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July 24, 2009

British Columbia Utilities Commission
Sixth Floor, 900 Howe Street, Box 250
Vancouver, BC, V6Z 2N3
Attn: Erica Hamilton, Secretary
By Courier

Dear Madam:

Re: Long Term Electricity Transmission Requirements Inquiry,
BCUC Orders No. G-30-09, G-47-09, BCUC Project # 3698545
Submissions on First Nations Issues (Exhibit A-16)

Further to my submissions letter which you will receive today under separate cover, enclosed please find 20 copies of the attachment: McCabe, J. Timothy S. *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*. (LexisNexis Canada Inc. 2008), excerpt: Title page, table of contents, and Chapter 3, Section D "Consultation and Accommodation,"pp.89-136.

Yours truly,

William J. Andrews

Barrister & Solicitor

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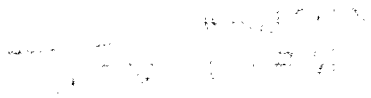

THE HONOUR OF THE CROWN AND ITS FIDUCIARY DUTIES TO ABORIGINAL PEOPLES

J. Timothy S. McCabe

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The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples

October 2008

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After *Haida*, a judge of the Federal Court (Kelen J.) relied on it to find "that the honour of the Crown requires good faith negotiations leading to a just settlement of the Aboriginal claims",[102] and the Ontario Court of Appeal (Laskin J.A.) referred to "the government's obligation to bring about the reconciliation of Aboriginal and non-Aboriginal peoples through negotiation".[103]

It is to be noted that the consultation and accommodation required by the honour of the Crown is warranted where claims are "being seriously pursued in the process of treaty negotiation and proof".[104] And no doubt the negotiation toward settlement required by that honour also calls for mutual effort.[105]

D. CONSULTATION AND ACCOMMODATION

i. Origins of the Crown's legal duty of consultation and accommodation

In *R. v. Sparrow*[106] the Supreme Court first called attention to the importance, in relation to rights recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*,[107] of consultation by the Crown with aboriginal peoples. At that stage, the context of the need was justification of infringements of aboriginal rights[108] (a matter that remains as salient as ever). Seven years later, in *Delgamuukw v. British Columbia*, consultation was elevated to a "duty".[109] And seven years after

---

[101] *Haida, ibid.*, at paras. 10, 42, 48-49; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 2, 22 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 66 (S.C.C.). See below, this Chapter, Section D, Subsections ii and iv.

[102] *Canada (Information Commissioner) v. Canada (Minister of Industry)*, [2006] F.C.J. No. 212, [2006] 4 F.C.R. 241, at para. 45 (F.C.). The appeal to the Federal Court of Appeal was dismissed by a majority without analysis of the point: [2007] F.C.J. No. 780, [2008] 1 F.C.R. 231, at para. 25 (F.C.A.) (*per* Richard C.J.).

[103] *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, 82 O.R. (3d) 721, at para. 117 (Ont. C.A.). See also paras. 135-39, and *Stoney Band v. Canada*, [2005] F.C.J. No. 33, 249 D.L.R. (4th) 274, at para. 16 (F.C.A.), leave to appeal refused [2005] S.C.C.A. No. 122 (S.C.C.).

[104] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 27 (S.C.C.). See below, this Chapter, Section D, Subsection ii.

[105] *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, 82 O.R. (3d) 721, at para. 138 (Ont. C.A.):

> Addressing the disputed issues by negotiations has obvious advantages as long as all parties work reasonably and constructively towards a settlement.

[106] [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.).

[107] This section concerns the legal requirement of consultation and accommodation in respect of established or claimed rights under s. 35(1). Consultation between the Crown and aboriginal peoples is often also required in equity where the Crown undertakes discretionary control in relation to a cognizable aboriginal interest so as to impress upon itself responsibility as a fiduciary. The Supreme Court first called attention to the duty of consultation in that circumstance in *Guerin v. The Queen*, [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335 (S.C.C.) (at 388 *per* Dickson J. and 355 *per* Wilson J.). See below, Chapter 4, Sections A and C.

[108] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1119 (S.C.C.).

[109] *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 168 (S.C.C.).

that, in *Haida Nation v. British Columbia (Minister of Forests)*, the Court worked out its theoretical foundation for the duty.[110]

"The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown."[111] Thus, in both of its realms of application (*i.e.*, where s. 35(1) rights are claimed but not yet established[112] and where such rights are established[113]), the origins of the duty draw upon the full range of the Supreme Court's attributions to the honour of the Crown, as a precept by which the Crown's conduct is judicially reviewable. That is, like the honour of the Crown generally, the duty of consultation and accommodation effects necessary reconciliation[114] and arises from the assertion of Crown sovereignty.[115] Just as the honour of the Crown requires the negotiation

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[110] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.). In *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2005] B.C.J. No. 444, 251 D.L.R. (4th) 717, at para. 20 (B.C.C.A.) ("*Musqueam*"), Southin J.A. said that rights to consultation and accommodation were "conferred upon" aboriginal peoples by the judgment of the Supreme Court of Canada in *Delgamuukw* and "elucidated" by the judgment in *Haida*.

[111] *Haida*, *ibid.*, at para. 16; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 24 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 51 (S.C.C.):

> The duty to consult is grounded in the honour of the Crown . . . and it is not necessary for present purposes to invoke fiduciary duties.

See also *Mikisew*, at para. 4.

[112] See below, this Section, Subsection ii.

[113] See below, this Section, Subsection iii.

[114] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 45 (S.C.C.):

> Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.

Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 25 (S.C.C.):

> The obligation to consult does not arise only upon proof of an Aboriginal claim, in order to justify infringement. That understanding of consultation would deny the significance of the historical roots of the honour of the Crown, and deprive it of its role in the reconciliation process.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 4 (S.C.C.):

> Adequate consultation in advance of the Minister's approval did not take place. The government's approach did not advance the process of reconciliation but undermined it.

See above, this Chapter, Section A.

[115] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 59 (S.C.C.):

> The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 3 (S.C.C.):

of treaties, it requires consultation and accommodation before their achievement.[116] And the treaties themselves, once entered into, further require, in light of the honour of the Crown, the duty of consultation and accommodation.[117]

Though the duty to consult and accommodate rests on the Supreme Court's post-1982 conceptualization of one result of the assertion of Crown sovereignty, it seems that the conceptualization is dependent on the existence of s. 35(1) of the *Constitution Act, 1982*.

> It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.[118]

One consequence of this may be that while the duty arises from the seminal event greatly antedating 1982, it affects only transactions occurring after the latter date. Thus although, in accordance with the law as found by the Court, the duty to consult and accommodate was an "Interest other than that of the Province" pursuant to s. 109 of the *Constitution Act, 1867*[119] to which the interest of a province in the public lands was subject when it entered confederation and remains subject,[120] it may be that s. 35(1) made the duty justiciable and did so only in respect of events and circumstances after it came into force. Section 35(1) "enshrined" the duty[121] when it "entrenched" aboriginal and treaty rights.[122]

> [T]he principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.

See above, this Chapter, Section A.

[116] *Haida, ibid.*, at para. 20 (see above, this Chapter, Section C); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 24 (S.C.C.).

[117] *Haida, ibid.*, at para. 19; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at paras. 4, 54, 57 (S.C.C.):

> The duty of consultation which flows from the honour of the Crown, and its obligation to respect the existing treaty rights of aboriginal peoples (now entrenched in s. 35 of the *Constitution Act, 1982*), was breached.
>
> .....
>
> What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.
>
> .....
>
> [T]he honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (*e.g.*, consultation) as well as substantive rights (e.g., hunting, fishing and trapping rights).

[118] *Haida, ibid.*, at para. 20. See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 24-25 (S.C.C.).

[119] So renamed from the original title "*British North America Act 1866*" by the *Constitution Act, 1982*, s. 53, Schedule, Item 1.

[120] *Haida, ibid.*, at para. 59.

[121] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 24 (S.C.C.).

[122] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 4 (S.C.C.).

