

**The Duty to Consult in the Administrative Law context:
When it arises, and where it is enforced**

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I. INTRODUCTION

The jurisprudential life of the Crown's duty to consult with aboriginal people in the interim of the final determination of aboriginal claims is almost a decade long: *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, 2002 BCCA 59, *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 147, confirmed by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74.

Since the Supreme Court of Canada's confirmation of the duty in 2004, First Nations have spent a lot of litigation time and effort trying to determine just how, when, and where they can enforce this duty. The disputes have entwined questions of what Crown conduct triggers the duty with questions of what Crown conduct is reviewable by the Courts and how. Several cases have addressed just where the justiciable sites for the duty's enforcement lie: (*Huu-ay-aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697; *Leighton v. Canada (Minister of Transport)*, 2006 FC 1129, para. 26-32 and *Metlakatla Indian Band v. Canada (Attorney General)*, 2007 FC 553 para 58; *Musqueam v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at paras. 16-23 (per Southin J.A.); *Joe Hall et al. v. Canada (Attorney General)*, 2007 BCCA 133).

The role of tribunals in enforcing the Crown's duty to consult arose in 2008 in the companion cases of *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 and *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67. The B.C. Court of Appeal determined in both cases that, in making the statutory determinations at issue under the *British Columbia Utilities Act*, R.S.B.C. 1996, c. 463, s. 71, the British Columbia Utilities Commission ("BCUC", or the "Commission") had the jurisdiction and the obligation to determine whether the Crown had met any duty to consult with respect to the Crown conduct at issue. These cases enmeshed the questions of where the duty arises, and what bodies are properly engaged in the duty's enforcement.

No appeal was sought from *Kwikwetlem*, but the respondent Rio Tinto Alcan sought leave to appeal to the Supreme Court of Canada from the *Carrier Sekani* decision, and when leave was granted, BC Hydro joined as an appellant. The Court heard and released its decision in *Rio Tinto Alcan v. Carrier Sekani Tribal Council* in the fall of 2010 (2010 SCC 43). This decision, as well as the *Beckman v. Little Salmon/Carmacks First Nation*, 201 SCC 53, will be reviewed below, as will points from other decisions that deal with the intersection of aboriginal and administrative law.

The salient issue this paper looks at is when the duty arises, and how it is enforced in the administrative state.

II. THE DUTY TO CONSULT

A. WHEN IT ARISES AND HOW TO ENFORCE IT

Rio Tinto Alcan is the first Supreme Court of Canada case dealing with consultation since the 2004/2005 trilogy of *Haida*, *Taku* and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69. The questions of what Crown conduct triggers the duty to consult and the site of the duty's enforcement were both at issue in the case.

The case arose from the filing of an Energy Purchase Agreement (EPA) made between BC Hydro and Rio Tinto Alcan Inc. with the BCUC under s. 71 of the *Utilities Commission Act*, for a determination as to whether the EPA was in the "public interest".

The EPA was couched in a long history. Almost 60 years ago, the Province gave the rights to the water in the Nechako to Alcan Aluminum Inc. by licence. Alcan then reversed the flow of the Nechako River in order to generate power for aluminum production in Kitimat. In 1987 this regime was confirmed by an agreement between Canada, B.C. and Alcan. First Nations were never consulted about any of this.

Now Alcan diverts the maximum water it can from the River, allowing only about 25% of the natural flow down the Nechako River. This has significant negative impacts upon

the fish in the Nechako River (e.g. salmon, sturgeon and trout), and so too on the CSTC's aboriginal rights.

B.C. Hydro went before the BCUC for approval of the EPA. (Alcan is no longer using all of its electricity for aluminum production—it sells a substantial amount of it into the energy grid.) The Carrier Sekani Tribal Council objected on the basis that they had not been consulted.

The BCUC decided that it did not need to consider the failure to consult, because the EPA would have no physical impact on water levels in the Nechako: Alcan had said it would always divert the maximum water allowable, and if it did not sell the power to BC Hydro, it would sell to someone else.

