COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nlaka'pamux Nation Tribal Council v. British Columbia (Environmental Assessment Office),* 2011 BCCA 78

Date: 20110218
Docket: CA037570

Between:

Nlaka'pamux Nation Tribal Council

Appellant
(Petitioner)

And

Derek Griffin in his capacity as Project Assessment Director, Environmental Assessment Office, Belkorp Environmental Services Inc. and Village of Cache Creek

Respondents
(Respondents)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Groberman

On appeal from: the Supreme Court of British Columbia, September 17, 2009, (*Nlaka'pamux Nation Tribal Council v. Griffin*, 2009 BCSC 1275, Vancouver Registry No. S092162)

Counsel for the Appellant:	Reidar Mogerman Mark G. Underhill
Counsel for the Respondent Griffin:	Patrick G. Foy, QC Erin K. Christie
Counsel for the Respondent Belkorp:	Stephen M. Fitterman
Place and Date of Hearing:	Vancouver, British Columbia March 31, 2010
Place and Date of Judgment:	Vancouver, British Columbia February 18, 2011

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This appeal arises out of a proposal to extend a landfill near Cache Creek by about 40 hectares. The landfill extension would occupy land over which the Nlaka'pamux First Nation claims Aboriginal rights and title.

[2] The appellant (which I will refer to as the NNTC) is a tribal council incorporated in 1981. Its members include some, but not all, of the Indian bands associated with the Nlaka'pamux First Nation. It purports to be the party entitled to assert claims on behalf of the First Nation. As such, it claims that it had a right to be consulted regarding the proposal in accordance with the Supreme Court of Canada's judgment in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511.

[3] The landfill extension proposal was subject to an assessment under the *Environmental Assessment Act*, S.B.C. 2002, c. 43. The Environmental Assessment Office did not solicit input from the NNTC before determining the scope of the assessment, though it did invite input from the various bands that are members of the NNTC. The order establishing the procedures and methods for carrying out the assessment did not mandate consultation with the NNTC, but the Project Assessment Director did propose some sort of "government to government" discussions outside of the scope of the assessment order, and later issued an amendment to the order that would permit (though not require) consultation with the NNTC.

[4] The NNTC says that it was entitled to be consulted before the scope of the assessment was established. It also says that the order setting out the methods and procedures for assessment was flawed because it lacked a provision requiring the Environmental Assessment Office or the proponents of the project to consult with the NNTC. The NNTC sought judicial review in the Supreme Court, requesting a declaration that the Crown, through the Environmental Assessment Office, failed to

comply with its duty of consultation and also seeking to quash orders and approvals granted in the assessment process.

[5] The respondents accept, for the limited purposes of this proceeding, that the NNTC was entitled to be consulted in respect of the proposed project. They say, however, that the Crown was entitled to determine the process by which consultation took place, and argue that it was not required to mandate consultation between the proponent and the NNTC under the *Environmental Assessment Act*. They say that the Environmental Assessment Office's offer to engage in direct discussions with the NNTC met the requirements of consultation.

[6] The Supreme Court judge dismissed the petition, finding that the Environmental Assessment Office had acted reasonably in undertaking consultations with the NNTC.

The Project

[7] The factual background to this case is complex. I will attempt to outline its most important aspects.

[8] Since 1987, a large proportion of the solid waste generated in Metro Vancouver has been trucked to a landfill in Cache Creek. The landfill was expected to be filled to capacity in 2009, and Metro Vancouver has, accordingly, engaged in various attempts to find a solution for solid waste disposal into the future.

[9] The process has been far from straightforward. In 2000, the Greater Vancouver Regional District (as Metro Vancouver was then known) purchased land in an area known as the Ashcroft Ranch about 4 kilometres south of the Village of Cache Creek. It anticipated that a new landfill could be built on the site. The land was made the subject of an environmental assessment in 2003, but the proposal was controversial. The NNTC, among others, opposed the idea of using landfills in the interior of the Province to dispose of solid waste from the Lower Mainland. In 2005, the Minister of Sustainable Resource Management issued an order suspending the assessment process. The purpose of the suspension was to allow

for reconsideration and amendment of the Greater Vancouver Regional Solid Waste Management Plan.

[10] In June 2006, the Province, the Greater Vancouver Regional District and the First Nations Leadership Council initiated a tripartite process to consider how the Cache Creek landfill would be replaced. A three-member advisory panel (which included a representative of the First Nations Leadership Council) considered 23 "expressions of interest" to replace the landfill. By March of 2007, however, the panel (in consultation with an independent evaluator), reached the conclusion that none of the proposed options could be up and running by the time the existing landfill reached capacity in the fall of 2009.

[11] Beginning in June 2007, the Greater Vancouver Regional District began to look at alternative interim solutions to deal with its solid waste. Five specific projects were considered, including an extension to the existing Cache Creek landfill. The NNTC corresponded with the Environmental Assessment Office to discuss its processes and the various projects then being proposed. In a lengthy letter dated December 7, 2007, Mr. Griffin, Project Assessment Director with the Environmental Assessment Office, acknowledged the need to consult First Nations, and then specifically discussed the role of the NNTC in environmental assessments:

> The EAO [Environmental Assessment Office] is prepared to ensure that the NNTC has an opportunity to be consulted on a government to government basis, outside of the EA [Environmental Assessment] working group process, for any project under review. At the same time, EAO believes it is appropriate to use the working group process wherever possible, as our experience has shown this to be an effective forum for dealing with First Nation issues in past. For this reason, EAO typically requests First Nations to participate in the working group process, and if there are any issues respecting asserted aboriginal rights or title that cannot be adequately addressed in that forum (for example, because they require discussion of information First Nations feel should be kept confidential), then they can be addressed in separate government to government discussions. In saying this, it is also important to note that we believe the purpose of such government to government discussions must be to address any outstanding ***Haida*** obligations that are not sufficiently discharged in the working group, and that there is not a duty to reach agreement on all issues of interest to First Nations (although we certainly prefer to do so where possible). [Emphasis in original.]

[12] I pause to note that, as I understand it, the "working group" is an *ad hoc* group convened for the purpose of studying, discussing and reviewing a project proposal that is being assessed under the *Environmental Assessment Act*. It is made up of representatives of various governmental agencies and representatives of potentially affected First Nations. Unlike the "project committee" which was required under the former *Environmental Assessment Act* (the legislation that was in place at the time of *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550), the "working group" is not required by or mentioned in the current statute.

[13] Mr. Griffin's letter also referred to the Cache Creek Landfill Extension Project:

> This is a new project that appears to be a reviewable project under the Act although it has not yet entered the EA process. As you are aware, EAO is interested in meeting with the NNTC to discuss this project and the NNTC's potential interests and concerns regarding the project (and in particular, whether the Nlaka'pamux Nation or any of the bands within the Nlaka'pamux Nation assert any aboriginal rights, including title, in the project area), and we will be in contact with you again in the near future to determine a suitable time.

