment that there was a duty to consult in the circumstances and its subsequent preliminary assessment of the Band's aboriginal claim to Sun Peaks, which is described in the January 13, 2011 correspondence to the Band from the Ministry of Natural Resources and Operations.

[162] I am also satisfied that there is a broader perspective to consider with respect to the potential impact on the Band's aboriginal rights in the future. The ability to protect and preserve its claim for aboriginal rights and title to Sun Peaks is the underlying purpose of the duty to consult. Where a change in local government interferes with the Band's ability to demand consultation occurs before decisions that potentially affect its rights are made, then that change triggers the duty to consult. From this broader perspective, the incorporation of the Municipality created a new mechanism for making decisions that could potentially impact the ability of the Band to engage in a meaningful consultation about their affected rights and interests.

[163] Section 879 of the *Local Government Act* requires the Municipality to consider whether consultation with First Nations is required when developing its official community plan. Pursuant to the letters patent, the Municipality's official community plan and interim land use by-laws must also be approved by the Province. However, there is no requirement to consider whether it is necessary to consult directly with aboriginal groups on issues other than land use and the municipality has no independent constitutional duty to consult with the Band. In *Gardner v. Williams Lake (City)*, 2006 BCCA 307 [*Gardner*], the British Columbia

Court of Appeal addressed the scope of s. 879 of the *Local Government Act* and, specifically, whether it conferred on the municipal council a constitutional duty to consult with First Nations groups. At para. 24 of *Gardner,* Saunders J.A. held that the honour of the Crown is not engaged by local governments:

> Local governments, however, are the creatures of the provincial legislature, bound by their provincial enabling legislation. This case, therefore, does not engage the honour of the Crown or the heightened responsibility that comes with that principle in cases engaging Aboriginal questions. Rather it concerns the content of the requirement to consult that is found in s. 879 of the *Local Government Act*. The case simply requires consideration of the language of the section in its context.

[164] Moreover, whether the Municipality complied with s. 879 of the *Local Government Act* is judged by the patently unreasonable standard: *Gardner* at para. 27. A local government is not subject to the more stringent correctness standard imposed with regard to the Crown's assessment of the scope of the constitutional duty to consult in any given case.

[165] The Attorney General argues the change in local government does not interfere with the Province's obligation to consult with the Band and it will also have a duty to assess the Municipality's consultations with the Band to ensure they meet the standards set by the Province. However, in practical terms this division of responsibility creates a number of additional hurdles for the Band. First, as outlined above, the Municipality now exercises control over many aspects of local government that are not subject to a duty to consult with First Nations and that are beyond any supervisory jurisdiction exercised by the Province. Second, if the Municipality decides to consult with First Nations in regard to its official community plan, the Band will be required to expend its own resources to carry out the consultation because the Municipality has no authority to provide funding to aboriginal groups for this purpose. Third, if the Band is dissatisfied with the consultation afforded by the Municipality, it would then be required to compel the Province to commence consultations pursuant to its constitutional duty. This two tiered system of consultation creates obvious impediments to the exercise of the Band's right to consult. In addition to the increased time and delay, there is the cost of engaging in two consultation processes. As occurred in this case, a significant and often unresolved issue in the consultation process is the provision of adequate funding to permit meaningful participation by the Band in the consultation process.

[166] For these reasons, I find the Province misconceived the significant potential impact a change in local government may have on the aboriginal interests claimed by the Band. Both types of potential impact described above explain the Band's concern that all of the outstanding issues regarding the Sun Peaks resort be the subject of consultation simultaneously. Incorporation of the Municipality had a direct and significant impact on the Band's ability to effectively consult with the Province about proposed municipal decisions and the enhanced influence and control of Sun Peaks Resort Corporation on Municipal policies changed the character of the decision maker to their detriment.

ADEQUACY OF THE CONSULTATION

[167] It is apparent from the authorities cited by the parties that the court is required to make an independent assessment of the consultation that actually occurred, notwithstanding a conclusion that the Province misconceived either the strength of the claim or the impact of

the proposed decision. Underlying this assessment is the court's determination of the precise scope of the duty to consult. Having concluded that the proposed change in local government potentially gave rise to serious adverse consequences in respect to the Band's aboriginal interests, I must turn to the strength of their claims.