On appeal, the British Columbia Court of Appeal held that the Commission had erred in its disposition of the consultation question. The Court made no finding as to whether the duty to consult did in fact arise with respect to the EPA, but that the Commission erred in not making a full inquiry into whether the duty arose (*Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 paras. 57, 61-64).

On appeal from the decision, the Supreme Court of Canada confirmed the Court of Appeal's determination that the Commission had the jurisdiction and obligation to consider the adequacy of any consultation that was required, but upheld the Commission's determination that no duty was triggered by the EPA.

On the issue of what Crown conduct triggers the duty to consult, the Court confirmed and expanded on the broad language in *Haida*, holding that the duty does not arise solely with respect to "government exercises of statutory power", but to government action that may adversely impact aboriginal claims or rights (para. 43, citing two B.C. Supreme Court decisions, (*Huu-Ay-Aht*, at paras. 94 and 104; *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139, at paras. 11-15).

This lies at the heart of an important conceptual distinction between what triggers the duty on one hand, and the juridical mechanism for enforcing the duty on the other.

Nothing in *Haida* suggested that the government conduct at issue *would* be limited to exercises of statutory power. *Haida* spoke of contemplated Crown “conduct.” The issue tended to rise instead from Crown respondent arguments on judicial review post-*Haida*, that the challenged conduct at issue did not trigger the duty because it was not an exercise of specific statutory power and therefore not subject to judicial review (see e.g. *Huu-ay-aht*, supra and *Leighton*, supra).

The Court in *Rio Tinto* confirmed though that the duty not only attaches at a higher level than discrete statutory decisions, but that the conceptualization of the adverse impacts that might trigger the duty is broader than immediate physical impacts:

“...government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to “strategic, higher level decisions” that may have an impact on Aboriginal claims and rights...”(para. 44)

The Court went on to provide a series of examples of the sorts of “higher level decisions” that may trigger the duty:

“Examples include the transfer of tree licences [*sic*] which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (*Dene Tha’ First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff’d 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province’s infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia’s Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re*, 2009 CarswellBC 3637 (B.C.U.C.)).” (para. 44)

Decisions that “set the stage” for future decisions that directly impact asserted aboriginal rights will trigger the duty. Significantly, the Court held that any reduction in the Crown’s future ability to ensure that the future development of a resource is done

consistently with the Crown's obligations to aboriginal peoples is itself an adverse impact:

“... high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no “immediate impact on lands and resources”: Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.” (para. 47, emphasis added)

“... In cases where adverse impact giving rise to a duty to consult has been found as a consequence of organizational or power-structure changes, it has generally been on the basis that the operational decision at stake may affect the Crown's future ability to deal honourably with Aboriginal interests. Thus, in *Haida Nation*, the Crown proposed to enter into a long-term timber sale contract with Weyerhaeuser. By entering into the contract, the Crown would have reduced its power to control logging of trees, some of them old growth forest, and hence its ability to exercise decision making over the forest consistent with the honour of the Crown. The resource would have been harvested without the consultation discharge that the honour of the Crown required. The Haida people would have been robbed of their constitutional entitlement. A more telling adverse impact on Aboriginal interests is difficult to conceive.” (para. 90, emphasis added)

In the case before it, the Court held that the Crown conduct at issue—the entry into an Energy Purchase Agreement (EPA) between BC Hydro and Rio Tinto Alcan—would cause no adverse effect to the respondent First Nations, and so, did not give rise to a duty to consult (paras. 87, 92). But the Court confirmed that the BCUC had, in determining under the *Utilities Commission Act* whether to approve the EPA, the jurisdiction and obligation to assess whether any duty to consult that did arise had been met. This is discussed in more detail below.

