CONSULTATION AND ACCOMMODATION UPDATE

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TABLE OF CONTENTS

I. Introduction 1

II. Recent Case Law Regarding the Duty to Consult 3

A. *Ross River Dena Council* v. *Government of Yukon*, 2012 YKCA 14 3

B. *Sambaa K'e Dene Band* v. *Duncan*, 2012 FC 204 5

C. *Adams Lake Indian Band* v. *Lieutenant Governor in Council*, 2012 BCCA 333 6

D. *Neskonlith Indian Band* v. *Salmon Arm (City)*, 2012 BCCA 379 8

E. *Halalt First Nation* v. *British Columbia*, 2012 BCCA 472 10

III. Important Developments in the Duty to Consult in 2012 12

A. The Duty to Consult Regarding Legislation and Orders in Council 12

B. The Role of the Strength of Claim Analysis in the Consultation Process 15

C. The Impact of *Daniels v. Canada* on the Duty to Consult 16

IV. Conclusion 16

CONSULTATION AND ACCOMMODATION UPDATE

I. INTRODUCTION

While the pursuit of modern treaties continues to be elusive and difficult, and aboriginal title litigation continues to be expensive and frustrating, the duty to consult and accommodate, as recognized in B.C. in *Haida* in 2002,[1] remains healthy, and still the most effective tool available to First Nations – as well as the Crown and the rest of us – in moving towards true reconciliation, and enhancing a more just economic and governance participation of First Nations on their lands.

In 2010, the Supreme Court of Canada decided *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650. In *Rio Tinto Alcan,* the Court strongly confirmed the central tenets of the duty to consult and accommodate, and clarified the role of administrative tribunals in relation to the duty to consult. However, the Court in *Rio Tinto Alcan* also held that past wrongs do not give rise to a duty to consult, a point that has led to much confusion in subsequent cases. The B.C. Court of Appeal in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247[2] attempted some clarification – properly limiting the approach in *Rio Tinto Alcan* to conduct that causes no new impacts at all.[3] While the issue of past impacts versus present impacts continues to complicate almost every case, *West Moberly*'s focus on cumulative impacts and the relevance of past history was a step forward.

In comparison, 2012 saw relatively modest advances in the law of consultation. With the central tenets of duty to consult now well-established, in 2012 the courts largely dealt with issues of application regarding when then duty to consult applies in specific circumstances, and with the application of the duty to new areas, such as municipal law and in the context of modern treaty negotiations and overlaps. Perhaps the most important development in 2012 was the confirmation, in British Columbia and Yukon at least, that the duty to consult applies to legislation and orders in council, and may impact the "open entry" mineral tenure regimes.

[1] *Haida Nation v. British Columbia (Minister of Forests),* 2002 BCCA 147.
[2] Leave to appeal to the SCC refused: 2012 CanLII 8361.
[3] At paras. 116-20.

With the *William*[4] case decided by the B.C. Court of Appeal, and now on its way to the Supreme Court of Canada, aboriginal title has received yet another setback. The implications of that case for the duty to consult have not yet been determined, but are likely to arise in present and future cases until the Court rules. However, the court of appeal's treatment of activity-based aboriginal rights, both in *William* and in *West Moberly*, offers hope that aboriginal rights may begin to play a more meaningful role in reconciliation.

In some ways, the important and useful role that the duty to consult now plays in the relationship between First Nations, government, and industry is confirmed daily by the many successful interactions that do not result in litigation. The duty to consult has become part of the fabric of government and industry, and is taken for granted in every major project in B.C. Impact Benefit Agreements enabling resource development to continue on lands that are subject to unresolved aboriginal and treaty rights are a regular occurrence, and many First Nations are pursuing Reconciliation and Strategic Engagement Agreements more generally with government.

In B.C., government has continued the process, first started with forestry and the FRA program, towards a comprehensive response to the duty to consult, and to reconciliation. The implementation of revenue sharing programs by the province has now been extended to mineral tax revenue, in the ECDA program, and seems poised to be extended to other major projects such as pipelines, gas plants, and new ski resorts.