It appears that, notwithstanding the Crown's longstanding assertion of sovereignty and the need for reconciliation, the duty lacks legal traction in respect of transactions before 1982. In 1990 the majority (*per* Cory J.) in *R. v. Horseman*[123] affirmed earlier doctrine that the *Natural Resources Transfer Agreements* that came into force in 1930 had the effect of modifying the treaty rights of Indians in the prairie provinces without consultation with them. The majority observed:

> [A]lthough it might well be politically and morally unacceptable in today's climate to take such a step as that set out in the 1930 Agreement without consultation with and concurrence of the Native peoples affected, nonetheless the power of the Federal Government to unilaterally make such a modification is unquestioned and has not been challenged in this case.[124]

ii. Consultation and accommodation in respect of not yet established rights[125]

Because the duty of consultation and accommodation is grounded in the honour of the Crown and the need for reconciliation of the aboriginal societies and the sovereignty of the Crown, it applies in full measure where aboriginal peoples claim aboriginal rights or title — and are "seriously" pursuing the claim[126] — but have not yet proved its existence in law or negotiated a treaty in respect of it.[127] This conclusion is founded on two interrelated courses of reasoning — which may be called the purposive and the equitable — both explained in *Haida*, the leading case on the matter.[128] The first follows from the point, revealed for the

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[123] [1990] S.C.J. No. 39, [1990] 1 S.C.R. 901 (S.C.C.).

[124] *Ibid.*, at 934 (*per* Cory J.). Against this conclusion is the idea that in principle the full range of the Crown's actions at all times since its assertion of sovereignty are subject to scrutiny by the courts in order to assess whether they were in accord with its honour: see *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 17 (S.C.C.), and above, this Chapter, Section A.

[125] For a good summary of the judicial three-step process, emerging from *Haida*, *ibid.*, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.), for assessing performance of the Crown's duty of consultation and accommodation, where adequacy of the performance is challenged, in respect of not yet established s. 35(1) rights, see below, this Section, Subsection vi. The summary, by Smith J. of the British Columbia Supreme Court in *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 2653, 51 B.C.L.R. (4th) 133, at paras. 137-58 (B.C.S.C.), serves as an outline of the prescribed approach and responsibilities of the Crown before implementing a proposed course of action, as well as that of courts called upon to assess actual performance after the event.

[126] *Haida*, *ibid.*, at para. 27. See above, this Chapter, Section C.

[127] See above, this Chapter, Section C.

[128] Neither adjective appears in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.). In *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) the Court (*per* Dickson C.J.C. and La Forest J.) specified, at 1105, that "Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiation can take place." In *Haida*'s companion case, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.), the Court (*per* McLachlin C.J.C.) took up the theme, at para. 24, pointing out that "Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims."

first time in the case, that treaties are the normal and expected mechanism for achievement of the needed reconciliation.[129] The assumption of the Supreme Court is that during the period between assertion of the claim and proof of it, negotiations toward settlement are proceeding.

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[130]

In other words, in light of the Court's doctrine that the negotiation of treaties is the core means by which reconciliation is to be effected, and thus the focus of effort in the meantime by the Crown and aboriginal peoples where no treaty yet exists, legal doctrine requires that events and circumstances pending conclusion of the treaties be regulated in accordance with consultation and accommodation.

Aligned with this purposive reasoning is the equitable imperative — the need to protect the not yet established rights of aboriginal peoples during the period prior to their proof or establishment by agreement.

> Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? ...
>
> The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.[131]

The purposive and equitable courses of reasoning are two sides of the same coin.

> To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When

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[129] *Haida*, *ibid.*, at para. 20. See above, this Chapter, Section C.

[130] *Haida*, *ibid.*, at para. 25; *Stoney Band v. Canada*, [2005] F.C.J. No. 33, 249 D.L.R. (4th) 274, at para. 18 (F.C.A.), leave to appeal refused [2005] S.C.C.A. No. 122 (S.C.C.).

[131] *Haida*, *ibid.*, at paras. 26-27.

> the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.[132]

The Supreme Court (*per* McLachlin C.J.C.) in *Haida* found confirmation of the existence of the Crown's duty prior to establishment of the right in earlier cases. Beginning in *Sparrow* the Court had, in the course of justification analysis, looked to whether consultation had occurred, even though the existence of the aboriginal right asserted was not proved until litigation of the claim.[133]

The reasons in *Haida* and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* rejected British Columbia's arguments that prior to proof of the asserted right the Crown is subject only to the broad administrative law "duty of fairness" that arises when an administrative decision affects rights, privileges or interests or to a common law "duty of fair dealing". The demands of reconciliation and the honour of the Crown preclude that approach.[134] Rejected in Haida also was the "practical argument", which referred to practical difficulties said to be inherent in a duty to consult and accommodate whose content varies according to, among other things, the content of the asserted rights and their strength, both of which remain at least somewhat uncertain until proved or otherwise established, and also to alleged impracticality and unfairness in requiring consultation "before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided".[135] The Court acknowledged the practical difficulty.[136] But it held that

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[132] *Haida*, *ibid.*, at para. 33. See also para. 38:

> I conclude that consultation and accommodation before final claims resolution ... is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at 262.

[133] *Haida*, *ibid.*, at para. 34:

> The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*, *supra*, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour *before* determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification. [emphasis in original]

[134] *Haida*, *ibid.*, at paras. 28, 32-33; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 23-24 (S.C.C.):

> The province's submissions present an impoverished vision of the honour of the Crown and all that it implies. ... The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1) [para. 24].

[135] *Haida*, *ibid.*, at para. 30

[136] *Haida*, *ibid.*, at para. 36:

> It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall [No. 1]*, *supra*, at para. 112, one

the difficulty was answered by "assigning appropriate content to the duty, not by denying the existence of the duty".[137] Concerning the alleged securing of a remedy without proof, it noted that:

> Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.[138]

The delineation of the point at which the Crown's duty of consultation and accommodation arises is uncomplicated but exacting.

> [T]he duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.[139]

The requisite knowledge of potential existence of right or title may arise as a result of a formal claim[140] — acceptance of a claim into a formal negotiation

---

cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope".

At para. 38 it was said that consultation and accommodation before final claims resolution is "challenging".

[137] *Haida, ibid.*, at paras. 36-38:

> [I]t will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements.
>
> .....
>
> The content of the duty ... varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.
>
> I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible ... Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

[138] *Haida, ibid.*, at para. 32.

[139] *Haida*, at para. 35, citing *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] B.C.J. No. 1494, [1997] 4 C.N.L.R. 45, at 71 (B.C.S.C.), aff'd [1999] B.C.J. No. 1880, [1999] 4 C.N.L.R. 1 (B.C.C.A.). See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 21, 25 (S.C.C.).

[140] *Taku River, ibid.*, at para. 26:

> The federal government announced a comprehensive land claims policy in 1981, under which Aboriginal land claims were to be negotiated. The TRTFN submitted its land claim to the Minister of Indian Affairs in 1983. The claim was accepted for negotiation in 1984, based on the TRTFN's traditional use and occupancy of the land. No negotiations ever took place under the federal policy; however, the TRTFN later began negotiation of its land claim under the treaty process established by the B.C. Treaty Commission in 1993. As of 1999, the TRTFN had signed a Protocol Agreement, and was working towards an Agreement in Principle. The Province clearly had knowledge of the TRTFN's title and rights claims.

process can supply the proof of knowledge (establishing not only the duty to consult but also facts relevant to the scope and content of the duty in the particular case)[141] — or by the lodging of objections to provincially mandated activity on the basis of claimed rights or title.[142] According to the Court, the potential for adverse impact of the claimed interests may be surmised from the circumstances.[143]

The Court (*per* McLachlin C.J.C.) has made clear that the duty crystallizes whenever decisions with potential for serious impact on asserted s. 35(1) rights

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[141] *Taku River*, *ibid.*, at para. 30:

> In order to participate in treaty negotiations under the B.C. Treaty Commission, the TRTFN were required to file a statement of intent setting out their asserted territory and the basis for their claim. An Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. Nonetheless, the TRTFN's claim was accepted for negotiation on the basis of a preliminary decision as to its validity. In contrast to the *Haida* case, the courts below did not engage in a detailed preliminary assessment of the various aspects of the TRTFN's claims, which are broad in scope. However, acceptance of its title claim for negotiation establishes a *prima facie* case in support of its Aboriginal rights and title.

Ka' a' Gee Tu First Nation v. Canada (Attorney General), [2007] F.C.J. No. 1006, [2007] 4 C.N.L.R. 102, at para. 104 (F.C.):

> The Respondent contends that the land claims process was entered into on a without prejudice basis and should therefore have no bearing on the determination of the strength of the Applicants' claim. I disagree. While not a determinative factor, the Crown's participation in the land claims process is a factor that may inform the Court in assessing the strength of the Applicants' claim.

[142] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 65 (S.C.C.):

> The Haida have claimed title to all of the Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 "[s]ince 1994, and probably much earlier". The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

By the time the case reached the Supreme Court of Canada the courts below had engaged in a thorough preliminary assessment of the facts concerning the claim: *Haida*, *ibid.*, at paras. 67, 69-71; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 30 (S.C.C.).