[168] The tests for aboriginal title are described in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, at paras. 52-58 and for aboriginal rights the evidentiary requirements are articulated in *Van der Peet* at paras. 45-75 and in *R. v. Sappier; R. v. Gray*, 2006 SCC 54 at paras. 45-49.

[169] It is appropriate to start with a presumption that the strength of the Band's claim is no less than that assessed by the Province in its proposed consultation with the Band about timber cutting rights within Sun Peaks. As outlined earlier, this assessment pertains to claims by the same aboriginal band in regard to the same lands in dispute in this case. The Province's preliminary assessment of the strength of claim is that the Band has a "strong *prima facie* claim to aboriginal rights to hunt and gather plants for both food and medicinal purposes." In addition, the Band may also have a "*prima facie* aboriginal right[s] to use certain areas for cultural purposes." The Province concluded the Band had a "weak *prima facie* claim to aboriginal title" to Sun Peaks.

[170] The Ethnographic Background Report dated January 20, 2010 (the "Report"), was created by the Ministry of the Attorney General to inform the Crown of the historical use and occupation of Sun Peaks by aboriginal peoples. This Report recognizes the traditional territory of the Secwepemc Nation as including Sun Peaks and the areas immediately surrounding the resort. According to this study, each division of the Secwepemc Nation was identified with a particular territory depending on its habitual harvesting of resources; however, all of the territories belonged to the entire Secwepemc Nation. The Report notes that many of the Secwepemc winter villages were in or near Sun Peaks along the South Thompson River, Shuswap Lake, and the mouth of Adams Lake: Report at p. 3.

[171] Sun Peaks was an area traditionally used for hunting and gathering. There is also historical evidence of trails in and about the mountains included within Sun Peaks. As the author of the Report says at p. 3:

> Sun Peaks Resort Area includes Mount Tod... and is the highest of three peaks which make up the Sun Peaks Resort. ... Neskonlith elders from the Kamloops and Chase areas identified Mount Tod as an important gathering area. In 1888, Dawson recorded in his geological survey field notebook that he ascended Mount Tod by way of a trail which was used by Indians while berry picking and accessing the adjacent valley.
>
> ... Recent studies have shown that the Montane Parkland environment, the third level of altitude, was a significant component in the seasonal round of subsistence activities. When salmon runs were unproductive a greater dependence was placed upon the deer, roots, and berries found in the mountains. Furthermore, archaeologists Muir et al note that ethnographic accounts mention daytime use of the Alpine zone, the highest levels of altitude, accessed from Parkland base camps for purposes consisting primarily of plant gathering and hunting. ...
>
> In total, the ethno botanist Gary Palmer documented over 135 plants species known to have been used for medicine, food or construction in the Kamloops Division territory to the south of Alkali Lake. Of particular interest,... Tod Mountain, currently the location of Sun Peaks, was specifically visited in order to gather Snake Root.

[172] The Report also noted that while all parts of the Secwepemc territory were open to the constituent bands, they had established rules about trespass and control over hunting grounds. Thus if a member of some other tribe hunted in the Secwepemc territory, the owner of the hunting ground had a right to expect a share of the meat: Report at p. 19. Territory could also be sold or inherited within families: Report at p. 20.

[173] Because the Secwepemc people followed a yearly seasonal schedule of resource harvesting, they occupied different elevations and areas depending on the season. In the early spring the families moved to the highland areas to fish for lake trout. In April and May they gathered shoots, roots and edible bulbs and in the fall they harvested berries in a variety of locations and elevations: Report at p. 23. Hunting was also an important part of the seasonal round from August to October. The families travelled to base camps near the Montane parklands and the men hunted for elk, deer and caribou at the higher elevations. The tribes returned to winter villages in the late fall and subsisted on dried and preserved food: Report at p. 26.

[174] The claims of the Band are also supported by the existence of reserves in close proximity to Sun Peaks. In 1877, the Adams Lake Band was awarded seven reserves, five of which are near Sun Peaks: Report at p. 39.