The following section of this paper presents summaries of five cases decided in 2012 that, in the authors' opinion, represent important developments in the law of consultation. Section III reviews two important issues raised in these cases that have implications for the law of consultation, and offers a brief note regarding the impact of *Daniels v. Canada* on the duty to consult.

[4] *William v. British Columbia*, 2012 BCCA 285.

II. RECENT CASE LAW REGARDING THE DUTY TO CONSULT

A. *Ross River Dena Council* v. *Government of Yukon*, 2012 YKCA 14

Under the Yukon *Quartz Mining Act*, SY 2003, c 14 (the "Act"), an individual may physically stake a claim on land administered by the Government of Yukon, other than land that is excluded under the Act. Within 30 days of staking the claim, the individual must record the claim with the Mining Recorder. The Mining Recorder's role is administrative in nature; the Recorder has no discretion to refuse to record a claim that complies with the Act. The holder of a mineral claim is entitled to all minerals within the boundaries of the claim, and may undertake "Class 1" exploration activities without providing notice to any person, including the Government of Yukon. Class 1 activities, which are exempt from environmental assessment, include clearing land, constructing lines, corridors and temporary trails, using explosives, and removing subsurface rock.

The plaintiff Ross River Dene Council brought an action seeking a declaration that the Government of Yukon has a duty to consult prior to recording a claim within the "Ross River Area", which includes lands to which the plaintiff claims aboriginal rights and title. The Supreme Court of Yukon held that a duty to consult arises only after a claim is registered under the Act. The plaintiff appealed.

The Yukon Court of Appeal held that the act of recording a claim under the Act is Crown conduct that might adversely affect an aboriginal right because it transfers the rights to the minerals within the claim to the claim holder, and it grants the claim holder the right to engage in exploration activities. As a result, the Crown has a duty to consult in relation to the recording of a mineral claim. In the court's view, the absence of discretion as to whether to record a claim was problematic as it precluded the Crown from discharging its constitutional duties to consult and accommodate aboriginal groups. The court did not go so far as to hold that the Act is unconstitutional, noting that the problems with the Act might be addressed under s. 15 by excluding from the operation of the Act lands to which a claim might adversely affect aboriginal and treaty rights.

The court declined to indicate precisely what was required to make the regime established under the Act consistent with the duty to consult, but suggested that an affected First Nation must be provided with notice of proposed exploration activities and, where appropriate, an opportunity to consult prior to the activity taking place. In order for consultation to be meaningful, the Crown must maintain the ability to prevent or regulate exploration activities.

The court issued two declarations, the effect of which it suspended for one year:

> (a) the Government of Yukon has a duty to consult with the plaintiff in determining whether mineral rights on Crown lands within lands [comprising] the Ross River Area are to be made available to third parties under the provisions of the *Quartz Mining Act*.
>
> (b) the Government of Yukon has a duty to notify and, where appropriate, consult with and accommodate the plaintiff before allowing any mining exploration activities to take place within the Ross River Area, to the extent that those activities may prejudicially affect Aboriginal rights claimed by the plaintiff.

On February 25, 2013, the Government of Yukon filed an application for leave to appeal to the Supreme Court of Canada.

Comments

If upheld, this case has obvious implications for mineral tenure regimes elsewhere in Canada. In British Columbia, claims are staked through an online system operated by the province. Like the Yukon system, there is no opportunity for consultation prior to the registration of a mineral claim in B.C. Applying the court's reasoning in *Ross River*, the B.C. mineral tenure regime seems problematic, and, unless amended, seems vulnerable to a similar action in relation to a breach of the duty to consult. The B.C. regime is somewhat different from the Yukon regime regarding post-staking exploration activities, which may allow more opportunity for consultation. The holder of a mineral claim in B.C. has no right to conduct exploration activities on land subject to a mineral claim without a permit: *Mineral Tenure Act*, RSBC 1996, c 292, s. 14(2); *Mines Act*, RSBC 1996, c 293, s. 10.