[143] *Taku River*, *ibid.*, at para. 27:

> When Redfern applied for project approval, in its efforts to reopen the Tulsequah Chief Mine, it was apparent that the decision could adversely affect the TRTFN's asserted rights and title. The TRTFN claim Aboriginal title over a large portion of northwestern British Columbia, including the territory covered by the access road considered during the approval process. It also claims Aboriginal hunting, fishing, gathering, and other traditional land use activity rights which stood to be affected by a road through an area in which these rights are exercised. The contemplated decision thus had the potential to impact adversely the rights and title asserted by the TRTFN.

For particulars, see para. 31.

are made. Such decisions may occur at the strategic planning stage,[144] the subsequent operational stages at which the plans are implemented, or both.[145] Consultation at the earliest stage of government decision making is in accord with principle and the interests of all parties.[146]

The content and scope of the duty to consult and accommodate in cases where the aboriginal right or title is not yet established varies with the particulars of specific cases.[147] Once knowledge of the possible existence of the

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[144] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 75-76 (S.C.C.):

> The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence, or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).
>
> I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

See *Dene Tha' First Nation v. Canada (Minister of Environment)*, [2006] F.C.J. No. 1677, [2007] 1 C.N.L.R. 1, at paras. 106-10 (F.C.).

[145] In contrast to the situation in *Haida*, *ibid.*, in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.) the claimant First Nation was consulted throughout the certification process under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119 (the strategic planning stage) and its concerns accommodated: *Taku River*, at para. 45. In addition, the report under the statute provided that there would be further consultation and, if indicated, accommodation at subsequent operational stages, *i.e.*, "the permitting, approval and licensing process" for the proposed mine reopening: *Taku River*, at paras. 45-46. See below, this Subsection, footnote 167.

[146] *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2004] B.C.J. No. 2143, 34 B.C.L.R. (4th) 280, at paras. 83, 91-92 (B.C.S.C.):

> Thus, in my view the duty to consult in this case arises at the earliest decision making by the government in an approval process leading to the possible infringement of claimed aboriginal rights.
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> .....
>
> In this case there are [judicially] undeclared aboriginal rights on the one side and interim and conditional rights to process [by environmental assessment] on the other.
>
> Thus, the need for consultation to take place at the earliest opportunity arises, before parties seeking land rights from the government have invested such time and money that practical frustration ripens into legally enforceable rights against the Province and ultimately to the detriment of all British Columbians.

[147] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 37, 40 (S.C.C.), citing *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108,

right or title and of possible harm to it is present, the Crown, or a court reviewing the adequacy of the Crown's performance of its duty, must engage in "a preliminary assessment of the strength of the case supporting the existence of the right or title, and ... the seriousness of the potentially adverse effect upon the right or title claimed". The objective of the assessment is to specify the kind and degree of the consultation and accommodation "proportionate" to the strength of the case and seriousness of the potential harm.[148]

Decisions that might seriously affect such rights can be of many kinds. They may include consent to change in the control of a corporation holding forestry licences in lands subject to s. 35(1) rights[149] or change in the administrative regime under which forestry operations are conducted.

> The authorities reveal that the contemplated adverse effect need not be obvious. The test, as articulated by *Haida Nation*, and subsequently followed in a number of cases, focuses on conduct that has the *potential* to cause an adverse effect. [emphasis in original][150]

But, as the British Columbia Court of Appeal (*per* Finch J.A.) has affirmed, a decision that has "no appreciable adverse effect" on ability to exercise a s. 35(1) right does not trigger the duty to consult.[151] Where, for example, it appears that the decision or proposed activity may actually benefit the aboriginal claimant and the rights claimed are commercial rights, *i.e.*, rights that have no internal limit,[152] the duty to consult and accommodate may be "located on the lower end of the spectrum".[153]

On the other hand where the Crown and the claimant "are near the end of treaty negotiations with an agreement in principle that acknowledges rights related to forest resources and title to certain lands" and there have been

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[1997] 3 S.C.R. 1010, at para. 168 (S.C.C.); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 25, 29 (S.C.C.). In *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 1062, [2005] 3 C.N.L.R. 74, at paras. 116, 126-28 (B.C.S.C.) it was held that the government cannot ignore its obligation to consult in a manner informed by the strength of the claimant's case and the degree of the potential adverse effect, in the particular case, and instead substitute an "overall policy" applicable to all aboriginal groups. See below, this Section, Subsection iv.

[148] *Haida*, *ibid.*, at paras. 39, 68; *Taku River*, *ibid.*, at para. 29. Assessment of the strength of the case should "consider in a preliminary way both the factual and legal strength": *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 2653, [2006] 1 C.N.L.R. 22, at paras. 237, 246-49 (B.C.S.C.).

[149] *Gitxsan First Nation v. British Columbia (Minister of Forests)*, [2002] B.C.J. No. 2761, 10 B.C.L.R. (4th) 126, at paras. 82-83, 86 (B.C.S.C.).

[150] *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 2653, [2006] 1 C.N.L.R. 22, at para. 229 (B.C.S.C.). See paras. 222-39.

[151] *R. v. Douglas*, [2007] B.C.J. No. 891, 278 D.L.R. (4th) 653, at para. 44 (B.C.C.A.), leave to appeal refused [2007] S.C.C.A. No. 352 (S.C.C.).

[152] See *R. v. Gladstone (Gladstone No. 1)*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723, at paras. 57-63, 66 (S.C.C.). And see above, Chapter 1, Section C, Subsection i.

[153] *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, [2007] F.C.J. No. 827, [2007] 4 C.N.L.R. 1, at paras. 36-46 (F.C.).

previous accommodation agreements that have provided for continuing consultation, the duty clearly "falls on the higher end of the spectrum".[154]

The resulting sliding scale for fulfillment of the duty ranges from mere notice, disclosure and discussion at one end of the continuum to "deep consultation", involving every opportunity for substantial aboriginal input and onus on the Crown to ensure the input has impact, at the other extremity. The Supreme Court (*per* McLachlin C.J.C.) in *Haida* was at pains to make clear that the cases within the "spectrum" and the corresponding content and scope of the duty should not be considered as falling within "watertight compartments".[155] Flexibility is demanded not only because "different situations requir[e] different responses"[156] but also because "the level of consultation required may change as the process goes on and new information comes to light".[157]

"At all stages, good faith on both sides is required".[158] In light of the fact that a "controlling question in all situations is the honour of the Crown",[159] it must have and act upon "'the intention of substantially addressing [Aboriginal] concerns' as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation." It must eschew all "sharp dealing".[160] And in discharging its duty "regard may be had to the procedural safeguards of natural justice mandated by administrative law".[161]

Good faith on the part of the aboriginal claimants is also required at all stages.[162] They "should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements" so that the preliminary assessment can be accomplished.[163] And it is imperative that they

> ... not frustrate the Crown's reasonable good faith attempts, ... [or] take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.[164]

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[154] *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 1062, [2005] 3 C.N.L.R. 74, at para. 120 (B.C.S.C.). See also *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2005] B.C.J. No. 444, 251 D.L.R. (4th) 717, at para. 94 (*per* Hall J.A.) (B.C.C.A.).

[155] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 41, 43 (S.C.C.). See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 32 (S.C.C.).

[156] *Haida*, *ibid.*, at para. 41.

[157] *Haida*, *ibid.*, at para. 45; *Hiawatha First Nation v. Ontario (Minister of Environment)*, [2007] O.J. No. 506, 221 O.A.C. 113, at para. 69 (Ont. Div. Ct.). For particulars of the "spectrum", see below, this Section, Subsection iv.

[158] *Haida*, *ibid.*, at para. 42. See below, this Section, Subsection iv.

[159] *Haida*, *ibid.*, at para. 45.

[160] *Haida*, *ibid.*, at para. 42.

[161] *Haida*, *ibid.*, at para. 41.

[162] *Haida*, *ibid.*, at para. 42. See below, this Section, Subsection iv.

[163] *Haida*, *ibid.*, at para. 36.

[164] *Haida*, *ibid.*, at para. 42, citing *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 1880, [1999] 4 C.N.L.R. 1, at 44 (B.C.C.A.) and *Heiltsuk Tribal*

"Mere hard bargaining" does "not offend an Aboriginal people's right to be consulted". Although the duty of consultation and accommodation follows in part from the doctrine that treaties are the normal and expected mechanism in Canada for achievement of the goal of Crown-aboriginal reconciliation, the fact that "there is no duty to agree"[165] is equally an essential characteristic of the necessary consultation and accommodation. If despite the parties' good faith efforts no agreement is reached as to appropriate accommodation, the Crown "may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns".[166] The process of consultation and accommodation "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim".[167]

Council v. British Columbia (Minister of Sustainable Resource Management), [2003] B.C.J. No. 2169, 19 B.C.L.R. (4th) 107 (B.C.S.C.). See above, this Chapter, Section C

[165] *Haida, ibid.*, at para. 42. See also paras. 10, 48-49 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 2, 22 (S.C.C.). And see below, this Section, Subsection iv.