The Court held that because the EPA would neither change water flows in the Nechako nor caused the sort of change in management that would hinder the Crown's ability to deal honourably with resource in the future, that the duty to consult did not arise. Indeed, the Court expressly noted that the Crown—and in particular, BC Hydro as a Crown corporation and agent—would remain part of a Joint Operating Committee for the Nechako Reservoir, and retain the according obligation to consult regarding future decisions in that context:

“Nor need the second element — proposed Crown conduct or decision — detain us. BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia.” (para. 81, emphasis added)

“By contrast, in this case, the Crown remains present on the Joint Operating Committee and as a participant in the reservoir operating model. Charged with the duty to act in accordance with the honour of Crown, BC Hydro's representatives would be required to take into account and consult as necessary with affected Aboriginal groups insofar as any decisions taken in the future have the potential to adversely affect them. The CSTC First Nations' right to Crown consultation on any decisions that would adversely affect their claims or rights would be maintained. I add that the honour of the Crown would require BC Hydro to give the CSTC First Nations notice of any decisions under the 2007 EPA that have the potential to adversely affect their claims or rights.” (para. 91, emphasis added)

B. TRIBUNALS AND THE CONSTITUTION

While it is worth illuminating the distinction between the conduct that *triggers* the duty vs. just where the duty is enforceable or justiciable, this should not be taken too far. The point is worth making because for a period there appeared to be some danger that real or perceived constraints upon the courts' jurisdiction on judicial review would have the effect in practice of limiting the scope of the constitutional duty itself. The Court's strong language in *Rio Tinto* likely abates this risk.

However, on the other hand, the duty is only as meaningful as its enforceability.

Therefore, determining where in our regulatory and adjudicative structure the constitutional duty can be enforced is an important question. Practitioners of administrative and constitutional law will recall the long tension in which the companion issue was held as the Supreme Court of Canada deliberated upon the enforceability of the *Charter* at the administrative tribunal level, recently reviewed in *R. v. Conway*, 2010 SCC 22. The strong dissent in *Cooper* came to prevail, the Court adopting it in *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 (“*Martin*”, para. 29), and endorsing it again most recently in *Conway* (para. 77):

The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.
(*Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, per McLachlin J. (in dissent), at para. 70)

The issue faced by First Nations is not dissimilar: if the duty to consult is to be meaningful, it must attach to the appropriate level of Crown decision making, and must be enforceable through reasonable, accessible means. Both administrative law and s. 35 jurisprudence regarding the Crown’s duty to consult are concerned with maintaining the rule of law and constitutional supremacy in Crown decision making, and ensuring that the constitutionality of government action not be deferred or reserved for enforcement by the courts but be enacted through the decisions of the Crown’s delegates.

Haida established that the “solemn commitment” of s. 35 of the Constitution constrains the exercise of Crown authority over contested resources pending final determination of aboriginal claims (para. 29, 32-35). *Haida* also promises the assistance of “courts and tribunals” in properly measuring and enforcing this constraint (paras. 30, 37). *Martin* and *Paul* establish that the enforcement of constitutional rights and obligations, including s. 35 rights, is part of the regular (if perhaps not frequent) work of administrative tribunals:

From this principle of constitutional supremacy also flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts... (*Martin*, para. 29)

...The *Charter* is not invoked as a separate subject matter; rather, it is a controlling norm in decisions over matters within the tribunal's jurisdiction. (*Martin*, para 39)

The applicability of this in determining a tribunal's power to apply s. 35 of the *Constitution Act, 1982* was confirmed in the companion case of *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, at paras. 8 and 39; see also *Conway*, paras. 68, 73-75.

1. Legislative intent

The jurisdiction of a tribunal to apply the constitution depends upon legislative intent.

The Court recently summarized the test set out in *Martin* in *Conway*:

“Based on these principles, Gonthier J. concluded that the following determines whether it is within an administrative tribunal's jurisdiction to subject a legislative provision to *Charter* scrutiny:

Under the tribunal's enabling statute, does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter*.

Does the tribunal's enabling statute clearly demonstrate that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.” (para. 68)

The Court also observed in *Conway*:

“...with rare exceptions, administrative tribunals with the authority to apply the law have the jurisdiction to apply the *Charter* to the issues that arise in the proper exercise of their statutory functions...” (para. 20)

Citing *Conway* and *Paul*, the Court in *Rio Tinto Alcan* applied the same test.