[175] Sun Peaks was included within the reserve marked by Chief Neskonlith as the area he claimed for the Lakes Division bands. Although the claim that this land was designated reserve lands by Governor Douglas was rejected by the Federal Indian Claims Commission, it concluded that based on evidence from Neskonlith elders the "Shuswap people had a long history of using the territory demarcated by Chief Neskonlith": Commission Decision at p. 7. The Commission elaborated upon its findings at p. 47 of the Commission Decision as follows:

> It is apparent from the oral history testimony that the Shuswap tribe made use of the lands demarcated by Chief Neskonlith's boundaries and also lands outside of those boundaries. In some cases, primarily near the southern boundary, there is ample evidence regarding settlements, gardens, fields, and spiritual areas, although the location of grazing lands and the size of the Bands' herds remains unclear. Also, the oral history and the documentary record do not present a clear picture of how frequently the remote northern area of the reserve claimed by Chief Neskonlith was used, but the Elders did speak of hunting and trapping northwest of Adams Lake, and no doubt their ancestors travelled throughout the whole territory.

[176] The Province also considered a Traditional Use Study prepared by the Band and the Neskonlith Indian Band in 1998 in formulating its assessment of the strength of the claims involving Sun Peaks. The following passages from p. 7 of this Study are instructive of the nature of the Secwepemc connection to Sun Peaks:

> The Adams Lake and Neskonlith people have lived in Shuswap country in the south central interior of British Columbia for thousands of years, and archaeologists have succeeded at connecting the contemporary Secwepemc to people living in the region at least 7,000 years ago. The Secwepemc lived by hunting, fishing, root digging, berry picking and trading. They occupied lands where three separate and distinct ecoregions merge, offering them plentiful resource alternatives and opportunities for economic diversification. The region was thoroughly interconnected with trails and travel routes

> and many of these routes have been incorporated in contemporary roads and highways.
>
> In summer, the Neskonlith and Adams Lake people dispersed throughout their traditional territory to take advantage of resources found in each ecoregion. While travelling in summer, the people lived in tents, but in winter they returned to their village sites along the South Thompson River and Adams Lake and Shuswap Lake. In winter, many, but not all people, lived in a village of "kekulis" or pit houses, which are the most obvious and impressive reminders of their long tradition of occupation in the region. In the lower Adams River watershed alone there are at least 80 recorded occupation sites.

[177] The affidavit evidence filed by the Band also indicates that even in modern times its members have continued to frequent Sun Peaks for traditional purposes such as hunting and gathering. It is apparent that development within Sun Peaks has necessarily curtailed their use of the lands and the availability of herbs and game. The reduction in use of the land for such traditional purposes may reasonably explain why the non-aboriginal residents who filed affidavit evidence on behalf of the Municipality have not witnessed aboriginal hunting or herb and berry gathering over this period. The evidence led by the Municipality in this regard must be accorded some weight; however, in my view, the Band's evidence is more consistent with the findings contained in the Ethnographic Background Report and the preliminary assessment by the Province as to the strength of the claim.

[178] Based on the evidence before me, I am satisfied that, on a preliminary assessment, the Band has a strong *prima facie* claim to aboriginal rights with respect to resource use such as hunting and gathering, and spiritual practices within Sun Peaks. The Band has a good *prima facie* claim to aboriginal title based on a pattern of regular occupation throughout the various seasons for hunting and gathering, as well as spiritual practices within Sun Peaks.

[179] Having determined the primary governing factors, I turn to the content of the duty to consult in the particular circumstances of this case. First, in every consultation and at all stages there must be good faith on both sides. The government must commit to a meaningful process of consultation where their intention must be to substantially address aboriginal concerns: *Haida* at para. 42. Consultation is not simply an exchange of information; it may oblige the Province to change its proposed action based on information received during the consultation process: *Haida* at para. 46. The Province must demonstrate that, in balancing the competing interests at stake in the incorporation decision, it listened to the Band's concerns with an open mind and in good faith made an effort to understand them and address them, with a view to minimizing the adverse impact of the decision while providing reasonable accommodation.

[180] Second, the existence of a strong claim and highly significant potential adverse impact attracts a duty of "deep consultation", which is described in *Haida* at para. 44:

> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal

participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case.

[181] In my view, this passage appropriately describes the nature of the consultation process that was required on the facts of this case. This is the type of complete and meaningful consultation recognized by the Province as necessary when addressing amendments to the MDA. The incorporation of the Municipality was an integral part of the expansion and development of the resort and, in particular, the influence of the Sun Peaks Resort Corporation over the policies of the municipal council. It is apparent from the record of consultation that the Province misunderstood the concerns expressed by the Band as to the connection between the incorporation decision, the impact on its rights in regard to future development at Sun Peaks, and the ongoing discussions about amendments to the MDA.