[14] It appears that shortly after this letter was written, the Greater Vancouver Regional District announced that it would be abandoning plans to use landfills in the interior of the Province. Instead, it began to pursue options to use waste-to-energy facilities, with the idea of using landfills in the State of Washington on an interim basis. These options, too, proved impractical, however, and the Cache Creek Landfill Extension Project was soon revived.

[15] In August 2008, the Village of Cache Creek filed a proposal for a small interim expansion of the Cache Creek landfill. That proposal (which is referred to as the Cache Creek Landfill Annex) was referred to the NNTC.

[16] In response to the Annex proposal, counsel for the NNTC wrote to the Assistant Deputy Minister of the Environmental Protection Division of the Ministry of Environment. In expressing opposition to the proposal, he said:

> [M]any years ago, without consultation or accommodation, and over the NNTC's objections, the Province approved the Cache Creek landfill in

> Nlaka'pamux Territory. That dump, and the transportation corridor that it includes, constitutes one of the most serious ongoing infringements of Nlaka'pamux Title and Rights. A Cache Creek expansion cannot even be contemplated unless and until Nlaka'pamux Title and Rights are properly addressed in respect of the historic, existing, and ongoing impacts and infringements of the entire Cache Creek landfill. We want to be very clear that this will embroil the Province and Metro Vancouver in an examination and accommodation of the unjustified infringements created by the Cache Creek landfill from its inception.

[17] On September 16, 2008, the Assistant Deputy Minister received a letter from the Ashcroft Indian Band (one of the constituent bands of the Nlaka'pamux First Nation) distancing itself from the position taken by the NNTC:

> We are writing to address a letter dated August 28, 2008 sent to your office from [counsel for the Nlaka'pamux Nation Tribal Council]. As members of the Nlaka'pamux Nation, we were both surprised and disappointed by this letter. This letter does not reflect our position relating the extension of the Cache Creek landfill, and we neither approve nor endorse the letter.
>
> Any Nlaka'pamux Nation aboriginal rights and title in the area of the proposed Annex and the extension of the Cache Creek landfill originate from the traditional use of that area by the Ashcroft Indian Band, and we support both the proposed Annex and the extension of the Cache Creek landfill.
>
> The Nlaka'pamux Nation Tribal Council in providing instructions to [its counsel] to express the opinions set out in the letter, and to submit the letter to you, was not acting on behalf of the Nlaka'pamux Nation. Aboriginal title and rights are collective rights. They are not held by the Nlaka'pamux Nation Tribal Council. That entity has no authority of its own, nor any authority to instruct [its counsel] or anyone else for that matter, to deal with matters pertaining to Nlaka'pamux Nation's title and rights.

[18] As the letter suggests, in addition to the proposal for the Cache Creek landfill annex, material had been submitted to the Environmental Assessment Office in respect of the Cache Creek landfill extension project. Unlike the smaller annex project (which was designed to extend the life of the landfill for about two years), the extension project was large enough to engage the review process under the *Environmental Assessment Act*, which provides a mechanism for the assessment of the probable adverse effects of proposed projects in British Columbia.

The Environmental Assessment Process

[19] Certain types of projects are designated as "reviewable" under the *Environmental Assessment Act* and regulations. Part 6 of the *Reviewable Projects Regulation*, B.C. Reg. 370/2002, determines when municipal solid waste management projects are reviewable. The extension of the Cache Creek landfill is of sufficient magnitude to be reviewable pursuant to the regulation.

[20] Under s. 8(1) of the *Environmental Assessment Act*, proponents of a reviewable project must not proceed with the project without obtaining an environmental assessment certificate or, alternatively, a determination by the Executive Director of the Environmental Assessment Office that the project's impacts will be sufficiently small as to make an environmental assessment unnecessary.

[21] On August 8, 2008, the proponents of the Cache Creek extension project filed the project description with the Environmental Assessment Office. The project description was referred to the Project Assessment Director, to whom the Executive Director of the Environmental Assessment Office had delegated powers under the authority of s. 4 of the *Act*.

[22] The Project Assessment Director was required to determine whether an environmental assessment of the proposed project was necessary. Section 10(1)(c) of the *Act* provides:

> [I]f the executive director considers that a reviewable project may have a significant adverse environmental, economic, social, heritage or health effect, taking into account practical means of preventing or reducing to an acceptable level any potential adverse effects of the project, may determine that
>
> > (i) an environmental assessment certificate is required for the project, and
> >
> > (ii) the proponent may not proceed with the project without an assessment.

[23] On August 28, 2008, the Project Assessment Director exercised his powers under that section by making an order requiring the proponents to obtain an environmental assessment certificate before proceeding with the project.

[24] Beginning on September 3, 2008, the Associate Deputy Minister for the Environmental Assessment Office wrote to the chiefs of various Indian Bands with a presence in the vicinity of the project to formally advise them that the environmental assessment process for the extension project had been initiated. The first letters were to the Bonaparte Band (of the Secwepemc First Nation) and the Ashcroft Band (of the Nlaka'pamux First Nation). The two bands appear to be the ones with reserves in the closest proximity to the proposed landfill. A copy of the letter to the Ashcroft First Nation was sent to the NNTC.

[25] Similar letters were sent to other bands in the area, including the Oregon Jack Creek Band (September 3, 2008), whose chief, Chief Pasco, also chaired the NNTC. A copy of that letter was sent to the NNTC, as were copies of letters sent to three other bands associated with the NNTC on September 5, 2008.

[26] On September 11, 2008, the Project Assessment Director wrote to the Ashcroft and Bonaparte Indian Bands, inviting them to provide information concerning their Aboriginal rights and other interests in the project area, and also inviting them to take part in a working group to provide advice and review with respect to the project.

[27] On September 15, 2008, the Project Assessment Director sent letters to the Boothroyd Band, Boston Bar First Nation, Lytton First Nation, and Oregon Jack Creek Indian Band, with copies of each of the letters sent to the NNTC. The letters included the following:

> My purpose in writing you is to provide some background information on the Project so that you may determine if you wish to be consulted. EAO is seeking to identify those First Nations whose aboriginal interests could be impacted by the Project; and, at present, it is not clear to us whether the Project is located in an area that is of significance to the [band to which the letter was sent] in terms of aboriginal rights and title. In this regard, please be advised that EAO will be consulting with the Ashcroft Indian Band on account

> of its relative proximity to the Project area. At this same time, it is our understanding that from the Nlaka'pamux perspective aboriginal rights are held at the Nation level – hence we are canvassing whether you wish to be consulted separately or whether consultation with Ashcroft will be satisfactory.
>
> If the [band to which the letter was sent] does wish to be consulted separately, EAO would like to know about the Aboriginal rights and other interests that the band may assert in relation to the Project area and whether or not the band believes the Project may have an effect on its interests.

[28] Similar letters were sent to other bands that are associated with the Nlaka'pamux First Nation, but not affiliated with the NNTC.