Perhaps the most significant aspect of *Ross River* is that it constitutes a judicial examination of the application of the duty to consult to an entire legislative regime, an issue discussed in more detail below.

In *Wahgoshig First Nation v. Solid Gold Resources Corp.*, 2012 ONSC 2323, [2013] 1 C.N.L.R. 367, the Ontario Divisional Court took a different view of the mineral tenure regime in that province. Considering an application for leave to appeal an order enjoining a mining company from undertaking exploratory drilling authorized under the *Mining Act*, R.S.O. 1990, c. M.14 in the absence of consultation, the court suggested that no duty to consult arose in relation to such conduct since there was no "Crown conduct". The Divisional Court declined to consider the matter on the merits, however, holding that the appeal was moot as the mineral tenure regime had since been amended to provide for a process to consult First Nations regarding exploratory activity.[5]

B. *Sambaa K'e Dene Band* v. *Duncan*, 2012 FC 204

In 1999, Canada entered into comprehensive lands claims negotiation with the Sambaa K'e Dene Band (SKDB), the Nahanni Butte Dene Band (NBDB), and the Acho Dene Koe First Nation (ADKFN), all adherents to Treaty 11. In 2008, while these negotiations were ongoing, the ADKFN signed a framework agreement with Canada and the Northwest Territories in an effort to achieve a comprehensive land claims agreement on its own behalf. Canada did not notify or consult with the SKDB and the NBDB prior to entering into this agreement with the ADKFN. ADKFN's asserted territory included portions of the territories of the other two bands, and the quantum of land Canada offered ADKFN under the agreement was greater than the total area of ADKFN territory that was not subject to overlap claims. Canada refused to consult the SKDB and NBDB until after an agreement in principle with ADKFN had been reached, when specific treaty settlement lands would be discussed. SKDB and NBDB filed an application for judicial review of Canada's refusal to consult them.

The court allowed the application, holding that Canada had a duty to consult the applicants prior to reaching an agreement in principle with the ADKFN. The court noted that, in addition to their treaty rights, the SKDB and NBDB had established a reasonably strong *prima facie* case based upon their asserted aboriginal rights to the land in question. Because Canada was contemplating transferring lands to ADKFN that were subject to overlap claims, the impact was not merely

[5] 2013 ONSC 632.

speculative. In order to be meaningful, consultation could not be postponed until final agreement discussions. The existence of a non-derogation clause did not address the applicants' concerns.

Comments

This is an important case in B.C. where several First Nations are at or near the agreement in principle stage in treaty negotiations with the province and Canada. While this ruling may complicate negotiations, it is an important recognition that, in order to be meaningful, consultation must take place at the agreement in principle stage, where many important aspects of the final agreement are settled. Non-derogation clauses, which provide that rights granted under treaty will not interfere with the rights of other aboriginal groups, while important, offer relatively little practical assistance to neighbouring aboriginal groups since they only operate in respect of proven rights.

C. *Adams Lake Indian Band* v. *Lieutenant Governor in Council*, 2012 BCCA 333

Sun Peaks Mountain Resort is a ski resort on lands near the Kamloops, B.C. that are subject to aboriginal rights and title claims of the Lakes Division of the Secwepemc Nation, which includes Adams Lake Indian Band. The development of the resort is governed by the Master Development Agreement between British Columbia and the developer. Prior to March of 2010, the resort had been within the jurisdiction of the Sun Peaks Mountain Resort Improvement District. On March 25, 2010, the Lieutenant Governor in Council passed an order in council cancelling the letters patent of the Sun Peaks Mountain Resort Improvement District and issuing letters patent for the Sun Peaks Mountain Resort Municipality. The band filed a petition for an order quashing this order in council on the basis of a breach of the duty to consult the band.