[182] While significant and valuable information about the incorporation process was shared with the Band during consultation meetings, from the outset the Province narrowly focused on the superficial maintenance of the status quo *vis-à-vis* the Band's aboriginal rights in the transfer of responsibilities as between the Regional District, the Improvement District and the Municipality. The Province emphasized that the incorporation would not interfere with the Band's aboriginal rights because Municipal land use and planning decisions would require Ministry approval. However, the Province ignored the loss of provincial and regional regulation of and supervision over many other areas of responsibility exercised by the Municipality (as described earlier) and the fact that the incorporation of the Municipality would give Sun Peaks Resort Corporation more say in a far broader range of decisions. Indeed, at no point during the consultation process did the Province inform the bands that they would use the special governance powers in s. 11 of the *Local Government Act* to appoint a representative of Sun Peaks Resort Corporation to the municipal council. Nor was the possibility that this could happen directly addressed by the Province during the consultation meetings. The Province also spent very little time during the consultation discussing the pros and cons of the two proposed municipal boundaries. This is particularly significant given the greater sphere of influence accorded to the Sun Peaks Resort Corporation when the larger controlled recreation area was chosen for the municipal boundaries.

[183] The failure to recognize a need to establish a strength of claims assessment at the outset of the consultation led the Province to ignore what the Band, as well as the other Lakes Division bands, said in support of their aboriginal rights and title to Sun Peaks. The first meetings with the Province occurred on July 18 and 19, 2007. The Province met separately with each of the Lakes Division bands and during each meeting the bands described the traditional aboriginal uses of Sun Peaks, which included fishing, hunting, berry picking, gathering plants for medicinal uses, and sacred ceremonies. Chief Wilson indicated the Traditional Use Study that included Sun Peaks was obsolete and required updating. At subsequent meetings the bands also attempted to define the rights claimed in respect of Sun Peaks. While it is apparent the government representatives listened to what the bands had to say, and made notes of their comments in the minutes, they took no steps to gather data concerning the traditional aboriginal uses of the lands within the proposed municipal boundaries for the purpose of making an assessment of the strength of the Band's claims and did not seek from the Band comments on its assessment. In my view, the government representatives misunderstood the reason why the bands continued to raise the issue of their

unresolved aboriginal claims to Sun Peaks during the consultations meetings. This is apparent in the later meetings when the government representatives advised the Band that this consultation was not the proper forum for resolving aboriginal rights claims.

[184] It is because the Province misconceived the relationship between the proposed incorporation and the Sun Peaks development that its representatives insisted the incorporation consultation be separate from the ongoing discussions concerning the MDA. While all of the issues appear to have been discussed during the early meetings, as the government's deadline for the incorporation referendum vote approached, and when it was apparent the consultation process was moving very slowly, the Province encouraged the bands to get on with discussions about the MDA and expressed their belief that the incorporation consultation had concluded. For the same reason, the Province ignored the entreaties of the bands that to properly assess the impact of continued development at Sun Peaks, they required background reports and studies addressing the environment, traditional aboriginal uses, and loss of economic benefits. The Province believed these issues were irrelevant to the incorporation decision because it had no impact on the MDA. As a consequence of this misconception, the bands became frustrated with the consultation process; they were justifiably of the view that the government was ignoring their concerns.

[185] It was also very important for the bands that a framework be established to define the scope of consultation and the resources to be provided by the government to ensure the bands could participate in the discussions in a meaningful way. The negotiation of a framework agreement was the topic of discussion in the first meeting held in July 2007, and this agreement continued to be the primary focus of almost every meeting until December 2008. Until in or about October 2008, the bands, along with Ms. Brown and Ms. Watson, discussed the terms of a framework agreement that would cover all of the proposed decisions related to the Sun Peaks development, including incorporation. The government representatives worked on a draft agreement that was provided by the bands. This draft agreement contemplated consultations on a wide range of topics, including mitigation measures for potential impacts on the bands' interests; education and training; environmental protection; land-use management options for the lands within or near the resort; financial considerations, including land acquisition by the bands; protection and use of indigenous knowledge; social and cultural protection; and dispute resolution. It also contemplated additional research where there were gaps in the government's knowledge relevant to the discussion topics.