“The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal’s power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39).” (para. 69)

The Court confirmed that the BCUC has the jurisdiction to decide questions of law, and, as it was put by the Court in *Conway*, “[t]he presumption in favour of constitutional jurisdiction was therefore triggered and was not rebutted” (*Conway* para. 76):

“...It is common ground that the *Utilities Commission Act* empowers the Commission to decide questions of law in the course of determining whether the 2007 EPA is in the public interest...” (*Rio Tinto Alcan* para. 69, emphasis added and para. 72)

Accordingly, the Court held that the Commission had the obligation to determine whether any duty to consult arose with respect to the decision before it, and if so, whether the Crown had discharged the duty (para. 84).

2. Not a “new duty”

The main ground upon which *Rio Tinto Alcan* sought leave to appeal to the Supreme Court of Canada from the B.C. Court of Appeal’s decision was that the Court of Appeal had ignored the statutory mandate of the BCUC, and introduced a “new duty to decide” to the tribunal. However, as *Conway*, and the preceding jurisprudence demonstrate, the obligation upon the BCUC was not new:

“These cases confirm that administrative tribunals with the authority to decide questions of law and whose *Charter* jurisdiction has not been clearly withdrawn have the corresponding authority — and duty — to consider and apply the Constitution, including the *Charter*, when answering those legal questions.” (*Conway*, para. 70, emphasis added)

The Supreme Court of Canada rejected the argument before it in *Rio Tinto Alcan* that the discretion afforded the BCUC under the *Act* to determine what was relevant to the public

interest would allow the Commission to displace its obligation to determine the constitutional question if it did not find that question to be relevant to the public interest.

The Court also rejected the argument that the obligation to determine the adequacy of any required consultation needed to be set out expressly in the statute in order to establish the Commission's authority and duty to do so, in favour of the "questions of law" test already established.

3. Exempting constitutional or s. 35 issues

As noted, the "questions of law" test triggers a presumption in favour of constitutional jurisdiction that can then be rebutted by the legislature. The Court specifically considered and rejected the argument that the presumption for the Commission's jurisdiction was rebutted by s. 44 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which applies to the Commission by virtue of s. 2(4) of the *Utilities Commission Act*, and states that "[t]he tribunal does not have jurisdiction over constitutional questions". After considering the definition of "constitutional questions" under the *Constitutional Question Act*, the Court held:

"...the provisions of the *Administrative Tribunals Act* and the *Constitutional Question Act* do not indicate a clear intention on the part of the legislature to exclude from the Commission's jurisdiction the duty to consider whether the Crown has discharged its duty to consult with holders of relevant Aboriginal interests." (para. 72)

It is worth noting that the power of the legislature to remove the jurisdiction of a tribunal to assess the adequacy of any required Crown consultation in relation to the matter before the tribunal may not be without constraint.

Gonthier J. in *Martin* was overtly concerned that forcing litigants to refer constitutional issues to the courts would result in costly and time-consuming bifurcation of proceedings (para. 29) and wrote:

“I refrain, however, from expressing any opinion as to the constitutionality of a provision that would place procedural barriers in the way of claimants seeking to assert their rights in a timely and effective manner, for instance by removing *Charter* jurisdiction from a tribunal without providing an effective alternative administrative route for *Charter* claims.” (para. 44, emphasis added)

Accordingly, if the legislature were to remove the power of a tribunal to assess the adequacy of any required consultation on matters before the tribunal without putting in place an effective alternative administrative route for the enforcement of the obligation, there may, depending on the circumstances, be grounds for constitutional review.¹

In *Haida* too the Court recognized that reducing recourse to the courts would strengthen reconciliation process promised in s. 35 of the Constitution:

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...” (*Haida*, para. 51 emphasis added)

In *Conway* the Court held:

“Over two decades of jurisprudence has confirmed the practical advantages and constitutional basis for allowing Canadians to assert their *Charter* rights in the most accessible forum available, without the need for bifurcated proceedings between superior courts and administrative tribunals ... The denial of early access to remedies is a denial of an appropriate and just remedy, as Lamer J. pointed out in *Mills*, at p. 891. And a scheme that favours bifurcating claims is inconsistent with the well-established principle that an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal’s specialized statutory jurisdiction (*Conway*, para. 79)

¹ This particular point would be distinct from what the legislature did under the *Clean Energy Act*, S.B.C. 2010, c. 22, s. 4(3), which took matters themselves (which may have given rise to the constitutional obligation to consult) out of the jurisdiction of the British Columbia Utilities Commission.