The band argued that the province had breached the duty to consult by failing to undertake a strength of claim analysis, and that the decision to incorporate the municipality would adversely affect ongoing consultation on related issues regarding the development of the resort. The B.C. Supreme Court issued a declaration that the province had not fulfilled its duty to consult the band regarding the order in council (but without setting aside the order in council). The province appealed; the band cross-appealed. The court of appeal allowed the appeal and dismissed the petition.

In the court's view, the only issue before the court was the adequacy of the consultation regarding the incorporation. The court held that the incorporation had little effect on the band's aboriginal rights and title. The court was unmoved by the fact that incorporation would consolidate the local government's powers within a single council responsible to a smaller electorate whose interests, according to the chambers judge are "generally aligned with the Sun Peaks resort". In the court of appeal's view, the development of the resort is governed by the Master Development Agreement ("MDA"). The court held that the duty to consult the band regarding the incorporation was as the low end of the spectrum, and that the consultation was adequate. In the circumstances, the court held that no strength of claim analysis was required.

On April 11, 2013, the Supreme Court of Canada dismissed the band's application for leave to appeal.

Comments

By taking a narrow view of the impacts of the incorporation, this case takes a relatively narrow view of subject matter of the duty to consult, one that might be challenged as ignoring common sense realities. The appellate court, unlike the chambers judge, distinguished between the impacts of incorporation, as a "stand-alone issue" and the impacts of the ski hill MDA and other issues of land use that would have critical impacts on the band. Arguably, this was a matter of pleading. The court found that the petition included "no specific complaint about the adequacy of ongoing consultation with respect to proposed amendments to the MDA", and that the chambers judge therefore erred in considering the related consultations. In fact, the company was not even joined in the petition. A wider net cast in the petition might well have produced a different result.

The court's holding that no strength of claim analysis was required due to the "insignificant" impact of the incorporation on the band's aboriginal rights (as a discrete "stand-alone issue") is somewhat puzzling, given that the court found that a duty to consult arose in the circumstances. Did the court mean that a strength of claim analysis is never required, or that a strength of claim assessment is only required where the impact of the contemplated conduct on the First Nation's rights is substantial? If the latter, how is the Crown to assess the impact of its conduct on the First Nation's rights without first conducting a strength of claim analysis? Also, note the court's

reference to the *Marshall; Bernard*[6] in the context of the weakness of an aboriginal title claim (at para 73). It is uncertain whether this impacted the decision, but is concerning that it gains a mention.

D. *Neskonlith Indian Band* v. *Salmon Arm (City)*, 2012 BCCA 379

Two entities, referred to collectively as "Shopping Centres", owned about 61 acres of land in Salmon Arm, B.C., which they planned to develop. The Salmon River crossed the northwest corner of the property, which bordered Neskonlith Indian Reserve No. 3. The property was designated as flood plain under the Salmon Arm Official Community Plan, meaning that development was prohibited unless an Environmentally Hazardous Area Development Permit was obtained. The owners applied to the city for an Environmentally Hazardous Area Development Permit. The city gave notice of this application to the Neskonlith Indian Band, but did not accede to the band's demand to discuss the consultation process. The band commissioned a report that concluded that the site elevation was too low, and created a potential flood risk to them in future. Following a meeting attended by representatives of the band, the city issued a development permit. The band filed a petition seeking to quash the permit. The band conceded that the development would have no immediate impact on its interests, but alleged that future mitigation measures, such as diking and channeling, might adversely impact the band's rights. The B.C. Supreme Court dismissed the petition. The B.C. Court of Appeal dismissed the appeal.

The court of appeal held that local governments have no legal authority to engage in consultation. The court held that the Crown cannot delegate the duty to consult to local governments, which do not have sufficient statutory authority to engage in the "nuanced and complex constitutional process" of consultation and accommodation. The court expressed concern that imposing a duty to consult on local governments would be impractical and would unduly interfere with local governments' responsibilities.