[186] In October 2008, the government unilaterally proposed an altogether different type of framework agreement that did not identify the topics of discussion outlined above and set out separate timelines for the completion of the incorporation consultation. By the terms of this agreement, the Province agreed to provide any "available" information that might help the bands determine the impact of the proposed decisions on their aboriginal rights and to meet in person to discuss the identified impacts. Thereafter, the only promise made by the Province was to "undertake a full and fair consideration of any views presented by the Band". Conspicuously absent from the draft agreement was any commitment to fund research into the topics included within the consultation, to prepare a strength of claims analysis, and to accommodate the interests of the bands where possible. In my view, this framework agreement clearly contemplated consultation at the low end of the spectrum. The agreement defined the consultation process in terms that are very similar to the treaty language

considered in *Beckman*. At paras. 74-75, the Supreme Court of Canada in *Beckman* found that an obligation to "make a full and fair consideration" of aboriginal views, without any requirement on the government to "understand the effect" of the proposed decision coupled with an attempt to then "try and minimize it" relegated the agreed standard to the low end of the consultation spectrum.

[187] Only the Shuswap band agreed to the framework agreement proposed by the Province. The other bands refused to sign the framework agreement primarily because they were dissatisfied with the level of funding the government was willing to commit to the process and the lack of any funding for the negotiation of the framework agreement. However, the bands also continued to raise concerns at meetings as late as June 2009 that the framework agreement was too narrow in scope and that it failed to provide for studies into the impact of the resort on cultural heritage, archaeology, land acquisition, infrastructure and the environment. It was shortly after this date, on July 2, 2009, that the Minister of Tourism, Mr. Krueger, advised the bands that the government believed the incorporation consultation was over.

[188] In my view, after July 2009 the Province was only going through the motions to complete the incorporation consultation and get the work of the Governance Committee back on track. Indeed, after this date Ms. Brown sought only to resume consultations with regard to the MDA and the transfer of the timber administration. Moreover, the bands legitimately lost interest in attending more meetings as a result of what Mr. Krueger had said and because the government continually failed to realize the real and substantial connection between the incorporation decision and the Sun Peaks development in general. Up to this point it is apparent that the Province had failed to direct their minds to the real concerns of the bands in respect of the development and the potential impact a change in local government could have on the expansion of the Sun Peaks resort and the influence of the Sun Peaks Resort Corporation on the Municipality. I find nothing in the conduct of the Band that frustrated the consultation process. The Band did not put improper barriers in the way of appropriate accommodations being reached. A careful examination of the evidence indicates the Band did not oppose incorporation altogether; instead, they opposed a decision on the incorporation before the other issues involving Sun Peaks were resolved.

[189] As McLachlin C.J.C. says in *Haida* at para. 63, when reviewing the sufficiency of the consultation efforts by the government, the court must look at the process adopted and not simply the outcome of the consultation sessions. In this regard, I find the Province clearly failed to uphold the honour of the Crown in its dealings with the Band during the incorporation consultation. While the government continued to engage the bands in a consultation process with regard to the MDA and the transfer of the timber administration, it announced that the incorporation consultation was complete and ignored the bands' concerns that the incorporation would further entrench the power and influence of the Sun Peaks Resort Corporation over the new local government and was thus intimately connected with these other issues. In my view, this was not a reasonable consultation process.

[190] Lastly, I need to address the accommodations that were made by the Province. Even if the consultation process was flawed, if the accommodations substantially addressed the interests of the Band, the court should not ultimately conclude that the consultation failed to uphold the honour of the Crown. The Crown is not under a duty to reach an agreement

during the consultation process; however, where there is a strong aboriginal claim, meaningful consultation may require the Crown to modify its course of action "to avoid or minimize infringement of aboriginal interests pending their final resolution": *Wii'litswx* at para. 178. An assessment of whether the consultation was meaningful leads to a consideration of the accommodations actually made by the government. The question is whether the accommodations were within the range of reasonable available outcomes.

[191] The sole accommodation by the Province in response to the concerns raised by the Band was a requirement that the Municipality establish a First Nations Advisory Committee and that it not dissolve such a committee until December 31, 2014. While the Province also purported to reserve to the Minister of Community and Rural Development a supervisory role in regard to the Municipality's official community plan, it is apparent that this was necessary to ensure the municipal council respected the terms of the MDA. It was not a restriction on the Municipality's authority that was intended to satisfy concerns raised by the bands regarding land use and property development within Sun Peaks.