[166] *Haida, ibid.*, at para. 45.

[167] *Haida, ibid.*, at para. 48. The Court (*per* McLachlin C.J.C.) in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 pointedly remarked, at para. 1, that the "case raises the issue of *the limits* of the Crown's duty to consult with and accommodate Aboriginal peoples when making decisions that may adversely affect as yet unproven Aboriginal rights and title claims" (emphasis added). Comparison of the facts in the two British Columbia cases heard concurrently, *Haida* and *Taku River*, is instructive as to those limits. In *Haida* the Court (*per* McLachlin C.J.C.) concluded (para. 79) that the province "failed to engage in any meaningful consultation at all" and, therefore (para. 77), "We cannot know, on the facts here, whether consultation would have led to a need for accommodation." In *Taku River*, on the other hand, it concluded that the role afforded to the claimant First Nation in the statutory environmental assessment process was sufficient to fulfill the province's duty of consultation (paras. 2, 33-41) and the mitigation measures directed as a result of the statutory process comprised adequate accommodation (paras. 2, 43-46):

> Within the terms of the process provided for project approval certification under the Act, TRTFN concerns were adequately accommodated. In addition to the discussion in the minority report, the majority report thoroughly identified the TRTFN's concerns and recommended mitigation strategies, which were adopted into the terms and conditions of certification. These mitigation strategies included further directions to Redfern to develop baseline information, and recommendations regarding future management and closure of the road [para. 44].
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> . . .
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> The Project Committee concluded that some TRTFN concerns could be more effectively considered at the permit stage or at the broader stage of treaty negotiations or land use strategy planning. The majority report and terms and conditions of the Certificate make it clear that the subsequent permitting process will require further information and analysis of Redfern, and that consultation and negotiation with the TRTFN may continue to yield accommodation in response. For example, more detailed baseline information will be required of Redfern at the permit stage, which may lead to adjustments in the road's course. Further socio economic studies will be undertaken. It was recommended that a joint management authority be established. It was also recommended that the TRTFN's concerns be further addressed through negotiation with the Province and through the use of the Province's regulatory powers. The Project Committee, and by extension the Ministers, therefore clearly addressed the issue of what accommodation of the TRTFN's concerns was warranted at this stage of the project, and what other venues would also be appropriate for the TRTFN's continued input. It is expected that, throughout the permitting, approval and licensing process, as well as in the development of a land use

To some extent distinctive to cases of asserted but unproved rights is the instruction that "[b]alance and compromise ... [is] necessary".

> Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary[168]

It is true that the duty to consult and accommodate "by its very nature entails balancing of Aboriginal and other interests",[169] and balance and compromise "are inherent in the notion of reconciliation".[170] Accordingly, there is a sense in which the law concerning consultation and accommodation in relation to established s. 35(1) rights also directs balance and compromise.

> The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights.[171]

> [A]ccommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.[172]

Balance and compromise, or "give and take", is an indispensable and especially vital element of the duty of consultation and accommodation in the case of asserted but not yet established s. 35(1) rights. Where such rights are established they may be lawfully infringed only in pursuit of obligations "compelling and substantial", and the "public interest" is too vague and broad to provide meaningful guidance.[173] But where s. 35(1) rights are not yet established the Crown is not only entitled to aim for balance and compromise in accommodating the potential rights by harmonizing them with the interests of others but is obliged to do so.

> The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, [in cases of rights not yet established] what is required is a process of balancing interests, of give and take.[174]

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strategy, the Crown will continue to fulfil its honourable duty to consult and, if indicated, accommodate the TRTFN [para. 46].

[168] *Haida*, *ibid.*, at para. 45. See also *Taku River*, *ibid.*, at para. 42.

[169] *Haida*, *ibid.*, at para. 14. See below, this Section, Subsections iv and v.

[170] *Haida*, *ibid.*, at para. 50.

[171] *Ibid.*

[172] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 2 (S.C.C.).

[173] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1113 (S.C.C.).

[174] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 48 (S.C.C.). See *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 168 (S.C.C.) (*per* Lamer C.J.C.).

> The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation.[175]

It appears, however, that the balancing, compromise and harmonization are of a particular kind. In order that reconciliation be achieved by means of, and commensurate with, the honour of the Crown, the Supreme Court believes that s. 35(1) rights claimed but not proved must be protected from harm arising from the balancing exercise. One of the reasons advanced by the Court (*per* McLachlin C.J.C.) in *Haida* for rejecting the argument that the aboriginal claimant's proper remedy is to apply for an interlocutory injunction demonstrates the point.

> [T]he balance of convenience test [which forms part of the standard analysis in interlocutory injunction cases] tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns.[176]

A claim of s. 35(1) rights, which are *sui generis* in Canadian law, is immune from the kind of balancing typical in other instances of claimed but not proved rights. During the pendency of the claim, claimed s. 35(1) rights must receive at least some recognition in practice. Balancing, compromise and harmonization, while salutary, must not be allowed to render the claimed rights impotent.

It appears that claimants of not yet established s. 35(1) rights may not be *required* to engage in processes of consultation and accommodation if they prefer to adopt another lawful approach. The Crown in right of British Columbia was denied leave to discontinue an action for an injunction to restrain logging by a band claiming aboriginal title, the Court rejecting the Crown's argument that the consultation prescribed in *Haida* and *Taku River* should be permitted to occur. The band preferred to pursue its "assertion and desire to *prove* aboriginal title" (emphasis in original) in the court proceeding (in which payment by the Crown of costs in advance had been ordered).[177] Successful proof of aboriginal title would result in "a different standard of consultation and accommodation" at a later date than would characterize the process in the absence of such proof.[178]

It is apparent that questions remain concerning the Crown's duty to consult and accommodate where s. 35(1) rights are asserted but not yet established. The Court in *Haida* specified that its task was "the modest one of establishing a general framework for the duty" and that:

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[175] *Haida*, *ibid.*, at para. 49, citing definitions of "accommodate" and "accommodation" in the *Concise Oxford Dictionary of Current English*, 9th ed. (Oxford: Clarendon Press, 1995).

[176] *Haida*, *ibid.*, at para. 14, citing J.J.L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000).

[177] For the costs order see *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] S.C.J. No. 76, [2003] 3 S.C.R. 371 (S.C.C.).

[178] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2005] B.C.J. No. 713, 48 B.C.L.R. (4th) 170, at paras. 26-30 (B.C.S.C.).

> As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.[179]

iii. Consultation and accommodation in respect of established rights[180]

From the beginning of its jurisprudence concerning established s. 35(1) rights the Supreme Court of Canada has included consultation and accommodation among the possible *indicia* of whether a particular infringement of such rights is justifiable as a matter of law. In *Sparrow* the Court (*per* Dickson C.J.C. and La Forest J.) counted among the "further questions to be addressed, depending on the circumstances of the inquiry" as to justification:

> ... the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.[181]

In dissenting reasons in *R. v. Van der Peet*, McLachlin J. urged "consultation and negotiation with the aboriginal people" as the means to determine the extent of fishing needed to supply what the people "traditionally took from the fishery", the latter quantity being the limit of the aboriginal right.[182] In *R. v. Marshall (Marshall No. 2)*[183] the Court brought together the happening or not of consultation as a "question" in the justification analysis (as in *Sparrow* and the cases citing it) and the idea of coupling consultation with negotiation (advocated

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[179] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 11 (S.C.C.). See also para. 39.

[180] For a good summary of the judicial three-step process, emerging from *Haida*, *ibid.*, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388 (S.C.C.), for assessing performance of the Crown's duty of consultation when it contemplated a course of action that might adversely affect established s. 35(1) rights, see below, this Section, Subsection vi. The summary, by Smith J. of the British Columbia Supreme Court in *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 2653, [2006] 1 C.N.L.R. 22, at paras. 137-38 (B.C.S.C.), serves as an outline of the prescribed approach and responsibilities of the Crown as well as that of courts called upon to assess actual performance after the event.

[181] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1119 (S.C.C.); *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771, at para. 97 (S.C.C.) (*per* Cory J.); *R. v. Nikal*, [1996] S.C.J. No. 47, [1996] 1 S.C.R. 1013, at paras.109-10 (S.C.C.) (*per* Cory J.); *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 138 (S.C.C.) (*per* L'Heureux-Dubé J., dissenting on other grounds); *R. v. Gladstone (Gladstone No. 1)*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723, at paras. 55, 64 (S.C.C.) (*per* Lamer C.J.C.); *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at paras. 162, 168 (S.C.C.) (*per* Lamer C.J.C.); *R. v. Marshall (Marshall No. 2)*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at paras. 32, 43-44 (S.C.C.). See generally, above, Chapter 1, Section C, Subsection i.