The court questioned whether the issuance of the development permit was "Crown conduct" sufficient to give rise to a duty to consult, given that none of the parties had alleged that the city was acting as an agent of the Crown. The court also observed that, on the facts, it was unclear

[6] *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220.

whether the issuance of the development permit would have any adverse effect on the band's rights. The court considered that any effect was "uncertain, indirect, and at the far end of the spectrum of adverse effects posited in *Haida*".[7] Assuming that the city had a duty to consult the band, and that a duty to consult arose on the facts, the court held that the duty had been discharged. The court observed that the absence of a strength of claim analysis did not preclude adequate consultation.

Comments

Leave to appeal to the Supreme Court of Canada was not sought in this case. As a result, this case remains the current law on the issue of whether the duty to consult applies to local governments in B.C. The court's conclusion on these facts raises the question of the recourse available to a First Nation when a local government undertakes conduct that may adversely affect the First Nation's aboriginal rights.

While, strictly speaking, the issue of whether the province had a duty to consult in relation to the city's conduct was not before the court in this case, by questioning whether there was any Crown conduct in this case, the court suggested that no duty to consult arises in relation to conduct undertaken by a local government. If that is that case, it may be that the only duty to consult in relation to local governments is that which arises when the province transfers property or jurisdiction to a local government. This would seem an unsatisfactory solution since, at the time such a transfer is made, it may be impossible to know whether and to what extent the transfer will result in conduct that would adversely affect aboriginal rights, as that issue will depend on future conduct undertaken by the local government.

It is interesting, and may be relevant to future cases involving statutory bodies, that the court of appeal focused on the ability of the municipality to effectively consult:

> The Court in *Rio Tinto* was mindful of the fact that any "tribunal" charged with the obligation to consult and if indicated, accommodate, would require "remedial powers". Such powers have not been granted to municipalities, just as they have not been granted to quasi-judicial tribunals. As the third order of government, municipal councils are simply not in a position to, for example, suspend the application of bylaws or the terms of OCPs, grant benefits to First Nations or indeed to consider matters outside their statutory parameters… *A fortiori*, local governments lack the

[7] At para. 83.

> authority to engage in the nuanced and complex constitutional process involving "facts, law, policy and compromise" referred to in *Rio Tinto*. [At para. 68.]

This may also be a case in which the pleadings choices played a role. The Province was not a party, and counsel made a deliberate choice to argue the case directly against the city as a delegated decision-maker. The petitioners also did not challenge either the OCP amendment or the zoning decisions, but only the permit.

Given the court of appeal's approach, in future cases, a different pleading may be necessary. Notably, if the court of appeal's reasoning is correct, that the honor of the Crown engages only the province, and the municipality has no ability or duty to consult under its legislation, then there is a legislative gap (similar to that found in *Ross River*), which can only be addressed by litigation targeting the province. Note that Newbury J.A. chose to rely upon and emphasize the following passage from *Rio Tinto Alcan*:

> As the B.C. Court of Appeal rightly found, the duty to consult with Aboriginal groups, triggered when government decisions have the potential to adversely affect Aboriginal interests, is a constitutional duty invoking the honour of the Crown. It must be met. <u>If the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts</u>: *Haida Nation*, at para. 51. [At paras. 62-3, 75; emphasis added by Newbury J.A.]

E. *Halalt First Nation* v. *British Columbia*, 2012 BCCA 472

The District of North Cowichan proposed to install three pumps to draw water from the Chemainus River aquifer in order to meet the district's water needs. In response to concerns from the province and the Halalt First Nation that withdrawals from the aquifer would affect the flow of the Chemainus River, the district amended the project to provide for two wells, only one of which would operate at a time, and only in winter. The province issued an environmental assessment certificate in respect of the modified project. The Halalt sought judicial review of the issuance of the certificate.

The B.C. Supreme Court declared that the duty to consult the Halalt with respect to the project had not been discharged. The court considered that, in effect, the project was the implementation of a strategic decision by the district to replace surface water supply with groundwater supply. The court was of the view that the decision to amend the project was made without the Halalt's

involvement, and without adequate accommodation. The court was also critical of the province for approving the project in the absence of an evidentiary basis for the conclusion that the project would have no significant adverse environmental effects. The court stayed the certificate pending adequate consultation and accommodation. The province appealed.