In *Rio Tinto Alcan* the Court held:

“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. 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: *Haida Nation*, at para. 51.” (*Rio Tinto Alcan*, para. 63 and repeated at 75)

C. ELSEWHERE IN THE REGULATORY STATE...

The “unstructured discretion” warned of by the Court in *Adams* and *Haida* resonates with the legacy of *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 “in its conclusion that any exercise of statutory discretion is subject to the *Charter* and its values” (*Conway* para. 5, para. 21).

The B.C. Court of Appeal very recently commented on the admonishment against unstructured discretion in *Nlaka’pamux Tribal Council v. British Columbia (Project Assessment Director, Environmental Assessment Office)*, 2011 BCCA 78 (“*Nlaka’pamux*”):

“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.” (*Nlaka’pamux* para. 88, emphasis added).²

² It should be noted however that in that case the Court held at para. 90 that the *Environmental Assessment Act* is a regulatory structure, one of whose goals is to provide a framework for First Nation consultation. However, this lies in contrast to what the Court said about that *Act* in *Kwikwetlem* at para. 53:

The most significant differences between the former and the current *Act* are the omission of a purposes section, changes to the criteria for the grant of an EAC, and the absence of provisions mandating participation of First Nations. The notion that the

The fundamental issue is put succinctly by Binnie J. for the majority in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (“*Little Salmon*”):

“A decision maker who proceeds on the basis of inadequate consultation errs in law.” (*Little Salmon*, para. 48)

That case arose out of an application for judicial review from an approval by the delegated decision maker of a grant of 65 acres of surrendered land (under a comprehensive treaty) to a third party. The First Nation had existing treaty rights in respect of the land, with respect to which the Court held the Crown had the duty to consult (paras. 57, 61, 66).

Both *Nlaka’pamux* and *Little Salmon* demonstrate that the Crown cannot, through internal prescription or agreement, avoid its constitutional obligation to consult, which is imposed as a matter of law, based upon the honour of the Crown. In *Little Salmon* the Crown pointed to the treaty, which did not expressly require consultation on the taking up of the land for the purposes of the grant. The Court rejected this, stating:

“I think this argument is unpersuasive. The duty to consult is treated in the jurisprudence as a means (in appropriate circumstances) of upholding the honour of the Crown. Consultation can be shaped by agreement of the parties, but the Crown cannot contract out of its duty of honourable dealing with Aboriginal people. As held in *Haida Nation* and affirmed in *Mikisew Cree*, it is a doctrine that applies independently of the expressed or implied intention of the parties.” (para. 61, emphasis added)

“However, as stated, the duty to consult is not a "collateral agreement or condition". The LSCFN Treaty *is* the "entire agreement", but it does not exist in isolation. The duty to consult is imposed as a matter of law, irrespective of the parties' "agreement". It does not "affect" the agreement itself. It is simply part of the essential legal framework within which the treaty is to be interpreted and performed.” (para. 69, emphasis added)

interests of First Nations are entitled to special protection does not arise in the current Act.

In *Nlaka'pamux* the Court of Appeal overturned a decision on judicial review which had held that the Crown could exclude consultation with the petitioner Tribal Council from an environmental assessment process regarding a proposed landfill extension, the Crown opting instead for “government to government” consultation outside the process.

The landfill extension proposal was subject to an assessment under the *Environmental Assessment Act*, S.B.C. 2002, c. 43. The s. 11 order establishing the procedures and methods for carrying out the assessment did not mandate consultation with the petitioner Tribal Council but would permit (though not require) some sort of "government to government" discussions outside of the scope of the assessment order. One of the complicating facts of the case was competing claims and evident animosity between First Nations who claimed the right to be consulted. However, the Court held:

“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.” (para. 68)

The Court held that whatever other consultation process may be provided for outside the environmental assessment, it was essential that consultation be part of the environmental assessment process itself, which is the sort of “high-level planning process” to which the duty attaches. Consultation within that process could not be substituted by consultation occurring outside the process (para. 97).