[192] I am not satisfied that the creation of a First Nations advisory committee reasonably met the concerns of the Band. First, the Municipality is not required to consult with the First Nations Advisory Committee and the Municipality has no independent constitutional obligation to do so as discussed above. Lacking in s. 8 of the letters patent is the mandatory language of s. 6 of the letters patent, which requires the Municipality to consult with a resort advisory committee, if the Minister does not appoint a councillor pursuant to s. 11(1) of the letters patent. The terms of reference for the First Nations Advisory Committee are also vague and appear to suggest that it is only issues that the municipal council view as relevant to "First Nations" that could be the subject of discussions. Significantly, there is no stipulation in the letters patent with regard to what the Municipality must do with the advice they receive from the First Nations Advisory Committee. In addition, the First Nations Advisory Committee can be dissolved after December 31, 2014, and the letters patent do not contemplate what would replace the committee after this date.

[193] Second, the First Nations Advisory Committee does little to redress the balance of power and influence as between the bands and the Sun Peaks Resort Corporation. The appointment of a municipal councillor as a representative of the corporation ensures that the corporation will have a say in and a direct influence over decisions that go well beyond the scope of the MDA.

[194] Lastly, the First Nations Advisory Committee does not address the Band's concern that the further entrenchment of the corporation's interests through incorporation of the Municipality would lead to an expansion of the resort, greater interference with their traditional use of Sun Peaks, and an increased loss of resources and economic opportunities for their members. In my view, it would have been impossible for the Province to adequately address this concern due to the separation of the incorporation consultation from the ongoing discussions with the bands about the MDA. By insisting that the issues surrounding the MDA and the incorporation were distinct and unrelated, the Province rendered a range of possible accommodations designed to minimize the potential impact of incorporation on development at Sun Peaks a moot issue. As a consequence, the concerns of the Band were not addressed prior to incorporation and will not be addressed in the ongoing consultations concerning the MDA.

[195] The broad powers granted to the Lieutenant Governor pursuant to s. 11 of the *Local Government Act* made available to the Province several accommodation options to preserve and protect the aboriginal rights and title claimed by the Band pending their final determination. Section 11(3.1) of the *Local Government Act* empowers the Lieutenant Governor in Council to exempt a mountain resort municipality from statutory provisions and to appoint one or more individuals to the municipal council. Section 11(3.2) of the *Local Government Act* grants the Lieutenant Governor in Council a discretion, on the recommendation of the Minister, to provide for "further exceptions, conditions and appointments" in the letters patent. In my view, the broad discretion accorded to the Province with respect to the structuring of a mountain resort municipality amply illustrates the limited nature of the actual accommodation adopted as a means of addressing the Band's interests in Sun Peaks. In addition, the inadequate nature of the accommodation provided by the Province may well prove to be substantially greater upon an in-depth analysis of the strength of claim by the government, which will be addressed below as part of the remedies ordered.

[196] For these reasons, I find the accommodation by the Province was not within the range of reasonable outcomes.

[197] The Band raises issues in regard to the refusal of the Province to share the results of its strength of claim assessment. In my view, the argument of the Band raises important issues about the consultation process and how these intersect with solicitor client privilege. However, it is not necessary for me to address whether the Province breached the honour of the Crown by its refusal to disclose this document. The strength of claim assessment prepared by the Crown, regardless of what this assessment consisted of, was not created for the purpose of the incorporation consultation. The Province created this assessment after determining that its consultation regarding the incorporation decision was complete and well after the Minister had drafted the letters patent for the proposed municipality. Thus while it is evidence of the Province's preliminary assessment of the strength of claim, whether any part of the assessment should be protected by solicitor client privilege is not an issue that needs to be determined in this proceeding.

REMEDIES

[198] The Band seeks a declaration that the Lieutenant Governor in Council breached its duty to consult with respect to the decision to incorporate the Municipality and an order setting aside Order in Council 158/2010 and the letters patent. Alternatively, the Band seeks an order suspending Order in Council 158/2010. In the further alternative, the Band seeks to adjourn its application for an order quashing Order in Council 158/2010 and asks the court to give directions with regard to the consultation that must take place in the interim period.