The court of appeal allowed the appeal and dismissed the application. The court noted that the certificate did not permit the operation of the wells in summer. In the event the district wished to operate the wells year-round, it would be required to apply to amend the certificate. As a result, the Crown had no obligation to consult on year-round pumping. That the Halalt were not consulted before the scope of the project was altered was not a breach of the duty to consult. In each case, the Halalt were given an opportunity to comment on the alteration. In the court's view, "deep consultation" took place, and the accommodation was adequate.

The court held that while it is desirable and "sometimes necessary" to assess the strength of asserted aboriginal rights claim, no strength of claim analysis is necessary where the Crown concedes that deep consultation is required. If the Crown discharges the duty to consult, the lack of a formal assessment of the strength of claim, or even an admission that a duty to consult arises, is of no consequence.

On January 18, 2013, the Halalt First Nation filed an application for leave to appeal to the Supreme Court of Canada.

Comments

This was a heavily fact-based case, both in the determination of impacts and the adequacy of the consultation. Even though brought by petition, it ended up in many days of evidentiary hearings, and will not readily provide a precedent either way.

There is an interesting issue in this case concerning the "duty to compensate". The court held that there was no duty to compensate the Halat for the interference with its aboriginal rights, noting that "It is not difficult to discern strong policy reasons for refusing compensation" but declining to specify what those policy reasons might be.[8] On a practical level, this comment

[8] At para. 180.

deserves revisiting. While compensation is not appropriate in every case, there are strong policy reasons for the Crown to provide compensation, as it has done in a number of industries. Compensation, often in the form of revenue sharing, frequently forms an important aspect of the accommodation provided to a First Nation in the discharge of the duty to consult. Courts have confirmed that aboriginal title has an economic component. When the Crown undertakes conduct that adversely affects an aboriginal right, whether permanently or temporarily, compensation may well be appropriate.

III. IMPORTANT DEVELOPMENTS IN THE DUTY TO CONSULT IN 2012

A. The Duty to Consult Regarding Legislation and Orders in Council

In 2012, the B.C. Court of Appeal put a fairly definitive end to the speculation that, when passing an order in council, Cabinet is immunized from the duty to consult due to the character of an order in council as "legislative action".

This speculation arose from the following *obiter* comment of the Alberta Court of Appeal in *R. v. Lefthand*, 2007 ABCA 206:

> There can however be no duty to consult prior to the passage of legislation, even where aboriginal rights will be affected… The same is true of the passage of regulations and Orders in Council by the appropriate Executive Council. [At para. 38.]

Leave to appeal to the Supreme Court of Canada was denied in *Lefthand*. In a comment in *Rio Tinto Alcan,* however, the Court indicated that it still saw this question as a live issue. In confirming the duty to consult applies to "strategic, higher level decisions" the Court noted, "We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand,* 2007 ABCA 206" (at para. 44). This passage gave hope to the Crown that the many important government decisions made by legislation or orders in council might be immunized from the duty to consult.

The Alberta Court of Appeal, however, had already moved on. In *Tsuu T'ina Nation v. Alberta (Minister of Environment),* 2010 ABCA 137 (a case that involved an order in council), the court, distinguishing between the remedy of quashing legislation and declaratory relief, concluded:

> [55] 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.
>
> …
>
> [57] In short, I am of the view that the fact that the plan was adopted by an order-in-council does not immunize the persons developing the plan from a duty to consult, if such duty otherwise arises in the circumstances of the case.