[29] While there was some dispute as to whether the various letters to members of the NNTC (and the copies sent to the NNTC directly) were, in fact, received, the chambers judge concluded, at para. 64 of his reasons, that "the member Bands of the NNTC and the NNTC office did receive the September letters". That finding is not challenged on this appeal.

[30] Section 11 of the *Act* required the Project Assessment Director, as the next step in the environmental assessment, to determine its scope and the procedures by which it would occur:

> 11 (1) If the executive director makes a determination set out in section 10 (1) (c) for a reviewable project, the executive director must also determine by order
>
> (a) the scope of the required assessment of the reviewable project, and
>
> (b) the procedures and methods for conducting the assessment, including for conducting a review of the proponent's application under section 16, as part of the assessment.
>
> (2) The executive director's discretion under subsection (1) includes but is not limited to the discretion to specify by order one or more of the following:
>
> (a) the facilities at the main site of the reviewable project, any of its off-site facilities and any activities related to the reviewable project, which facilities and activities comprise the reviewable project for the purposes of the assessment;
>
> (b) the potential effects to be considered in the assessment, including potential cumulative environmental effects;
>
> (c) the information required from the proponent
>
> (i) in relation to or to supplement the proponent's application, and

> (ii) at specified times during the assessment, in relation to potential effects specified under paragraph (b);
>
> ...
>
> (e) any information to be obtained from persons other than the proponent with respect to the potential effects specified under paragraph (b);
>
> (f) the persons and organizations, including but not limited to the public, first nations, government agencies and, if warranted in the executive director's opinion, neighbouring jurisdictions, to be consulted by the proponent or the Environmental Assessment Office during the assessment, and the means by which the persons and organizations are to be provided with notice of the assessment, access to information during the assessment and opportunities to be consulted;
>
> (g) the opportunities for the persons and organizations specified under paragraph (f), and for the proponent, to provide comments during the assessment of the reviewable project;
>
> (h) the time limits for steps in the assessment procedure that are additional to the time limits prescribed for section 24 or under section 50 (2) (a).
>
> ....

[31] On September 29, 2008, the Project Assessment Director wrote to the Ashcroft and Bonaparte bands, enclosing a draft order under s. 11 of the *Act*. In response, the Chief of the Bonaparte Band stated among other things that "the Project is located within the *Secwepemc* Nation and not within the Nlaka'pamux Nation".

[32] On October 7, 2008, the first meeting of the project working group occurred. Representatives of the Ashcroft and Bonaparte Bands attended. According to the minutes of the meeting,

> [The Project Assessment Director] reported representatives from the Bonaparte and Ashcroft Indian Bands are participants in the Working Group. A broader notification of First Nations with a potential interest in the project has been sent to the member bands of the Shuswap and Nlaka'pamux Nations. To date, there has been no response from the bands. EAO expects to hear from First Nations within the next few weeks. [The Project Assessment Director] noted that if a response is received, the EAO will determine if other First Nations will be part of the Working Group.

[33] On October 22, 2008, the Project Assessment Director issued an order under s. 11 of the *Act*. Section 1 of the schedule to the order provides for consultation with First Nations, but defines "First Nations" restrictively:

> "First Nations" means the Ashcroft and Bonaparte Indian Bands and such other bands as are added to this list by way of written notification to the Proponent by the Environmental Assessment Office.

[34] On a plain reading of the definition it would not include the NNTC, and would, in fact, preclude the addition of the NNTC, because it is not a band. Section 8.1 of the schedule to the order, however, might be broad enough to allow the addition of the NNTC to the definition of "First Nations":

> 8.1 The Project Assessment Director may at any time notify the Proponent, in writing, that one or more First Nations are to be added to the definition of "First Nations" as set out in section 1 of the Order; and in so doing may identify any modifications to any of the procedures and obligations contained in the Order, having regard to status of the existing procedures and obligations at the time the addition to the definition is to be made.

[35] On December 3, 2008, counsel for the NNTC wrote to the Assistant Deputy Minister of the Ministry of Environment, responding to the s. 11 order. Copies of the letter were sent to a number of parties, including all of the respondents. The letter strongly objected to the s. 11 order:

> I can confirm that I have received instructions from the [NNTC] to commence judicial review proceedings challenging the exclusion of the NNTC from the Section 11 Order. To be clear, the Section 11 Order was issued in violation of the honour of the Crown, is unconstitutional, and is of no force and effect. ...
>
> …
>
> ... [the Project Assessment Director issued] the Section 11 order on October 22, 2008, evidently having determined, without any consultation whatsoever, that the NNTC does not assert any of the Nation's rights or title in the Project area. Instead, only two Indian bands have been named in the order, both of whom have received financial benefits in return for their support for the Project. Thus, not only has the Province abandoned the consultation and accommodation process for determining a replacement to the Cache Creek landfill, to which all parties committed a tremendous amount of time and expense, it has now abandoned all consultation with the NNTC in respect of the Project. ...
>
> …
>
> We reiterate that our client is willing to engage on the issues raised by the Project. As we have said before, the waste management issues faced by

> British Columbia are serious. The NNTC is interested in real solutions to these problems that are based on a lawful and respectful reconciliation of the interests of the Province and the Nation. We are prepared to meet to discuss a fast-tracked and meaningful process as soon as you withdraw the Section 11 Order and agree to a meaningful and lawful process of consultation and accommodation.

[36] Counsel for the Environmental Assessment Office replied on December 16, 2008, as follows:

> It should be noted that at no time has EAO put forth the view that the Ashcroft Indian Band has authority to assert the entirety of the Nlaka'pamux Nation's rights and title. In fact, EAO is well aware, based on numerous engagements with representatives of the Nation, that from the perspective of the Nation its rights and title are asserted by and said to inhere in the Nation as a whole (and not, it must be said, in the NNTC). In this regard, we draw your attention to recital F of the section 11 order, which merely makes the pragmatic statement that the Ashcroft Indian Band is the Nation band that appears to be most closely associated with the project area. More importantly – and in our view this largely blunts the far-reaching assertions you make vis-à-vis the honour of the Crown – [the Project Assessment Director] wrote in September, 2008 to each Nation band, with a copy to the NNTC (in the case of letters to NNTC member bands). In his letter to each Nation band Mr. Griffin enquired whether consultation with Ashcroft would be sufficient or whether that band wished to be consulted separately. The section 11 order was drafted specifically so as to permit EAO to add to the definition of "First Nations" any band that asked for separate consultation. As we understand it, no band wrote to the EAO, nor did any band direct that EAO consult with NNTC on its behalf.
>
> Putting aside the broad allegations about honour and constitutionality, which, as noted, EAO does not accept, what would be most useful for EAO is information that assists in understanding the Nlaka'pamux Nation's connection to the Cache Creek area as at the time of contact and the time of Crown sovereignty. At least from EAO's preliminary perspective there appears to be a noteworthy consistency throughout the ethnographic literature to the effect that the Cache Creek landfill site would have been within Secwepemc territory in the years preceding and including 1846.