In that case much centered on the s. 11 order under the *Environmental Assessment Act* because, as the Court held, “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” (para. 98). Any other consultation would “by definition” then be outside that process. The process was in respect of a proposal that triggered the duty to consult (“deep consultation” in that case), therefore could not be completed without adequate consultation.

While the language of the statute was significant in that case, it is important to note that this principle is not contingent on statutory language. It applies even where the statute

doesn't address consultation with respect to the decision or matter at issue. This what the Court of Appeal held in *Kwikwetelem*. In that case both a Certificate of Public Convenience and Necessity (under s. 45 of the *Utilities Commission Act*) and an Environmental Assessment Certificate (under the *Environmental Assessment Act*) were necessary before the proposed Interior Lower Mainland Transmission project could proceed. The *Utilities Commission Act* is silent on consultation. The Commission determined it need not consider the adequacy of consultation with respect to the matter before it, as Crown consultation could be occur later, through another process.

“The Commission, like the respondents, takes the view the CPCN process should be completed before an application for an EAC is made. In the appellants' view, this practical approach is possible only if the Commission is required to ensure the Crown has fulfilled its duty to consult about and, if necessary, accommodate their interests during the preliminary planning stage before it grants a CPCN for a specific project.” (para. 20).

The Court of Appeal overturned the Commission, holding (paras. 13-14):

“The Commission's constitutional duty was to consider whether the Crown's constitutional duty of consultation had been fulfilled with respect to the subject matter of the application. Thus, before it certified the ILM Project as necessary and convenient in the public interest, it was required to determine when the Crown's duty to consult with regard to that project arose, the scope of that duty, and whether it was fulfilled. The Commission did not look at its task that way or undertake that analysis. It decided that the government had put in place a process for consultation and accommodation with First Nations that required a ministerial decision as to whether the Crown had fulfilled these legal obligations before the ILM Project could proceed and that the Commission should defer to that process.”

“... In my view, the nature and effect of the CPCN decision obliged the Commission to assess the adequacy of the consultation and accommodation efforts of BC Hydro on the issues relevant to the s. 45 proceeding. The Commission's refusal to consider whether the honour of the Crown was maintained to the point of its decision was based on a misunderstanding of the import of the relevant jurisprudence and was unreasonable.” (emphasis added)

One of the complex issues that arises in the law and practice dealing with consultation is what happens when there are several decisions that deal with the same Crown action, or the same resource. The Court's judgment in *Kwikwetlem* deals squarely with this particular permutation of the general overarching question of just where the duty arises, and where it is enforceable:

“As I read the two governing statutes, they mandate discrete processes whereby two decision-makers make two different decisions at two different stages of one important provincially-controlled project. Neither is subsidiary or duplicative of the other. They are better seen the way the respondents treat them and the Commission understands them, as sequential processes that can be coordinated. The CPCN defines the activity that becomes the project to be reviewed by ministers before they grant an EAC. Each decision-maker makes a decision in the public interest, taking into account factors relevant to the question on which they are required to form an opinion.

Information developed for the purpose of the CPCN application and the opinion expressed by the Commission are likely to be relevant to the EAC application, just as information gathered at the pre-application stage of the EAC process may be relevant to the CPCN hearing. That interplay does not mean the effect of their decision on Aboriginal interests is the same. Nor does it make a ministerial review of the Crown's duty to consult with regard to the definition of the project a necessarily satisfactory alternative to an assessment of that duty at an earlier stage by the Commission charged with opining as to whether a public utility system enhancement is necessary in the public interest.” (paras. 55 and 56, emphasis added)