[182] [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 311 (S.C.C.) (*per* McLachlin J. dissenting).

[183] [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533 (S.C.C.).

by McLachlin J. in *Van der Peet*). It lauded consultation and negotiation leadi to agreements as the best means of resolving the complex issues that inevitab arise,[184] in the context of justification, when exercise of s. 35(1) rights comes i contact with enacted laws, the objectives of governments, and other rights an interests. Speaking of treaty rights, but citing an aboriginal title case, the Cou in *Marshall No. 2* said:

> As this and other courts have pointed out on many occasions, the process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation. La Forest J. emphasized in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (a case cited in the September 17, 1999 majority decision [*Marshall No. 1*]), at para. 207:
>
> > On a final note I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.[185]

In the meantime, in *Delgamuukw* the Supreme Court (*per* Lamer C.J.C.) articulated the principles that the nature and scope of consultation varies with the circumstances (a principle equally applicable in cases of asserted but not yet proved s. 35(1) rights)[186] and that, in most cases of established aboriginal title "it will be significantly deeper than mere consultation", sometimes "even requir[ing] the full consent of an aboriginal nation",[187] a principle with no application in cases where "the Crown's duty lies at the lower end of the spectrum". In such cases (as where the rights are asserted but not yet established),[188] though the

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[184] *Ibid.*, at para. 22:

> Resource conservation and management and allocation of the permissible catch inevitably raise matters of considerable complexity both for Mi'kmaq peoples who seek to work for a living under the protection of the treaty right, and for governments who seek to justify the regulation of that treaty right. The factual context, as this case shows, is of great importance, and the merits of the government's justification may vary from resource to resource, species to species, community to community and time to time.

[185] *Ibid.*

[186] See above, this Section, Subsection ii; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 37, 40-41, 43-45, 71 (S.C.C.).

[187] *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 168 (S.C.C.) (*per* Lamer C.J.C.). The occasion for and character of "mere consultation" in established aboriginal title cases is:

> In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue.

[188] See above, this Section, Subsection ii; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 48 (S.C.C.):

> The aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case.

Cf., *Haida*, at para. 24.

holder of the s. 35(1) rights in question has a right to be consulted it does not have a veto over government action.[189]

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),[190] the leading case on the subject of the duty of consultation and accommodation in respect of established rights, made two contributions of significance to the law. First, following *Haida* and *Taku River*, the two landmark cases on the duty in relation to rights not yet established,[191] *Mikisew* affirmed that in respect of established rights too the duty "is grounded in the honour of the Crown".[192]

More innovatively, the Supreme Court (*per* Binnie J.) declared the existence of a positive right to consultation and accommodation in respect of decisions and activities of the Crown affecting at least some established treaty rights, whether or not the activities infringe the right so as to require justification in order to be legally effective. That is, an aboriginal people holding the established right has a "process" or "procedural" right to consultation and, if warranted, accommodation, quite apart from its "substantive" right.[193]

Mikisew concerned the hunting, fishing and trapping rights of the Indian parties to Treaty No. 8 of 1899. Excluded by the terms of the treaty from the rights are:

> ... such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[194]

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[189] *Haida*, *ibid.*, at para. 48:

> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at paras. 64, 66 (S.C.C.):

> In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered* lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown's duty lies at the lower end of the spectrum. [emphasis in original]
>
> .....
>
> Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement.

See below, this Section, Subsection iv.

[190] *Ibid.*

[191] See above, this Section, Subsection ii.

[192] *Mikisew*, *ibid.*, at paras. 4, 51. See above, this Section, Subsection i. In addition to *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.) and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.), the Court (*per* Binnie J.) also cited for the point *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) and *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.).

[193] See above, this Chapter, Section B, Subsection iv.

[194] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 2 (S.C.C.).

The Court held that the federal Crown's proposal to use some of the land surrendered by the treaty to construct a winter road was a "taking up" within the meaning of the clause[195] and rejected the First Nation's contention that every taking up by the Crown pursuant to the treaty constitutes an infringement that must be justified in accordance with the *Sparrow* test.[196] But though the taking up of the land for the road was not an infringement of the treaty right, it nonetheless required consultation with the Indian parties to the treaty.

> As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g., consultation) as well as substantive rights (e.g., hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.
>
> .....
>
> Where, as here, the Crown is dealing with a *proposed* "taking up" it is not correct (even if it is concluded that the proposed measure *if implemented* would infringe

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[195] *Mikisew*, *ibid.*, at para. 60:

> I should state at the outset that the winter road proposed by the Minister was a permissible purpose for "taking up" lands under Treaty 8. It is obvious that the listed purposes of "settlement, mining, lumbering" and "trading" all require suitable transportation. The treaty does not spell out permissible "other purposes" but the term should not be read restrictively: *R. v. Smith*, [1935] 2 W.W.R. 433 (Sask. C.A.), at 440-41. In any event, as noted earlier, the opening recital of Treaty 8 refers to "travel".

See also paras. 24, 55.

[196] *Mikisew*, *ibid.*, at para. 31:

> I agree with Rothstein J.A. [of the Federal Court of Appeal in the case] that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added [by the court]). The language of the treaty could not be clearer in foreshadowing change.

The Court expressly repudiated, at para. 32, the approach of the British Columbia Court of Appeal majority on this point in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 1880, [1999] 4 C.N.L.R. 1 (B.C.C.A.):

> It follows that I do not accept the *Sparrow*-oriented approach adopted in this case by the trial judge, who relied in this respect on *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that *any* interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act, 1982*" (para. 144 (emphasis in original)) which must be justified under the *Sparrow* test. The Mikisew strongly support the *Halfway River First Nation* test but, with respect, to the extent the Mikisew interpret *Halfway River* as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a *Sparrow*-type justification, I cannot agree.

> the treaty hunting and trapping rights) to move directly to a *Sparrow* analysis. The Court must first consider the *process* by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights. [emphasis in original][197]

The threshold of circumstances which trigger this duty of consultation is the same as that prescribed in *Haida* and *Taku River* in respect of asserted but not yet established rights: — it arises when the Crown contemplates decisions or activities "which might adversely affect" the position of the holder of the rights.[198] The Indian parties to Treaty No. 8 and the other numbered treaties[199] had no assurance guaranteeing that lands surrendered by the treaty would remain forever subject to the same uses as at the date of the treaty so that their hunting, fishing and trapping would continue as before. The "taking up" clause negated the existence of such guarantee. But because any such taking up would remove the affected lands from the lands in which the rights could be exercised, and place them in the category of lands in which the rights could not be exercised, the honour of the Crown demands that the transfer be attended by a duty of consultation.

> In the case of Treaty 8, it was contemplated by all parties that "from time to time" portions of the surrendered land would be "taken up" and transferred from the inventory of lands over which the First Nations had treaty rights to hunt, fish and trap, and placed in the inventory of lands where they did not.
>
> .....
>
> [T]he aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes" (emphasis added [in *Mikisew*]). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.

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[197] *Mikisew*, *ibid.*, at paras. 57, 59.

[198] *Mikisew*, *ibid.*, at paras. 34, 55:

> In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation* and *Taku River* set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered.
>
> .....
>
> This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.

The impacts in *Mikisew* were summarized at para. 44.

[199] See above, this Chapter, Section B, Subsection iv.

> .....
>
> The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed.
>
> .....
>
> Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably. [emphasis in original][200]

Although the analysis in *Mikisew* is closely tied to the terms of Treaty No. 8 and, especially, the historical context of its negotiation,[201] it is likely that the duty of consultation found therein exists as well in other circumstances in which Crown decisions or activity might adversely affect treaty rights.

> [T]he principle of consultation in advance of interference with existing treaty rights is a matter of broad general importance to the relations between aboriginal and non-aboriginal peoples. It goes to the heart of the relationship and concerns not only the Mikisew but other First Nations and non-aboriginal governments as well.[202]

Just as the trigger circumstance for the duty of consultation is the same in respect of established rights as in the case of asserted but not yet established s. 35(1) rights, so too the content of the duty.[203]

In reaching its conclusion about the duty of the Crown to consult and, if merited, accommodate the interests of the Indians holding the treaty rights, the Supreme Court (*per* Binnie J.) in *Mikisew* necessarily rejected the argument that the extensive consultations with the Indian peoples in 1899 at the time Treaty No. 8 was negotiated discharged the Crown's duty.

> Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete

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[200] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at paras. 30-33 (S.C.C.). And see para. 57, quoted above in this Part, where the Court (*per* Binnie J.) concluded:

> As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (*e.g.*, consultation) as well as substantive rights (*e.g.*, hunting, fishing and trapping rights).

[201] See above, this Chapter, Section B, Subsection iv. *Mikisew*, *ibid.*, at para. 63:

> Here, the most important contextual factor is that Treaty 8 provides a framework within which to manage the continuing changes in land use already foreseen in 1899 and expected, even now, to continue well into the future. In that context, consultation is key to achievement of the overall objective of the modern law of treaty and aboriginal rights, namely reconciliation.

[202] *Mikisew*, *ibid.*, at para. 3. See also paras. 50, 54, 57. See above, this Chapter, Section B, Subsection iv.

[203] *Mikisew*, *ibid.*, at paras. 34, 62-63. For not yet established rights, see above, this Section, Subsection ii. For the content of the duty, see below, this Section, Subsection iv.

> discharge of the duty arising from the honour of the Crown, but a rededication of it [para. 54].[204]

Again, in light of the universality of language elsewhere in the case,[205] this idea seems to be of application in respect of all treaties, not just Treaty No. 8.

The Supreme Court (*per* Binnie J.) in *Mikisew* provided an important general caveat about the duty of consultation in respect of s. 35(1) rights. Where the promises under a treaty, for example, are perfectly clear, "the parties should get on with performance" and "the role of consultation may be quite limited."[206] No doubt here, as elsewhere, if the parties cannot agree whether consultation or performance is in order, "tribunals and courts can assist".[207]

In summary, *Mikisew* makes clear that the Crown's duty to consult and accommodate extends not only to circumstances where s. 35(1) rights are asserted but not yet established (as in *Haida* and *Taku River*)[208] and to circumstances where a decision or activity of the Crown would infringe or has infringed established s. 35(1) rights (as in *Sparrow*, *R. v. Badger* and several other cases in the Supreme Court)[209] but also where the right in question is an established treaty right and the Crown proposes activity which would not infringe the right but might nonetheless adversely affect it. In such cases, the Crown has a duty, and the people holding the treaty right a correlative process or procedural right, of consultation and possible accommodation.

Section 35(3) of the *Constitution Act, 1982* provides:

> For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

It has been held that a provision in one such land claims agreement, the Little Salmon/Carmacks Final Agreement of 1997, that it "shall not affect the ability of aboriginal people of the Yukon to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them" includes the Crown's duty to consult and accommodate. The latter was found to be a "constitutional treaty obligation" which "infuses every treaty".[210] Where a

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[204] *Mikisew*, *ibid.*, at paras. 53-55. See below, this Subsection, Subsection iv.

[205] See above, this Subsection, text at footnote 202, and this Chapter, Section B, Subsection iv.

[206] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 63 (S.C.C.):

> The determination of the content of the duty will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance.

[207] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 37 (S.C.C.).

[208] See above, this Section, Subsection ii.

[209] See above, this Subsection, text at footnote 181.

[210] *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)*, [2007] Y.J. No. 24, [2007] 3 C.N.L.R. 42, at paras. 81-82 (Y.T.S.C.):

statute provided that an environmental assessment process would "ensure that the concerns of aboriginal people ... are taken into account in that process",[211] it was held that "[w]hether the duty to consult is characterized as constitutional or not" the duty is expressly provided in the statute, and "need not be read in", because "inherent" in the Crown's legal duty, its "central purpose", is ensuring that the concerns of aboriginal people are taken into account.[212]

It would seem to follow from the analysis in *Mikisew* that the duty as formulated there can apply as well in the case of established aboriginal rights or title even if the potential adverse effect of the proposed activity would not amount to infringement of the rights or title.

iv. Meaning of consultation

In the leading cases *Haida*, *Taku River*[213] and *Mikisew*[214] the Supreme Court elaborated and augmented the Crown's duty to consult impelled by its honour. In so doing it also amplified the meaning and content of consultation in aboriginal law.

Prior to *Haida* and *Taku River* in 2004 consultation was discussed by the Supreme Court in the context of justification of infringements of s. 35(1) rights. The meaning and content of the Crown's obligations was but little detailed. At first it was described in terms that might suggest that the obligation is mainly to disseminate information to aboriginal holders of rights. In *R. v. Sparrow* the Supreme Court (*per* Dickson C.J.C. and La Forest J.) said of the question, pertinent to justification analysis in infringement cases, "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented":

> ... the Final Agreement has built in some flexibility to accommodate future constitutional rights as the law develops so as to avoid the pitfall of having an agreement that becomes chipped in stone or rigid in its interpretation.
>
> The duty to consult and accommodate is a constitutional treaty obligation based on the honour of the Crown and section 35 of the *Constitution Act, 1982*. It infuses every treaty. It is not based on an aboriginal right which the First Nation has ceded pursuant to 2.5.0 [of the Final Agreement] in its Traditional Territory. It is a principle of treaty interpretation to ensure that treaty rights exchanged for aboriginal title are respected. Its purpose is to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address.

[211] *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, s. 114(c).

[212] *Ka'a'Gee Tu First Nation v. Canada (Minister of Indian Affairs and Northern Development)*, [2007] F.C.J. No. 1007, [2007] 4 C.N.L.R. 160, at paras. 66, 68 (F.C.). The aboriginal party claimed that it did not surrender its aboriginal title in the land in question by Treaty No. 11 of 1921-22. In any event, there was no dispute about its treaty rights to hunt, fish and trap therein: *Ka'a'Gee Tu v. Canada (Attorney General)*, [2007] F.C.J. No. 1006, [2007] 4 C.N.L.R. 102, at paras. 12-14 (F.C.).

[213] For *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.) and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.), see above, this Section, Subsections i and ii.

[214] For *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388 (S.C.C.), see above, this Section, Subsections i and iii.

> The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.[215]

In *R. v. Nikal* it was added that in the matter of consultation, as in its other aspects, "the concept of reasonableness forms an integral part of the *Sparrow* test for justification".

> So too in the aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement.[216]

Significant new information about the nature and content of consultation in aboriginal title cases was provided by the Supreme Court (*per* Lamer C.J.C.) in *Delgamuukw v. British Columbia*.[217] Still examining consultation as an aspect of justification of infringements in light of the fiduciary relation between the Crown and aboriginal peoples, the Court made clear that where the s. 35(1) right in question is aboriginal title, "involvement of aboriginal peoples in decisions taken with respect to their lands" may be required in order for the Crown to discharge its duty.

> [A]boriginal title encompasses within it a right to choose to what ends a piece of land can be put. The aboriginal right to fish for food, by contrast, does not contain within it the same discretionary component. This aspect of aboriginal title suggests that the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*.[218]

The character and degree of the "involvement" was held by the Court to vary with the circumstances, ranging from "consultation" (*i.e.*, discussion in good faith "with the intention of substantially addressing the concerns of the aboriginal peoples") to practices "significantly deeper than mere consultation", sometimes extending to "the full consent of an aboriginal nation".[219] Two years

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[215] *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1119 (S.C.C.); *R. v. Badger*, [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771, at para. 97 (S.C.C.) (*per* Cory J.); *R. v. Nikal*, [1996] S.C.J. No. 47, [1996] 1 S.C.R. 1013, at para. 109 (S.C.C.) (*per* Cory J.); *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 138 (S.C.C.) (*per* L'Heureux-Dubé J., dissenting on other grounds); *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 162 (S.C.C.) (*per* Lamer C.J.C.); *R. v. Marshall (Marshall No. 2)*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at para. 32 (S.C.C.).

[216] *Nikal, ibid.*, at para. 110 (*per* Cory J.).

[217] [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.). See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 24 (S.C.C.).

[218] *Delgamuukw, ibid.*, at para. 168 (*per* Lamer C.J.C.).