The issue was squarely raised again before Bruce J. in the B.C. Supreme Court in *Adams Lake Indian Band v. British Columbia*, 2011 BSCS 266, in the context of the order in council incorporating the resort municipality. There, relying on *Tsuu T'ina*, she said, "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" (at para. 124). Bruce J. noted that the comments in *Lefthand* were *obiter*, and that the comment in *Rio Tinto Alcan* did not support the municipality because the Court declined to confirm or reject the comments in *Lefthand*. Instead, she pointed out that in *Musqueam Indian Band v. BC (Minister of Sustainable Resource Management)*, 2005 BCCA 128 (the UBC golf course case), the B.C. Court of Appeal had "suspended" an order in council approving the sale of the lands. Bruce J. concluded that both *Musqueam* and *Tsuu T'ina* clearly supported the duty to consult in relation to an order in council.

On appeal from the order of Bruce J. in *Adams Lake*, the B.C. Court of Appeal did not consider it necessary to revisit the issue of whether the duty to consult arises in relation to an order in council, apparently proceeding on the assumption that it does. The court accepted that a duty to consult arose in relation to the order in council, concluding that "the consultation with respect to the issue of incorporation of the Municipality as described above was adequate" (at para. 78).

Any lingering uncertainty on this matter in B.C. seems to have been resolved by *Ross River Dene Council v. Government of Yukon*, 2012 YKCA 14. There, three justices of the B.C. Court of Appeal, sitting as the Yukon Court of Appeal, effectively reviewed the legislative regime under the Yukon *Quartz Mining Act*. The court held that the lack of statutory discretion to register a claim under that Act deprived the Crown of the ability to consult and was therefore "defective":

> Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate aboriginal claims are defective and cannot be allowed to subsist. [At para. 37.]

Groberman J.A., writing for the court, referenced the *Lefthand* comment in *Rio Tinto Alcan*, which he said must be read narrowly:

> It may be that the doctrine of parliamentary sovereignty precludes the imposition of a requirement that governments consult with First Nations before introducing legislation (see *Reference re: Canada Assistance Plan (BC)*, [1991] SCR 525 at 563). Such a limitation on the duty to consult would, however, only apply to the introduction of the legislation itself, and could not justify the absence of consultation in carrying out the statutory regime. [At para. 39.]

The court held that though the design of the legislation had considerable value to the mining industry, it must be "modified" in order to permit the Crown to discharge the duty to consult (at para. 43). The court considered that "the regime must allow for an appropriate level of consultation before aboriginal claims are adversely affected." (At para. 44.) Note that this comment was made regarding the legislation proper.

The court in *Ross River* went on to find that the possibility of interim protection for certain lands pursuant to an order in council under the legislation might save the legislation from being unconstitutional. The court observed, however, that consultation would be required in respect of such orders in council:

> Consultation is an ongoing process, and further discussions may be necessary to ensure that OIC 2008/45 represents an appropriate accommodation of the Plaintiffs aboriginal title claims. [At para. 48.]

The Yukon Court of Appeal's decision in *Ross River* should end the debate. At least in B.C. and Yukon, the duty to consult may arise in relation to legislation and orders in council. The court's conclusion on this issue is sensible. The duty to consult is a constitutional imperative. Since both legislative and executive power exercised thereunder must be consistent with the Constitution, they must be consistent with the duty to consult. To hold otherwise would permit governments to stage an end-run around the Constitution.

B. The Role of the Strength of Claim Analysis in the Consultation Process

Halalt, Neskonlith, and *Adams Lake* all raise the issue of the role of the strength of claim analysis in the consultation process. In each of these cases, the First Nation complained that there had been no adequate assessment of the strength of its aboriginal rights claim, and in each case the B.C. Court of Appeal held that the Crown was not required to undertake such an assessment.

In *Halalt,* the court held that, if the Crown is prepared to concede that "deep consultation" is required, a strength of claim analysis is not necessary.[9] In *Adams Lake,* the court suggested that no strength of claim assessment was required because the impact of the incorporation on the band's aboriginal rights claims was "insubstantial".[10] In *Neskonlith,* in response to the band's complaint that no strength of claim assessment had taken place, the court noted that the Crown may discharge the duty to consult even while denying that a duty to consult arises on the facts.[11] While the court did not squarely address the issue in any of these cases, the court's comments, particularly in *Halalt* and *Neskonlith,* suggest that, as a matter of law, the Crown is not required to undertake a strength of claim analysis in order to discharge the duty to consult.