[199] The Attorney General argues that the alternative relief cannot be granted because it was not included in the petition, and that the only relief available in the circumstances is a declaration that the consultation was inadequate. In particular, the Attorney General argues the court has no jurisdiction to set aside Order in Council 158/2010 and further, that the delay in filing the petition should result in no such relief in the circumstances.

[200] The Municipality argues the court has no jurisdiction to quash an order in council because it is a legislative act. The Municipality also argues the court must consider the

prejudice caused to it by any remedy ordered by the court. In particular, the Municipality points to the uncertainty that would be created by a decision to quash Order in Council 158/2010. Lastly, the Municipality argues the court should decline to grant the relief sought based on the delay in the petitioner's application for judicial review until after the incorporation decision was made.

[201] I have concluded the Province failed to adequately consult with the Band prior to the issuance of Order in Council 158/2010 by the Lieutenant Governor in Council and that the accommodation arising from the consultation was not within the range of reasonable outcomes. Thus it is appropriate to declare that the Province did not fulfill its constitutional duty to consult with the Band with respect to the incorporation of the Municipality prior to the issuance of Order in Council 158/2010 by the Lieutenant Governor in Council. I am also satisfied that the court has jurisdiction to order the Province to engage in a consultation process with regard to the incorporation of the Municipality to uphold the honour of the Crown and in a manner that reflects the strength of the claims and the serious impact on the Band's interests identified by the court in this judgment. Nothing short of deep consultation and accommodation where possible is appropriate in all of the circumstances. It is also appropriate to order the Province to include consultation about the incorporation of the Municipality in its ongoing consultation process with the Band concerning the MDA and the transfer of the timber administration.

[202] There is ample authority for this type of relief. In *Musqueam Indian Band*, the Crown was ordered to consult with the band concerning the proposed sale of UBC endowment lands. The order in council transferring the lands was suspended for two years to permit meaningful consultation: *Musqueam Indian Band* at para. 101 per Hall J.A. In *Klahoose*, Grauer J. stayed all further operations under the disputed Forest Stewardship Plan pending deep consultation and the negotiation of an interim solution that would preserve the Klahoose aboriginal claims: *Klahoose* at para. 150. Upon a finding that the Crown breached its duty to consult with regard to the granting of rights to third parties over lands claimed by the Squamish Indian band, Koenigsberg J. ordered that consultation occur as if the decisions had not yet been made: *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320 at para. 95.

[203] This form of relief is also consistent with the underlying purpose of the duty to consult which is to maintain the honour of the Crown and to promote reconciliation between aboriginal and non-aboriginal peoples in a mutually respectful long term relationship: *Haida* at para. 45 and *Beckman* at para. 10. A positive duty imposed on the Province to fulfill its constitutional obligations accords respect to both the aboriginal rights claimed by the Band and the rule of law.

[204] Lastly, while this precise form of relief was not included in the Band's petition, I have jurisdiction to craft relief orders to ensure they conform to the reasons for judgment: *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1620 at para. 5.

[205] The Band asks the court to go further and issue an order quashing Order in Council 158/2010. There is clearly authority for the proposition that the court lacks jurisdiction to quash a legislative act. The Alberta Court of Appeal judgments in *Lefthand* and *Tsuu T'ina* limit the available relief after legislation is passed to a declaration that the Crown has failed to

fulfill its duty to consult during the processes preceding the legislative act. While the Alberta Court of Appeal recognizes a duty to consult in regard to proposed decisions that will become law by an order in council, it has concluded there is no duty to consult prior to the passing of legislation, including regulations and orders in council: *Lefthand* at para. 38. Whether this line of authority will be upheld by the Supreme Court of Canada is an open question. The existence of a duty to consult with respect to legislative action was left undecided by the Supreme Court of Canada: *Rio Tinto Alcan* at para. 44.

[206] The Band's position, however, is supported by the British Columbia Court of Appeal's decision in *Musqueam Indian Band.* As noted previously, the court in *Musqueam Indian Band* suspended the operation of an order in council that affirmed the transfer of UBC endowment lands pending adequate consultation and reserved jurisdiction to hear applications for additional relief at the end of the suspension period: per Hall J.A. at para. 101. Madam Justice Southin, in separate concurring reasons, held that the Minister should be restrained from exercising the powers granted pursuant to the order in council pending negotiations with the Musqueam Indian Band: at para. 71.