[219] *Ibid.*:

later, in *Marshall No. 2*, the Court broadened the duty of consultation as described in *Delgamuukw* to include treaty rights as well as aboriginal title and, once again looking at consultation as stemming from the "special trust relationship", added the seriousness and duration of the infringement, and of the circumstance the infringement was designed to address, as factors to be considered in determining the character and degree of consultation in accordance with the sliding scale prescribed in Delgamuukw. It also pointed out that if the consultation does not produce an agreement, the adequacy of the consultation is judicially reviewable.[220]

Although the findings in *Delgamuukw* about "involvement of aboriginal peoples in decisions taken with respect to their land" and about variation in the content of the duty of consultation depending upon the circumstances were premised on the Court's distinction "between aboriginal title and the aboriginal right to fish for food in *Sparrow*",[221] it seemed likely that "mere consultation", at least, appertained to aboriginal rights as well as to aboriginal title. This was confirmed in *Haida*. There the Haida Nation claimed, and made out *prima facie* cases for, both aboriginal rights and title.[222] The Supreme Court (*per* McLachlin C.J.C.) specified that the issue before it concerned both aboriginal rights and

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> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands

[220] *R. v. Marshall (Marshall No. 2)*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at para. 43 (S.C.C.):

> The Court has emphasized the importance in the justification context of consultations with aboriginal peoples. Reference has already been made to the rule in *Sparrow*, *supra*, at 1114, repeated in *Badger*, *supra*, at para. 97, that:
>
> > The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
>
> The special trust relationship includes the right of the treaty beneficiaries to be consulted about restrictions on their rights, although, as stated in *Delgamuukw*, *supra*, at para. 168:
>
> > The nature and scope of the duty of consultation will vary with the circumstances.
>
> This variation may reflect such factors as the seriousness and duration of the proposed restriction, and whether or not the Minister is required to act in response to unforeseen or urgent circumstances. As stated, if the consultation does not produce an agreement, the adequacy of the justification of the government's initiative will have to be litigated in the courts.

For the standard of review to be applied, see below, this Section, Subsection vi.

[221] *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 168 (S.C.C.) (*per* Lamer C.J.C.).

[222] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 6, 18, 71 (S.C.C.).

title and made findings referable to both.[223] And it expressly tied its findings to the analysis in "the Court's seminal decision in *Delgamuukw*".[224]

The detailed expositions of the meaning and content of consultation in *Haida*, *Taku River* and *Mikisew* reflect to some extent the particular contexts of those cases — aboriginal rights and title asserted but not yet established (*Haida* and *Taku River*)[225] and adverse impact on treaty rights by government activity not amounting to infringement of the rights (*Mikisew*).[226] But it is nonetheless apparent from their breadth of language[227] and their doctrinal associations that the expositions are intended to apply generally to all consultation carried out pursuant to the Crown's duty to consult,[228] making allowance for any modifications that may be necessitated by the particulars of other situations.

Chief among the effects of these three leading cases is their adoption and elaboration of the finding in *Delgamuukw* that the particulars of consultation in a given case vary with circumstances. The nature, content and intensity of consultation is dependent on contextual factors.[229] The point was made in *Haida* in the situation of not yet proven or established rights:

> The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.[230]

The point was reiterated in *Mikisew* where, because the rights in question were fully established, there was no question as to "a preliminary assessment of the strength of the case". In such cases other "contextual factors" are germane to the determination of the content of the duty to consult. In all cases, established rights or not, an important contextual factor is the second one highlighted in *Haida* — "the seriousness of the impact on the aboriginal people of the Crown's

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[223] *Haida*, *ibid.*, at paras. 11, 18, 20, 25-26, 32-33, 35, 43-44, 48, 50, 64, 68, 71.

[224] *Haida*, *ibid.*, at paras. 24, 39-42.

[225] See above, this Section, Subsection ii.

[226] See above, this Section, Subsection iii.

[227] *E.g.*, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 20 (S.C.C.); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 25 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 51 (S.C.C.).

[228] The duty is grounded in the honour of the Crown and the necessity of reconciliation (see above, this Section, Subsection i), both of which apply in all situations in which s. 35(1) rights are implicated. Moreover, *Haida*, *ibid.*, *Taku River*, *ibid.*, and *Mikisew*, *ibid.*, rely throughout on cases whose facts do not give rise to the particular problems in those three.

[229] The passages in *Haida*, *ibid.*, and *Mikisew*, *ibid.*, describing the "spectrum" of the duty of consultation are set out below, this Subsection, text at footnotes 279-83.

[230] *Haida*, *ibid.*, at para. 39. See also paras. 24, 40-41, 43-45, 68; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 25, 28, 32 (S.C.C.). And see above, this Section, Subsection ii.

proposed course of action".[231] Possible adverse effect on s. 35(1) rights is the factor that triggers the duty. The causative role of such effect is rigid.[232] But the seriousness of the anticipated impact may vary. This variation influences the nature, content and intensity of the requisite consultation. Assessing the degree of seriousness of impact and the appropriate response in terms of consultation thus requires flexibility, as does application of the other contextual factors.[233]

Apart from adoption and elaboration of the idea of a spectrum or sliding scale for the duty of consultation, dependent on and varying with contextual factors, the Supreme Court in *Haida*, *Taku River* and *Mikisew* also developed the law in terms of the purposes, institutional situation, and general frame of reference of the duty.

The purposes of the obligatory consultation — apart from the paramount doctrinal purposes of reconciliation of the Crown's sovereignty and aboriginal peoples, the upholding of the Crown's honour, and the like[234] — are to determine whether the Crown in the particular case must accommodate interests and claims of the aboriginal people concerned and, if accommodation is warranted, the nature and particulars of that accommodation.[235] No doubt determination by agreement is preferable:

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[231] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 63 (S.C.C.):

> The determination of the content of the duty to consult will, as *Haida* suggests, be governed by the context. One variable will be the specificity of the promises made. ... Another contextual factor will be the seriousness of the impact on the aboriginal people of the Crown's proposed course of action. The more serious the impact the more important will be the role of consultation.

See also paras. 34 and 61-62. And see above, this Section, Subsection iii.

[232] *Mikisew*, *ibid.*, at para. 34:

> The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered.

[233] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 45 (S.C.C.):

> Between ... extremes of the spectrum ... will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light.

See also paras. 39, 43-44 and *Mikisew*, *ibid.*, at para. 63.

[234] See above, this Section, Subsection i.

[235] This is implicit in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 47 (S.C.C.):

> When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

> Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights.[236]

In describing the responsibilities of the aboriginal party in consultation carried out pursuant to the Crown's duty, the Court (*per* Binnie J.) in *Mikisew* included the onus "to try to reach some mutually satisfactory solution".[237] But there is no duty to reach agreement,[238] even where the existence of the rights is proved.

> Had the consultation process gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement.[239]

The Supreme Court has made clear that "regulatory schemes" may be the institutional setting in which the duty of consultation is carried out.[240] Statutory processes making use of mediation or tribunals independent of, or existing at

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Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 42 (S.C.C.):

> As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[236] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 26 (S.C.C.).

[237] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 65 (S.C.C.).

[238] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 10, 42, 48-49; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 2, 22 (S.C.C.). See above, this Chapter, Section C, and this Section, Subsection ii.

[239] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 66 (S.C.C.). See above, this Section, Subsection iii.

[240] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 51:

> 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."

The citation in this context of the passage in *R. v. Adams*, [1996] S.C.J. No. 87, [1996] 3 S.C.R. 101 (S.C.C.) appears to mean that although adoption by the government of a regulatory scheme or "administrative regime" to assist in carrying out its duty to consult is only permissible, not required, if such a scheme *is* adopted it runs the risk of being struck down by the courts if it supplies insufficient "specific guidance" as to "the procedural requirements appropriate to different problems at different stages". The pronouncement in *Adams* sits uneasily in the context of procedural rights and duties of consultation, however apt it is in the context of the substantive rights in question in *Adams*.

some remove from, the government,[241] such as environmental assessment bodies, can be a vehicle contributing to fulfillment of the Crown's duty. In *Taku River*, the Court (*per* McLachlin C.J.C.) said:

> In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN [*i.e.*, the claimant aboriginal people] was part of the Project Committee, participating fully in the environmental review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations....
>
> .....
>
> The process of granting project approval to Redfern [*i.e.*, the proponent of the project] took three and a half years, and was conducted largely under the *Environmental Assessment Act*. As discussed above, the Act sets out a process of information gathering and consultation. The Act requires that Aboriginal peoples whose traditional territory includes the site of a reviewable project be invited to participate on a project committee.
>
> .....
>
> The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.[242]

Whether or not use is made of such mechanisms, it is the Crown itself which is subject to the duty to consult and which remains legally accountable for performance of it.[243]

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[241] *Haida*, *ibid.*, at para. 44:

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

[242] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 22, 33, 40 (S.C.C.). At para. 41 the work of the project committee under the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119, and the participation of the claimant people was summarized. At para. 36 it was reported that:

> The TRTFN was informed that not all of its concerns could be dealt with at the certification stage or through the environmental assessment process, and assistance was provided to it in liaising relevant decision makers and politicians.

See also para. 2.