[37] On December 23, 2008, counsel for the NNTC responded. He disagreed with a number of assertions in the December 16 letter, but proposed a way forward, concluding:

> [If the Project Assessment Director] is prepared to add the NNTC to the section 11 order, and then engage in good faith consultation consistent with the Crown's constitutional obligations, the NNTC will be pleased to provide further information regarding the Nation's interests in the Cache Creek landfill extension project. Otherwise, [the Project Assessment Director] can review

> that information in the affidavit material which will be filed in support of our application challenging the legality of the existing section 11 order.

[38] The Environmental Assessment Office approved terms of reference for the Project application on January 30, 2009; these terms of reference were intended to set out the information required by the Project Assessment Director in an application for an environmental assessment certificate under s. 16(2) of the *Act*. The section dealing with First Nations required the proponents' application to discuss consultation with the Bonaparte and Ashcroft Indian bands and also supply information on their involvement in the project. The terms of reference did not impose requirements in respect of consultation with or involvement of the NNTC.

[39] On February 5, 2009, the Project Assessment Director wrote to the NNTC, enclosing a copy of the terms of reference. In the covering letter, he said:

> Although the view of the Environmental Assessment Office (EAO) as to whether there is a duty of the Crown to consult the Nlaka'pamux Nation Tribal Council (NNTC) on the proposed Project differs from your view, EAO would like to keep you advised of the status of the EA review, which includes opportunities for input from all interested parties at certain stages of the EA review.

[40] On February 23, 2009, counsel for the NNTC wrote to the Project Assessment Director, asserting that the terms of reference were "deficient in a number of respects, including, among other things, the failure to include provisions for consultation with the NNTC and a proper accommodation of [the] Nation's rights and interests".

[41] On March 20, 2009, the NNTC filed the Petition in these proceedings.

[42] The Project Assessment Director responded to the February 23, 2009 letter on April 7, 2009. He did not specifically address the draft terms of reference, but instead addressed the scope of the s. 11 order:

- The EAO's section 11 orders have traditionally been used to identify those aboriginal entities with whom the proponent of a reviewable project is ordered to consult directly by EAO. The EAO orders the proponent to do this where it believes the delegation of such procedural tasks will assist EAO in meeting the Crown's consultation duties in an efficient and effective manner.

- The section 11 order does not purport to exhaustively define the scope and content of the Crown's legal duties, and the EAO may itself choose to consult directly with the aboriginal entities named in the section 11 order, or any others.
- The EAO's decision to name the Bonaparte Indian Band and the Ashcroft Indian Band in the section 11 order for the proposed Cache Creek Landfill Extension Project was based on our assessment of which entities would be most appropriate for the proponent to engage in direct discussions, in support of the Crown's duty to consult. In this regard, the EAO considered the following factors:
    - a significant degree of consistency in the ethnohistorical literature suggesting that the project area was within Secwepemc territory both at the time of contact and sovereignty;
    - substantial evidence that a number of bands within the Nlaka'pamux Nation actively challenge the authority of the NNTC to represent their interests in relation to aboriginal rights matters, as was made particularly clear to the EAO, in previous correspondence concerning the Environmental Assessment of the Highland Valley Copper Landfill Project;
    - the absence of any single entity that clearly represents the interests of the Nlaka'pamux Nation as a whole; and
    - from a pragmatic perspective, the geographical proximity of the Ashcroft and Bonaparte bands and the location of their reserves;
    - the fact that the EAO received no responses when it wrote to all bands of the Nlaka'pamux Nation (copy to the NNTC, in the case of letters to NNTC member bands) advising that we proposed to consult with the Ashcroft Indian Band and specifically asking if any other Nlaka'pamux Nation bands wish to be engaged directly. [Footnote omitted.]

[43] The Project Assessment Director left open the possibility of consultation with the NNTC:

> With all of the above in mind, EAO continues to believe that it is neither necessary nor appropriate to amend the section 11 order to require the proponent to engage in consultations with the NNTC, however, I emphasize that the EAO remains willing to consult directly with the NNTC to discuss its interests and concerns with the proposed project.
>
> To help clarify the above, EAO is proposing to amend the section 11 order to expressly state that the order to the proponent to consult the identified aboriginal entities is not to be taken as setting out the full scope and content of the Crown's duty or willingness to consult, and to further clarify the consultation obligations that EAO acknowledges in the course of its process. ...

[44] The proposed amendment to the s. 11 order was as follows:

> 22.1 In addition to provisions of this order respecting proponent consultation with First Nations, the EAO will afford First Nations the following opportunities:
>
> (a) The EAO will, if requested by a First Nation, engage in government to government consultations respecting the proposed Project. Such consultations … are to complement, but not displace, other opportunities for consultation afforded to First Nations through this order.
>
> (b) The EAO will afford First Nations the opportunity to have their views on assessment reports included in the package of materials sent to Ministers when a project is referred for decision. This may occur by specifying First Nation concerns in the assessment report or related consultation report (and ensuring First Nations have an opportunity to provide comments on such draft text before it is finalized) and/or by affording First Nations the opportunity to include their own written submission in the package of materials referred to ministers.
>
> 22.2 This order is not intended to restrict the full scope or extent of the Crown's duty to consult in respect of a decision on an EA certificate, and the EAO may engage in additional consultations with an aboriginal entity, whether or not it is named as a First Nation in section 1 of this order, if the EAO believes that such consultation is necessary to discharge the Crown's duty or the EAO is otherwise prepared to do so.

[45] The Project Assessment Director did not propose any amendment to the definition of "First Nation" in the order, nor did he propose the addition of an entity to the definition under s. 8.1 of the order.

[46] Counsel for the NNTC responded on April 17, 2009, stating that "the NNTC objects to the proposed amendment to your section 11 order … but is willing to engage with the EAO to develop a good faith 'government-to-government' consultation process as referenced in your proposed amendment". He characterized the amendment as creating "a two-tiered consultation process … inconsistent with both the *Environmental Assessment Act* and the Crown's constitutional obligations to First Nations", and continued:

> The language of subsection 11(2)(f) [of the *Environmental Assessment Act*] specifically contemplates consultation by either the proponent or the EAO. Thus, we do not accept that there is a second tier of "direct consultation" by the EAO occurring outside of section 11 as contemplated in your letter and proposed amendment. In our view, section 11 requires the director, by way of order, to identify and then develop meaningful consultation processes for <u>all</u> First Nations who assert aboriginal rights and title in respect of a project ….

> ...
>
> In conclusion, we object to the proposed amendment to the section 11 order, and reiterate our demand that the section 11 order be amended to specifically include the NNTC. Unless and until that is done, the order is unlawful. That said, and regardless of the litigation, our client is prepared to engage with the EAO, the Ministry of Aboriginal Relations and Reconciliation, and the Ministry of Environment to develop a good faith, "government to government" consultation and accommodation process. To that end, we are prepared to immediately meet with the EAO and the deputy ministers from MARR and MOE to propose and discuss a structure for government to government engagement.