[207] Whether or not the court has jurisdiction to quash Order in Council 158/2010, I am not satisfied that it is appropriate to do so in the circumstances of this case. The court has a discretion with respect to the remedies granted pursuant to s. 8 of the *Judicial Review Procedure Act.* In this case there are opposing interests that must be balanced in crafting the appropriate remedy.

[208] I agree with the Municipality that it is a third party whose rights have intervened since the enactment of Order in Council 158/2010. The municipal council has been functioning since June 28, 2010, and a decision to quash Order in Council 158/2010 would invite chaos. The status of any by-law passed by the council would be in doubt and the election of the Mayor and counsellors would be a nullity. The Municipality has expended public monies, engaged staff, and leased premises. All of these actions would be in jeopardy if the incorporation was declared a nullity. In my view, the Municipality is clearly a third party that has relied on Order in Council 158/2010 in good faith. Thus I must balance the potential prejudice to the Municipality against the prejudice to the Band if Order in Council 158/2010 is not quashed: *Klahoose First Nation v. British Columbia (Minister of Forests)* (1995), 13 B.C.L.R. (3d) 59 (S.C.) at para. 17, aff'd (1996), 18 B.C.L.R. (3d) 194, leave to appeal to SCC refused, [1996] S.C.C.A. No. 263.

[209] Turning to the prejudice to the Band, I am not satisfied that a failure to quash Order in Council 158/2010 will result in irrevocable harm to the aboriginal rights and title claimed by the Band in respect of Sun Peaks. The Province is in the process of consulting with the Band in regard to the MDA and the transfer of the timber administration. In the context of these discussions, the Province is capable of considering accommodation options that may involve amendments to the letters patent granted to the Municipality that more adequately reflect the adverse impact of the incorporation decision on the Band and the strength of their claims. This is not a case where the government has completed its consultation regarding the development at Sun Peaks rendering any further consultation concerning the incorporation of the Municipality moot. I note in this regard that the Band was not opposed to incorporation *per se*. Instead, the Band wanted all of the outstanding issues involving development at Sun Peaks to be addressed before any decision was made in regard to incorporation to ensure

the Province made the appropriate accommodations to preserve its aboriginal claims pending a final determination.

[210] I am mindful that the Band cannot be faulted for waiting until the Municipality was incorporated before bringing this application for judicial review. Obtaining injunctive relief, even on an interlocutory basis, would likely not have succeeded: *Haida* at para. 14. Nevertheless, the fact that the Municipality came into existence and has carried on business since June 2010 cannot be ignored.

[211] For these reasons, I find it is not appropriate to quash Order in Council 158/2010 or suspend its operation until the parties have concluded an adequate consultation process.

[212] The Band asks the court to adjourn its application to quash Order in Council 158/2010 and give directions in regard to the nature of the consultation expected in the circumstances. The Attorney General argues against this form of relief on the ground that it goes beyond the permissible scope of declaratory orders and because the court should not dictate the nature of the accommodations that must be considered by the Crown. The Municipality supports the arguments of the Attorney General.

[213] In my view, for the same reasons as the court has declined to quash the order in council, I find it is not appropriate to adjourn the Band's application to quash. The orders that I have made provide appropriate relief to the Band for the Crown's failure to adequately consult in regard to the incorporation decision. In addition, I agree with the Attorney General's submission that the court should not dictate the terms of reference for the consultation beyond what is expressly or implicitly part of the reasons for judgment. The court should also not confine the parties to any particular description of the available accommodations. As Hall J.A. says in *Musqueam Indian Band* at para. 97:

> The core of accommodation is the balancing of interests and the reaching of a compromise until such time as claimed rights to property are finally resolved. ... This is a developing area of the law and it is too early to be at all categorical about the ambit of appropriate accommodative solutions that have to work not only for First Nations people but for all of the populace having a broad regard to the public interest.

[214] Accordingly, while I shall retain jurisdiction to resolve issues that arise out of the application of these reasons for judgment during the course of the parties' consultation process, no further directions are necessary in the circumstances.

COSTS

[215] The Band asks that it be awarded costs in regard to this application. As the successful party, costs in favour of the Band appear to be appropriate. However, neither the Municipality nor the Attorney General addressed the matter of costs. Thus I will retain jurisdiction to address this issue and make an order for costs if the matter cannot be resolved informally by the parties. "Bruce J."