“In these circumstances, in my view, the appellants were not only entitled to be consulted and accommodated with regard to the choice of the ILM Project by BCTC, they were also entitled to have their challenge to the adequacy of that consultation and accommodation assessed by the Commission before it certified BCTC's proposal for extending the power transmission system as being in the public interest. It was not enough for the Commission to say to First Nations: we will hear evidence about the rights you assert and how the ILM Project might affect them.” (para. 60)

“Their failure to determine whether the Crown's honour had been maintained up to that stage of the Crown's activity was an error in law.” (para. 62)

This is consistent with the Supreme Court of Canada's judgment in *Rio Tinto Alcan*, that Crown decision makers must, in making their particular decision, do so in accordance with constitutional requirements. While it will vary, depending on where you are at in the administrative state (which varies from line decision makers to tribunals, to ministers etc.), whether the decision maker themselves will actually "do" the consultation, or merely determine that adequate consultation has occurred before proceeding, the fundamental premise is the same.

The duty to consult arises as a constitutional imperative and not a mere statutory obligation. In *Chief Joe Hall v. Canada (Attorney General)* 2007 BCCA 133, Chief Justice Finch, speaking for a 5-judge division of the B.C. Court of Appeal said:

"The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings with aboriginal peoples. It may not lawfully act in a dishonourable way. That is a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps to define the relationship between government and the governed." (see also *Halfway River First Nation v. British Columbia* [1999] 4 C.N.L.R. 1, para. 177)

In general, the duty to consult is the Crown's, and attaches to government action conceived at a high level; however, no Crown actor can make a decision that ignores or is contrary to the Crown's constitutional obligations to aboriginal peoples. That is "a limitation on the powers of government".

In *Kwikwetlem*, the Court remitted the Commission's scoping decision to the Commission for reconsideration in accordance with the Court's opinion, and directed that the effect of the CPCN that the Commission had issued be suspended for the purpose of determining whether the Crown's duty to consult and accommodate the appellants had been met up to that decision point. The Commission waited for the Supreme Court of Canada's judgement in *Rio Tinto Alcan* and subsequent submissions from the parties on this point, and recently released its determination (*In the matter of: British Columbia Transmission Corporation, Reconsideration of the Interior to Lower Mainland Transmission Project*, Decision, February 3, 2011). The Commission Panel determined that the Crown's consultation was not adequate for certain of the First Nations before the

Commission, including not having properly consulted regarding route and project options early on, and never having properly responded to First Nations on the question of revenue-sharing. BC Hydro was directed to report back to the Commission in 120 days, and the Certificate of Public Convenience and Necessity remains suspended until the Commission determines that the deficiencies in consultation have been remedied.

III. JUDICIAL REVIEW: STANDARD OF REVIEW

Binnie J. said this for the majority in *Little Salmon* regarding the standard of review to be brought to decisions made where the duty to consult is at issue:

“In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director’s decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director’s decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?” (para. 48, emphasis added)

This is what the Court said in *Rio Tinto Alcan* regarding the standard to be applied on review from a British Columbia tribunal:

“Before leaving the role of tribunals in relation to consultation, it may be useful to review the standard of review that courts should apply in addressing the decisions of tribunals. The starting point is *Haida Nation*, at para. 61:

The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. . . . Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be

required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness”

“It is therefore clear that some deference is appropriate on matters of mixed fact and law, invoking the standard of reasonableness. This, of course, does not displace the need to take express legislative intention into account in determining the appropriate standard of review on particular issues: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. It follows that it is necessary in this case to consider the provisions of the *Administrative Tribunals Act* and the *Utilities Commission Act* in determining the appropriate standard of review, as will be discussed more fully below.” (para. 64, 65)

...

“The first question is whether consideration of the duty to consult was within the mandate of the Commission. This being an issue of jurisdiction, the standard of review at common law is correctness. The relevant statutes, discussed earlier, do not displace that standard. I therefore agree with the Court of Appeal that the Commission did not err in concluding that it had the power to consider the issue of consultation.” (para. 67)

...