[47] The Project Assessment Director replied on April 24, 2009:

> ...Although it is EAO's position that many First Nations' interests can be appropriately addressed through the technical working group and the opportunity to comment on various documents undertaken as part of an environmental assessment, EAO remains willing to meet separately with First Nations if there are reasons to do so. That is not to say that the concept of a government to government discussion with EAO need entail the establishment of a complex or lengthy separate process, or that it need involve other ministries of the Crown.
>
> As the delegated EAO lead for the review of the proposed Project, I would be pleased to meet with the NNTC to discuss its interests and concerns with the proposed Project. ...

[48] Thereafter, there was an exchange of correspondence between the Project Assessment Director and his counsel and counsel for the NNTC on May 6 and 7, 2009 attempting to set up a meeting. The parties did not agree, however, on who needed to attend such a meeting, with the NNTC asking that two deputy ministers attend, and the Project Assessment Director viewing their attendance as being unnecessary.

[49] On May 25, 2009, the Project Assessment Director issued an order under s. 13 of the *Environment Assessment Act*, amending the s. 11 order in terms virtually identical to those that he had earlier proposed:

> 22.1 In addition to provisions of this order respecting proponent consultation with First Nations, the EAO will afford First Nations the following opportunities:
>
> 22.1.1 The EAO will, if requested by a First Nation, engage in government to government consultations respecting the proposed Project. Such consultations … are to complement,

> but not displace, other opportunities for consultation afforded to First Nations through this order; and,
>
> 22.1.2 The EAO will afford First Nations the opportunity to have their views on assessment reports included in the package of materials sent to ministers when a project is referred for decision. This opportunity may occur by EAO specifying First Nation concerns in the draft assessment report or related consultation report (and ensuring First Nations have an opportunity to provide comments on the draft assessment report or related consultation report before they are finalized) and/or by affording First Nations the opportunity to include their own written submission in the package of materials referred to ministers.
>
> 22.2 This order is not intended to restrict the full scope or extent of the Crown's duty to consult in respect of a decision on an EA certificate, and the EAO may engage in additional consultations with an aboriginal entity, whether or not it is named as a First Nation in section 1 of this order, if the EAO believes that such consultation is necessary to discharge the Crown's duty or the EAO is otherwise prepared to do so.

[50] The proponents submitted an application for an environmental assessment certificate, as required by s. 16 of the *Act* on February 9, 2009. However, the Project Assessment Director considered that it failed to meet the requirements of the terms of reference. A revised application was submitted by the proponents on May 19, 2009 and accepted on June 19, 2009.

[51] On June 16, 2009, counsel for the NNTC wrote to the Project Assessment Director and his counsel, alleging that the consultation process contemplated by the amended s. 11 order fell short of genuine "government to government" consultation. He proposed a meeting to discuss the issue.

[52] On June 19, 2009, a new Project Assessment Director responded:

> I would [like] to extend an invitation to yourself and Chief Bob Pasco to discuss the proposed Project and your concerns in more detail. I note that your letter seeks some clarification regarding the scope of "government to government consultation". For our part, by "government to government consultation" we mean consultations that are undertaken outside of the Environmental Assessment Office working group or other standard process. We have indicated a willingness to hold such discussions given previous concerns stated by Nlaka'pamux Nation Tribal Council (NNTC) and certain other First Nations regarding the typical Environmental Assessment (EA) process.

> I would be pleased to explore further opportunities for the NNTC to be involved in the EA for the proposed Project, whether that is through the working group or another mechanism.

[53] The Project Assessment Director also advised that he had determined that the application for an environmental assessment certificate met the requirements of s. 16 of the statute, and that the review process had begun.

[54] On July 13, 2009, counsel for the NNTC proposed a meeting with the Project Assessment Director. With respect to consultation, he stated:

> First, we maintain the position that the [NNTC] should be added to the section 11 order such [that] the NNTC is fully involved in the environmental assessment process. We are continuing to pursue that position in the lawsuit of which you are aware.
>
> Second, the NNTC expects that a significant component of any "government to government" consultation process will be a discussion of the accommodation of past, present and future infringements of the aboriginal rights and title of the Nlaka'pamux Nation.
>
> Third, we expect senior representatives of the provincial government to participate in the government to government consultation process, not just representatives of the Environmental Assessment Office, whose authority, as the province's legal counsel has already conceded, is limited to the statutory jurisdiction set out in the *Environmental Assessment Act*.
>
> Fourth, the NNTC requires proper resources to [*sic*] true consultation and accommodation process.

[55] The Project Assessment Director was unable to attend a meeting on the proposed dates, as he was on vacation; on his return on July 29, he sought to set up a meeting, saying, "[a]t the meeting we can discuss the issue of capacity funding and speak in more depth about the role of the province and the role of the proponent in consultation, specifically in the context of the section 11 and 13 orders".

[56] The petition for judicial review was heard on August 4, 2009, before the proposed meeting took place. The parties have advised the Court that there were subsequent meetings between the parties, and that the NNTC had some involvement in the project working group thereafter. The substance of the discussions between the parties and of the NNTC's participation has not been

disclosed to the Court. We are also advised that an environmental assessment certificate was issued on January 6, 2010.

The Duty of Consultation

[57] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, the Supreme Court of Canada established that Canadian governments are required to consult with First Nations with respect to uses of land that might affect their claimed, but unproven, Aboriginal rights or title in the land. The nature of the required consultation depends on the strength of the claim and on the potential for the proposed use of land to have negative impacts. The consultation must be carried out in good faith, and may lead to duties to accommodate in appropriate cases. While there is no duty on the government or on the First Nation to reach agreement, the Crown is required to afford the First Nation a right of consultation that is meaningful. Consultation and accommodation are the concrete requirements mandated by the need for the Crown to act honourably in its dealings with First Nations.

The Judgment of the BC Supreme Court

[58] This case illustrates some of the difficulties that can occur in actually attempting to apply the *Haida* framework. The site of the landfill extension is on territory claimed by both the Nlaka'pamux Nation and the Secwepemc First Nation. The evidence that was made available to the Environmental Assessment Office suggested that the Secwepemc claim was the stronger one. Further, neither the Nlaka'pamux Nation nor the Secwepemc First Nation appears to have any governing body that unequivocally speaks for the nation. Given the assertion of the Nlaka'pamux First Nation that their rights are held by "the nation", this can make meaningful consultation a challenge. It is particularly difficult when different entities that arguably speak for portions of the nations do not take compatible positions. That is the situation in respect of the Cache Creek extension project, in which the Ashcroft Band, the Nlaka'pamux group that appears to have the closest geographic connection with the proposed project, objected to any role for the NNTC. The NNTC

itself represents only a few of the Indian Bands associated with the Nlaka'pamux Nation – others are associated with the Nicola Tribal Association, and still others are unaffiliated.