Whether or not it is legally required, a strength of claim analysis serves an important practical purpose in the consultation process. The content of the duty to consult depends on the strength of the asserted aboriginal rights claim and the seriousness of the potential impact on the claimed rights.[12] It is difficult to see how the Crown could address the First Nation's concerns in relation to contemplated Crown conduct without an understanding of the contours of the claimed rights at stake. By serving to create such an understanding, a strength of claim analysis plays an important role in enabling the Crown to discharge the duty to consult. By refusing to undertake a strength of claim assessment, the Crown risks jeopardizing the consultation process.

[9] At para. 118.
[10] At para. 74.
[11] At para. 88, citing *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550, and *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103.
[12] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 at para. 39 ["*Haida"*].

C. The Impact of *Daniels v. Canada* on the Duty to Consult

In *Daniels v. Canada*, 2013 FC 6, the Federal Court declared that Métis and non-status Indians are "Indians" within the meaning of s. 91(24) of the *Constitution Act, 1867*. The court defined "non-status Indians" as:

> …people who had ancestral connection not necessarily genetic to those considered as "Indians" either in law or fact or any person who self-identifies as an Indian and is accepted as such by the Indian community, or a locally organized community, branch or council of an Indian association or organization [with] which that person wishes to be associated. [At para. 122.]

If upheld on appeal, *Daniels* will likely have important implications for the federal government in relation to its obligations towards "Indians". The duty to consult, however, is based not on whether persons are Indians within the meaning of s. 91(24), but rather on whether an aboriginal group has a claim to aboriginal and treaty rights within the meaning of s. 35 of the *Constitution Act, 1982.*

The duty to consult arises in relation to s. 35 aboriginal rights. Only "aboriginal peoples of Canada", a category that expressly includes Indians and Métis, are capable of holding aboriginal rights under s. 35. Being an "Indian" within the meaning of s. 91(24) of the *Constitution Act, 1867*, however, is neither necessary nor sufficient to establish a claim to an aboriginal right. In order to claim entitlement to an aboriginal right, an individual must prove membership in an aboriginal group that holds aboriginal rights, issues that are determined by reference to the common law of aboriginal rights, not by reference to the *Indian Act* or to s. 91(24). This is particularly true of aboriginal title. While it may be that "non-status Indians" hold s. 35 aboriginal rights either as members of established aboriginal groups or otherwise, *Daniels* is silent on this issue. As a result, it remains to be seen how *Daniels* might impact the duty to consult Métis and non-status Indians.

IV. CONCLUSION

In 2012, the courts addressed a number of important issues in relation to the duty to consult. The B.C. and Yukon courts of appeal held that the duty to consult arises in respect of legislation and orders in council. The Federal Court held that, in order to be meaningful, consultation regarding

treaty negotiations must occur at the agreement in principle stage. The B.C. Court of Appeal held that local governments have no duty to consult.

While the courts in 2012 answered a number of important questions regarding the duty to consult, they also raised new questions. By identifying the serious structural problem with the Yukon mineral tenure regime, the Yukon Court of Appeal has raised questions as to the constitutionality of mineral tenure regimes in other provinces, including in B.C. By holding that local governments have no duty to consult, the B.C. Court of Appeal raised the question of what remedy, if any, First Nations have in relation to conduct undertaken by local governments. Several cases decided by the B.C. Court of Appeal in 2012 raise the issue of the role of a strength of claim assessment in the consultation process, and, more generally, the role First Nations play in determining the nature and content of the consultation process.

While the central tenets of the duty to consult are now well established, important unresolved issues remain. First Nations and governments will continue to turn to the courts to address these issues as the duty to consult continues to play a critical role in the relationship between First Nations and governments in Canada.