“The determination that rescoping was not required because the 2007 EPA could not affect Aboriginal interests is a mixed question of fact and law. As directed by *Haida Nation*, the standard of review applicable to this type of decision is normally reasonableness (understood in the sense that any conclusion resting on incorrect legal principles of law would not be reasonable). However, the provisions of the relevant statutes, discussed earlier, must be considered. The *Utilities Commission Act* provides that the Commission’s findings of fact are “binding and conclusive”, attracting a patently unreasonable standard under the *Administrative Tribunals Act*. Questions of law must be correctly decided. The question before us is a question of mixed fact and law. It falls between the legislated standards and thus attracts the common law standard of “reasonableness” as set out in *Haida Nation* and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.” (para. 78)

Without commenting on the Court's treatment of the *Administrative Tribunals Act* in *Rio Tinto Alcan* (or that it was a statutory appeal), the law can, I think, be summarized this way: the deference entailed in the reasonableness standard applies to the findings of fact required to determine whether the duty is triggered, and it applies to the assessment of the consultation process itself. But it cannot be reasonable to proceed on the basis of inadequate consultation—it is incorrect to do so.

IV. REMEDIES

A. TRIBUNALS

Where a tribunal finds that Crown consultation with respect to the matter before it has been inadequate, it has, following *Rio Tinto Alcan*, potentially broad remedial powers:

A tribunal that has the power to consider the adequacy of consultation, but does not itself have the power to enter into consultations, should provide whatever relief it considers appropriate in the circumstances, in accordance with the remedial powers expressly or impliedly conferred upon it by statute. The goal is to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in Haida Nation." (para. 61, emphasis added)

This articulation of the remedial powers of tribunals where consultation has been found to be inadequate could be said to reflect the particular location of tribunals within the administrative state, "spanning the constitutional divide between the executive and judicial branches of government" (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licencing Branch*, 2001 SCC 52.)

B. CONSULTATION AS A SUBSTANTIVE RIGHT

The relationship between the law of consultation and administrative law is obviously close and intertwined (see, e.g. Binnie J. in *Little Salmon* at paras. 46, 47). However, the Court in *Haida* rejected the Crown's argument that any duty to consult is nothing more than the existing duties imported by administrative law upon government decision

making: (*Haida*, paras. 28, 31). In *Little Salmon* the Court said: “Added to the ordinary administrative law duties, of course, was the added legal burden on the territorial government to uphold the honour of the Crown in its dealings with the First Nation” (para. 57). The strong language used throughout the post-*Haida* jurisprudence recognizing the constitutional imperative of consultation reflects this.

However, as discussed throughout this paper, the obligation is in practice contingent upon the tools of its enforcement, and administrative law is the generally employed toolbox. Furthermore, much of the jurisprudence has focused on the procedural rights entailed in and adequacy of consultation, rather than on assessing the adequacy of substantive accommodation arising from consultation (but see e.g. *Wii’litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 at paras. 221 and 242).

That said, a significant aspect of the Court’s judgment in *Rio Tinto Alcan* highlights that the right to consultation is not just a procedural right, but a substantive one too. In addressing the fact that the EPA was premised on an existing massive resource exploitation about which the Carrier Sekani had never been consulted or accommodated, the Court said:

“The question is whether there is a claim or right that potentially may be adversely impacted by the *current* government conduct or decision in question. Prior and continuing breaches, including prior failures to consult, will only trigger a duty to consult if the present decision has the potential of causing a novel adverse impact on a present claim or existing right. This is not to say that there is no remedy for past and continuing breaches, including previous failures to consult. As noted in *Haida Nation*, a breach of the duty to consult may be remedied in various ways, including the awarding of damages...” (para. 49, emphasis added)

“...the failure to consult gives rise to a variety of remedies, including damages...” (para. 54, and see para. 83).

Damages are not within the remedies available under administrative law on judicial review. That they are a remedy available for failure to consult takes the duty and its enforcement beyond administrative law (and therefore the scope of this conference), but on this point it is worth noting the Supreme Court of Canada’s recent decision in

Telezone dealing with the interplay between proceedings for judicial review and actions against the Crown (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, see e.g. paras. 24, 30). How this will work where the action is for breach of the interim (i.e. *Haida*) constitutional obligation to consult has yet to be addressed in the case law.