[59] Even though the respondents accept, for the purpose of this litigation, that the NNTC is an organization entitled to be consulted in respect of the Cache Creek landfill extension, the absence of a consensus among First Nation groups on that issue complicated the task of the Environmental Assessment Office. The chambers judge was sympathetic to its difficulties:

> [68] …. The first [issue] is how the EAO as representative of the Crown should go about discharging its duty to consult with a First Nation when it is clear that there is no consensus within the First Nation with respect to the subject matter of the consultation. In this case, that issue is made even more difficult by the fact that the government is dealing with two nations, the Nlaka'pamux Nation and the Secwepemc.
>
> …
>
> [73] What is the government to do when faced with a diversity of putative representation on behalf of a First Nation. In my view, the government must discharge its duty to consult by taking reasonable steps to ensure that all points of view within a First Nation are given appropriate consideration. As I indicated above, government also has a duty to carry out its statutory mandate under applicable legislation. It must therefore balance its obligation to consult with its obligation to carry out its statutory duty in an effective manner. It is to be expected that this balancing will require a flexible approach by Government to adapt to the particular circumstances of each case.

[60] The chambers judge found that, in the circumstances, the Project Assessment Director did not fail to respect the government's constitutional duties by refusing to grant the NNTC the same consultation rights as were granted to the Ashcroft and Bonaparte bands under the s. 11 order:

> [75] I have concluded that the government acted appropriately in this case in making a decision to implement separate consultation protocols with the Ashcroft Band and the NNTC. I can see no objection in principle to requiring the proponents to consult with a specific Band if the government also undertakes appropriate consultation with the First Nation. That must be particularly so when there is a clear divergence of opinion between the putative representative of the Nation and the representatives of the Band.

[61] In assessing the adequacy of the opportunities for consultation afforded to the NNTC, the chambers judge considered it necessary to evaluate the strength of the Nlaka'pamux Nation's claim to Aboriginal title over the land on which the proposed project would be built. He found the claim to be a weak one:

> [79] Based on the limited material before me, my preliminary assessment is that the claim of the Nlaka'pamux Nation to aboriginal title to the land on which the Extension Project is proposed to be located is weak. I base this assessment on the fact that in the original land claim made by the Nlaka'pamux Nation stated that Ashcroft was the northern boundary of its territorial land claim. Further, on the evidence before me it appears that it is the Bonaparte Indian Band, a member of the Secwepemc Nation, which had had historical possession of the lands in question. In this regard, it is to be noted that the affidavit of Leslie Edmonds, an elder of the Village of Stassh, which is located on the Ashcroft Indian Reserve No. 2, does not specifically assert that the Extension Project is on land which has been exclusively occupied by the Nlaka'pamux Nation ….

[62] In the result, the chambers judge found the consultation offered by the Project Assessment Director to be reasonable:

> [82] I conclude that the decision of the Project Assessment Director to exclude the NNTC from the working group established pursuant to the Order and to amend the Sec. 11 order to provide that consultation with First Nations can be done on a government-to-government basis cannot, at this stage, be said to be a failure on the part of the Crown to discharge its duty to consult with the Nlaka'pamux Nation.
>
> …
>
> [84] In my view, given the following factors, that procedure cannot at this stage be said to be unreasonable:
>
> (a) the EAO has recognized that the NNTC represents at least some portion of the Nlaka'pamux Nation;
>
> (b) the EAO I think correctly, has identified that the stated objective of NNTC is the abandonment of any proposal to construct or extend landfills which will receive refuse from Metro Vancouver anywhere in the vicinity of its territory;
>
> (c) the position of the NNTC that any assessment of landfill projects must be part of the Replacement Process;
>
> (d) the stated position of NNTC is that no project can proceed without addressing the underlying land and rights of the Nlaka'pamux Nation to the territory in question;
>
> (e) the fact that the mandate of the EAO is to ensure a thorough and expeditious review of the environmental impacts of the Extension Project;

> (f) my preliminary assessment that the Nlaka'pamux Nation's claim to aboriginal title to the actual location of the Extension Project is weak.

[63] The chambers judge emphasized that his judgment concerned only the process that was being followed, and did not touch on the question of whether the Crown would meet its consultation duties within that process:

> [87] It is clearly too early in the process to determine whether the EAO will, in fact, discharge its duty to consult and accommodate if appropriate with respect to the environmental assessment of the Extension Project. At this stage, I have simply concluded that it cannot be said that the NNTC has been denied an appropriate and effective opportunity to be consulted and accommodated with respect to the environmental assessment of the project.

Analysis

[64] This case comes to this Court in a rather unsatisfactory state. The constitutional duty on the Crown is a duty to consult First Nations where a proposed use of land might affect Aboriginal rights or title that are claimed but unproven. In this case, the record suggests that the right of the NNTC to be consulted had been a matter of some controversy until shortly before the hearing of the petition. At that stage, the Project Assessment Director acknowledged a right to some consultation, and discussions ensued with the purpose of defining a process with NNTC involvement. At the hearing of the petition, the respondents conceded that the NNTC had a right to be consulted, and on this appeal, they accept, for the purpose of this litigation, that the consultation was to be "deep consultation".

[65] We are told that there were meetings and some level of consultation after the hearing of the petition. The Court must, of course, determine the case on the basis of the material that is before it. I would observe, however, that the parties' attempt to have the Court provide a simple answer to the question of what consultation conforms with the honour of the Crown presents difficulties. We do not know precisely what consultation has occurred, nor do we have any coherent picture of precisely what claimed Aboriginal rights might be affected by the project.

[66] The parties have not asked the Court to consider the adequacy of consultation with respect to any particular issue. Instead, they ask the Court to take a broad-brush approach. The NNTC invites the Court to quash the order under s. 11 of the *Environmental Assessment Act* on the basis that its failure to afford specific rights to the NNTC violated the Crown's duty to consult. It also seeks an order quashing the terms of reference established by the Environmental Assessment Office for the project application, and seeks a general declaration that the Environmental Assessment Office has failed to fulfil its duties to consult with the NNTC in good faith.

[67] The Crown, on the other hand, seeks to have this Court affirm the chambers judge's conclusion that the Environmental Assessment Office's offer to consult outside of the formal process established by the s. 11 order conformed to the requirements of the duty to consult.

[68] Like the chambers judge, I have some sympathy for the Project Assessment Director in this case. Faced with competing claims and obvious animosity among the First Nations groups that were demanding consultation, the task of creating an efficient and meaningful consultative process was a daunting one. That said, I cannot agree with the chambers judge's conclusion that the Crown was entitled to "balance its obligation to consult with its obligation to carry out its statutory duty in an effective manner". The Crown's duty to act honourably toward First Nations makes consultation a constitutional imperative. Difficult as it might have been to fulfill, it could not be compromised in order to make the process more efficient. In saying this, I recognize that the right to consultation is not unlimited. The Supreme Court of Canada's decision in *Taku* establishes that, at some point, the duty to consult may be exhausted. That point, however, will not occur at the outset of the process.

[69] In the case before us, the chambers judge found that the Nlaka'pamux claim to title over the site of the proposed landfill extension was relatively weak, and he used that finding to assess the adequacy of the consultation proposals put forward by the Environmental Assessment Office. The NNTC says that he erred in finding

the claim to be a weak one, in that he relied on inadmissible evidence. It further asserts that the judge's exclusive concentration on the claim to title failed to recognize that other Aboriginal rights are also claimed by the Nlaka'pamux Nation.

[70] On the first issue – the strength of the title claim – I am not persuaded that the chambers judge erred. In evaluating the strength of a claim for the purposes of consultation, the Crown is not conducting a trial. It need not restrict itself to evidence that would be admissible in a court of law on a title claim. It can rely on secondary sources, and also on the history of the First Nation's assertion of title. In the case before us, the ethnographic evidence indicated that the site was more closely associated with the Secwepemc Nation than with the Nlaka'pamux Nation. The historic Nlaka'pamux Nation land claim did not include the site. While this evidence does not demonstrate that the Nlaka'pamux claim to title is doomed, the Crown was entitled to take it into account in evaluating the *prima facie* strength of the Nlaka'pamux claim for the purposes of consultation. In reviewing the Project Assessment Director's conclusions on the strength of the claim, it was also appropriate for the trial judge to take this evidence into account.

[71] On the second issue, however, I am of the view that the NNTC is correct. The chambers judge appears to have concluded that because the claim to Aboriginal title is not particularly strong, the duty to consult was at the low end of the spectrum. In my view, whatever might be said of the claim for Aboriginal title, there is much stronger support for the proposition that the Nlaka'pamux Nations has Aboriginal rights (other than title) that might be affected by the project. Accordingly, it could not be concluded that the right to consultation was at the low end of the spectrum.

[72] To some degree, the fact that the Crown accepts that the appropriate level of consultation in this case is "deep consultation" relieves the Court from having to consider the particular rights that are in issue. There remains some difficulty, however, in that the adequacy of a consultation process may depend, at least in part, on the subject matter of that consultation. Some of the NNTC's demands in

respect of consultation appear to exceed its legal entitlement. For example, the correspondence shows that the NNTC wishes to use the current application as an opportunity to deal with the existing Cache Creek Landfill site. A recent decision of the Supreme Court of Canada appears to place historic effects on potential claims of Aboriginal rights outside the scope of the right to consultation – *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, 9 B.C.L.R. (5th) 205 at para. 49.

[73] In *Haida*, at para. 36, the Supreme Court stated that, "claimants should outline their claims with clarity, focusing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements". Unfortunately, this does not appear to have occurred in this case. The NNTC has been involved in ongoing discussions with the Province over the subject of landfills in the BC interior, and its positions go well beyond those that are connected to specific Aboriginal rights. There is, of course, nothing wrong with the NNTC engaging in political discussions beyond those that concern Aboriginal rights *per se*. It represents an important group of residents of the interior of the Province who are vitally concerned with the environment and the future of their region. In coming to court to assert the constitutional right to consultation, however, the specific Aboriginal rights that are claimed and the strength of those claims become important.

[74] The parties are seeking to have this Court determine the adequacy of the consultation process on a sparse record. While we have been made fully aware of the procedural wrangling between the parties, and have extensive environmental reports before us, we have only a limited indication of the nature of the NNTC's concerns, and only a hint at the sort of consultation that the Project Assessment Director had in mind.

[75] Fortunately, in my view, it is possible to deal with some of the issues that have been argued, even in the absence of a fuller record.

[76] The first issue is that of whether the Project Assessment Director acted unconstitutionally in initially setting out the scope of the assessment and formulating the terms of reference without consulting the NNTC.

[77] In my view, the Project Assessment Director did not breach any duty to the NNTC in making the initial s. 11 order, or in setting out terms of reference for the proponents' application.

[78] Before making the s. 11 order, the Project Assessment Director notified the constituent bands of the NNTC that an environmental assessment was being commenced, and asked that they advise him if they wished to be consulted. He also asked that they provide information with respect to Aboriginal rights and other interests that the bands asserted. In all cases, copies of the letters were sent to the NNTC. Neither the individual bands nor the NNTC responded to these letters in a timely fashion.

[79] In the circumstances, the Project Assessment Director made no error in proceeding with the assessment process by drafting a s. 11 order and receiving input from the two bands that were identified as having the most direct interest in the project. The NNTC was made aware of what was happening, and it was incumbent upon it to assert a right to participate in the process. As the Supreme Court of Canada observed at para. 65 of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, there is some obligation on First Nations groups to "carry their end of the consultation, to make their concerns known, to respond to the government's attempt to meet their concerns and suggestions, and to try to reach some mutually satisfactory solution".

[80] I am also of the view that the NNTC has failed to demonstrate that the Project Assessment Director breached any duty to it when he established the terms of reference for the application. The terms of reference did not determine the scope of the review, nor did they determine whether or not the NNTC would be consulted. They merely determined what material was necessary before the proponents' application would be accepted for review. Again, the terms of reference did not prevent the Project Assessment Director from requiring the proponents to provide further information as the review progressed.

[81] That, however, does not end the matter. While the Project Assessment Director did nothing wrong in drafting the initial s. 11 order and terms of reference, he had ongoing obligations to consult with the NNTC. When he became aware of its demands to be brought into the process, it was incumbent upon him to consider whether consultation was required, and, if it was, to establish an appropriate procedure for such consultation.

[82] In particular, the Project Assessment Director retained a power, under s. 13 of the *Environmental Assessment Act* to "vary the scope, procedures and methods determined under section 11 … if necessary … to complete an effective and timely assessment of the reviewable project". He had, therefore, an ongoing ability to modify the s. 11 order. As he received information from the NNTC and determined that the NNTC was entitled to be consulted, he should have considered modifications to the s. 11 order. Indeed, the Project Assessment Director seems to have recognized an ongoing duty, at least to some degree, and did engage in some discussions with the NNTC, culminating in an order under s. 13 amending the s. 11 order.

[83] As I have indicated, the respondents accept, for the purposes of this appeal, that the NNTC was entitled to "deep consultation". At para. 44 of *Haida*, this level of consultation was discussed:

> [In] 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. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

[84] The real issue in this case is whether the Project Assessment Director's offer of consultation and the amendment of the s. 11 order were sufficient to accommodate "deep consultation".

[85] A major difficulty in this case is that the parties have very different views as to the import of an order under s. 11 of the *Environmental Assessment Act*. The NNTC takes the view that the Crown fails to fulfill its duty to consult whenever it fails to specifically identify an affected First Nations entity in a s. 11 order.

[86] The NNTC places great weight on para. 51 of the Supreme Court of Canada's decision in *Haida*:

> It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. v. Adams*, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

[87] The NNTC says that the Project Assessment Director's offer to consult amounts to nothing more than an "unstructured discretionary administrative regime", and that it cannot meet the requirements of *Haida* consultation. In my view, the NNTC reads too much into the above-quoted paragraph.

[88] The Supreme Court of Canada in *R. v. Adams,* [1996] 3 S.C.R. 101, and in *Haida* wished to emphasize that unstructured discretion – *i.e.,* discretion that is not targeted to the protection of Aboriginal rights – will not be held to satisfy the Crown's duty in its dealings with First Nations to act honourably. That does not mean that a complex regulatory regime is always necessary. Indeed, in *Haida* itself, broad policy guidelines dealing with government operations were seen as providing a sufficient guard against unstructured discretion.

[89] It is clear to me that a complex regulatory structure will not always be necessary for the purposes of providing adequate consultation between the Crown and First Nations. For example, if seasonal maintenance operations on specific roads come into conflict with claimed Aboriginal rights to hunt or fish, it may be that simple discussions between maintenance crew forepersons and First Nations representatives will be adequate. It would be constitutional overkill to demand that a formal statutory structure for such limited and straightforward consultations be in place. Accommodation that can be made without the need for an expensive and cumbersome administrative structure is to be welcomed rather than discouraged.

[90] The difficulty in the case before us, however, is not the absence of a regulatory structure: the *Environmental Assessment Act* is, in fact, a detailed regulatory statute, one of whose goals is to provide a framework for First Nations consultation. The question of whether the Crown met its consultation duties can only be answered by considering the statutory framework as well as the duty to consult.

[91] The Project Assessment Director takes the position that consultation with First Nations need not occur under s. 11 orders, which he contends only establish the duties that are delegated to project proponents:

> [T]he only issue in this case … is … whether the only form of consultation that could discharge the honour of the Crown in this EA was indirect consultation with the assistance of the Project proponent by way of a s. 11 Order delegating to the proponent procedural aspects of consultation to assist the Crown in discharging its duty.

[92] He asserts that the Crown is free to enter into consultations complying with its duties under *Haida* outside of the scope of a s. 11 order.

[93] The proposition that a s. 11 order governs only consultation between a project proponent and a First Nation is not one that I accept. The purpose of s. 11 is to "determine the scope of the required assessment of the reviewable project". Under s. 11(2)(f), the order can specify:

> (f) the … organizations, including … first nations … to be consulted by the … Environmental Assessment Office during the assessment, and the means by which the … organizations are to be provided with … opportunities to be consulted;

[94] The project assessment is an important procedure under the *Environmental Assessment Act*. When the assessment is complete, under s. 17(2) of the statute, the Project Assessment Director must provide a report, recommendations and reasons for the recommendations to the ministers who will decide whether to issue a certificate. If a party has not been consulted in the assessment process, it will not have any influence over the contents of the report or the recommendations.

[95] In the case before us, the original s. 11 order did not provide for any consultation with the NNTC. The revised order did not specifically mention the NNTC, but did provide in clause 22.2 for discretionary consultation with Aboriginal entities:

> 22.2 This order is not intended to restrict the full scope or extent of the Crown's duty to consult in respect of a decision on an EA certificate, and the EAO may engage in additional consultations with an aboriginal entity, whether or not it is named as a First Nation in section 1 of this order, if the EAO believes that such consultation is necessary to discharge the Crown's duty or the EAO is otherwise prepared to do so.

[96] This section speaks of consultations that are beyond the scope of the s. 11 order itself. Because the s. 11 order defines the scope and procedures for the environmental assessment, it follows that clause 22.2 must refer to consultation that is outside the assessment itself. Presumably, such consultations would be brought to the attention of the ministers pursuant to s. 17(3)(b) of the statute, which allows the ministers to consider matters beyond the assessment report and recommendations in deciding whether to issue a certificate.

[97] While consultation outside of the environmental assessment is possible, it seems to me that it cannot substitute for consultation within the assessment process itself. The assessment process is a detailed investigation of the environmental effects of a project, and is critical to the process leading to an environmental assessment certificate. Denying the NNTC a role within the assessment process is

denying it access to an important part of the high-level planning process. Case law makes it clear that involving First Nations at the early stages of high-level planning can be essential to proper consultation: *Haida*; *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, 37 B.C.L.R. (4th) 309 at para. 95; *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68, 89 B.C.L.R. (4th) 273 at para. 70. In this case, that demanded recognition of the NNTC's right to be consulted in the formulating (or reformulating) of the s. 11 order.

[98] I agree with the NNTC's assertion that the statute requires that any First Nations consultation that is to form part of the assessment process be provided for in the s. 11 order. Any promise to consult outside the scope of the s. 11 order is, by definition, outside the scope of the environmental assessment.

[99] That does not mean that the Project Assessment Director lacked discretion as to the appropriate manner of involving the NNTC in the environmental assessment. Nothing in the statute, for example, mandates that consultation be by way of membership on a "working group". The role of the NNTC ought, however, to have been set out in the s. 11 order.

[100] In the result, I would find that the Project Assessment Director should have provided for consultation with the NNTC in the amended s. 11 order.

Remedy

[101] At this point, there is nothing to be gained by quashing the s. 11 order. The assessment has been concluded and a certificate issued. We are not asked, on this appeal, to quash the certificate, nor, in my view, would it be appropriate for us to do so. While we know that the amended s. 11 order was deficient, we do not know whether the deficiency was a mere technical irregularity or a genuine failure to engage in consultation.

[102] I say this because, notwithstanding my view that the scope of an environmental assessment is intended to be established by the order, we have been

advised that the NNTC participated in some meetings – including meetings of the working group – after the dismissal of the petition in this matter. That suggests that, notwithstanding the defects in the s. 11 order, at least some consultation took place within the environmental assessment process.

[103] The parties have, apparently, come to this Court to resolve an issue of law – that is, whether First Nations consultation in the environmental assessment process must be provided for in a s. 11 order, or whether there is some extra-statutory method by which it can take place. We are able to answer that the s. 11 order must set out the scope of any First Nations consultation that is to take place as part of the assessment process. While this does not preclude consultation outside the assessment process, such consultation will not serve as a substitute for consultation within the process.

[104] The chambers judge erred in finding that adequate consultation could occur outside the bounds of a s. 11 order. In light of the limited record before the Court, we should go no further than to declare that the s. 11 order did not adequately establish the basis upon which the NNTC was to be consulted. I would grant such a declaration, but would not quash the s. 11 order, as it is no longer in play.

[105] The declaration does not automatically invalidate the certificate, or any of the procedures in the environmental assessment. We simply do not have a sufficient record in front of us to determine whether the deficiencies in the s. 11 certificate had any consequences for the assessment, nor do we know the degree to which the assessment may have dealt with potential infringements of Aboriginal rights. Any challenge to the certificate will have to be made in separate proceedings.

[106] While it is unusual for a court to grant a bare declaration that an administrative procedure did not meet legal standards, there is precedent for such an order: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6. I am satisfied that it is the most appropriate remedy in this case.

[107] In the result, I would declare that the Project Assessment Director's amended order under s. 11 of the *Act* failed to adequately establish the necessary processes of consultation with the NNTC, and was, in that respect, defective.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Madam Justice D. Smith"