[243] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 53 (S.C.C.):

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. ... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

Apart from use of regulatory schemes, the institutional setting of the required consultation must be direct and specific engagement between the Crown and the affected aboriginal people. Opportunity afforded the latter to participate in general public consultation does not suffice[244] though, as *Taku River* demonstrates, direct engagement in a regulatory process such as a statutory environmental assessment adequately serves.[245]

Consultation in the course of a statutory regulatory process must be in accordance with the honour of the Crown and its consequent legal duty. Where, for example, the duty is fulfilled but the resulting accommodation measures are later modified pursuant to provisions in the statute authorizing such modifications without consultation, the court will intervene to direct proper consultation. The "Crown's duty to consult cannot be boxed in by legislation".[246]

Neither do measures and policies adopted by the government earlier, or earlier consultation, substitute for consultation concerning the decision or activity it now proposes.[247] In *Mikisew* the Supreme Court (*per* Binnie J.)

See also *R. v. Adams*, [1996] S.C.J. No. 87, [1996] 3 S.C.R. 101, at para. 54 (S.C.C.), cited in *Haida*, at para. 51, and quoted above, this Subsection, footnote 240.

[244] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at paras. 9, 13, 64 (S.C.C.):

> According to the trial judge, most of the communications relied on by the Minister to demonstrate appropriate consultation were instances of the Mikisew's being provided with standard information about the proposed road in the same form and substance as the communications being distributed to the general public of interested stakeholders. Thus Parks Canada acting for the Minister, provided the Mikisew with the Terms of Reference for the environmental assessment on January 19, 2000. The Mikisew were advised that open house sessions would take place over the summer of 2000. The Minister says that the first formal response from the Mikisew did not come until October 10, 2000, some two months after the deadline she had imposed for "public" comment. Chief Poitras stated that the Mikisew did not formally participate in the open houses, because "an open house is not a forum for us to be consulted adequately".
>
> .....
>
> The Minister now says the Mikisew ought not to be heard to complain about the process of consultation because they declined to participate in the public process that took place. Consultation is a two-way street, she says. It was up to the Mikisew to take advantage of what was on offer. They failed to do so. In the Minister's view, she did her duty.
>
> .....
>
> The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users).

[245] *Ahousaht Indian Band v. Canada (Minister of Fisheries and Oceans)*, [2007] F.C.J. No. 827, [2007] 4 C.N.L.R. 1, at paras. 50-52 (F.C.):

> [In *Taku River*] the Court rejected the notion that the duty to consult meant that the consultation process must always be tailored to the First Nations whose rights may be infringed, and thus that consultation must always be bilateral [para. 51].

[246] *Ka'a Gee Tu v. Canada (Attorney General)*, [2007] F.C.J. No. 1006, [2007] 4 C.N.L.R. 102, at para. 121 (F.C.). See generally paras. 119-24, 131-32.

[247] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 78 (S.C.C.):

> In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that

explained that the inability of such previous events to fulfill the duty of consultation, in respect of current proposals and circumstances, follows from the "fundamental objective of the modern law of aboriginal and treaty rights [*i.e.*,] the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions".[248] It was argued in the case that the consultation that occurred in 1899 when the treaty in question was negotiated obviated the need for consultation in 2000 when the government proposed a winter road that would have impact on trapping and hunting rights of the First Nation. The Court held:

> This is not correct. ... Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.
>
> ....
>
> In summary, the 1899 negotiations were the first step in a long journey that is unlikely to end any time soon.[249]

The "long process of reconciliation" is equally imperative, and equally instructive as to the necessity that consultation be current, in the case of aboriginal rights and title as in the case of treaty rights.

The general frame of reference for consultation pursuant to the Crown's duty described by the Supreme Court serves, along with its descriptions of the purposes and institutional setting, to elucidate the meaning and content of the mandated consultation. At least seven aspects of the frame of reference may be identified, most of them closely interrelated.

First, "at a minimum, it [consultation] must be consistent with the honour of the Crown".[250]

> The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation ...[251]

One practical effect of the honour of the Crown on the need for and significance of consultation may be gleaned from *Fairford First Nation v. Canada (Attorney*

> "[t]he Haida were and are consulted with respect to forest development plans and cutting permits. ... Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting ..." (Crown's factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions.

[248] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 1 (S.C.C.).

[249] *Mikisew, ibid.*, at paras. 54, 56. See above, this Section, Subsection iii.

[250] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 38 (S.C.C.).

[251] *Haida, ibid.*, at para. 45. See also para. 41, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at paras. 33, 62 (S.C.C.).

General),[252] a 1998 Federal Court Trial Division case concerned not with s. 35(1) rights but with consultation where the Crown acts as fiduciary to an aboriginal people in respect of a particular cognizable interest. The first nation had entered into an agreement with Manitoba and the federal Crown, as fiduciary, had a duty to deal with the province to protect the first nation from making an improvident transaction, which duty included consultation with the first nation. The federal authorities breached the duty by delay in carrying it out. Though Rothstein J. did not employ the honour of the Crown language (the Supreme Court of Canada judgment in *Haida* being six years in the future), the idea is implicit in his finding that the duty was actionable even though there was no evidence that failure to fulfill it in a timely manner caused harm to the first nation.[253]

Good faith is a second indispensable requirement. In *Delgamuukw* the Supreme Court (*per* Lamer C.J.C.) established that "consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples".[254] *Haida* and *Mikisew* endorsed this prescription.[255] *Haida* struck a further note, pointing out that good faith is a two-way street:

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C.C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C.S.C.).[256]

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[252] [1998] F.C.J. No. 1632, [1999] 2 F.C. 48 (F.C.T.D.).

[253] *Ibid.*, at para. 285:

> There is no indication in the material before me that earlier consultation would have had any impact on the course of negotiations with Manitoba. However, the duty to consult is not dependent on a retrospective assessment of whether consultation would have been useful. When Canada was unilaterally dealing with Manitoba, the duty to consult existed and the failure to consult during this period constituted a breach of fiduciary duty on the part of Canada.

[254] *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 168 (S.C.C.) (*per* Lamer C.J.C.).

[255] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 40-42 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at paras. 55, 61 (S.C.C.). See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 22, 29 (S.C.C.).

[256] *Haida*, *ibid.*, at para. 42. See above, this Chapter, Section C. At the initial stages, one duty of aboriginal claimants, in order to facilitate determination of the kind and strength of the asserted rights for purposes of triggering the duty to consult and accommodate, was noted in *Haida*, at para. 36:

> A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.[257]
>
> [T]here is some reciprocal onus on the Mikisew 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.[258]

The facts that aboriginal peoples have reciprocal responsibilities in the consultation process and that consulting in good faith is a two-way street had been noted earlier by the British Columbia Court of Appeal (*per* Finch J.A.):

> There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions: see *Ryan et al. v. Fort St. James Forest District (District Manager)* [1994] B.C.J. No. 2642 (25 January, 1994) Smithers No. 7855, affirmed (1994), 40 B.C.A.C. 91.[259]

More recently, the Alberta Court of Appeal (*per* Slatter J.A.) has specified:

> The obligation to consult does not include an obligation to repeatedly request input from the aboriginal group, nor to inquire as to why no response has been received to the invitation to consult. Likewise, no aboriginal group can effectively stall the development of public policy by delaying the provision of input, or by refusing to participate.[260]

To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements.

[257] *Haida*, *ibid.*, at para. 49.

[258] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 65 (S.C.C.).

[259] *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 1880, 64 B.C.L.R. (3d) 206, at para. 161 (B.C.C.A.) (*per* Finch J.A.). Justice Huddart concurring added, at para. 182:

> The requirement that a decision-maker under the *Forest Act* and the *Forest Practices Code* consult with a first nation that may be affected by his decision does not mean the first nation is absolved of any responsibility. Once the District Manager has set up an adequate opportunity to consult, the first nation is required to co-operate fully with that process and to offer the relevant information to aid in determining the exact nature of the right in question. The first nation must take advantage of this opportunity as it arises. It cannot unreasonably refuse to participate. ... In my view, a first nation should not be permitted to provide evidence on judicial review it has had an appropriate opportunity to provide to the decision-maker, to support a petition asserting a failure to respect a treaty right.

See also *R. v. Douglas*, [2007] B.C.J. No. 891, [2007] 3 C.N.L.R. 277, at para. 45 (B.C.C.A.), leave to appeal refused [2007] S.C.C.A. No. 352 (S.C.C.).

[260] *R. v. Lefthand*, [2007] A.J. No. 681, [2007] 4 C.N.L.R. 281 (Alta. C.A.), at paras. 42-43 (*per* Slatter J.A.), leave to appeal refused [2007] S.C.C.A. No. 468 (S.C.C.). Watson J.A. concurring added, at para. 193:

It remains likely, however, that claimants of not yet established s. 35(1) rights may not be *required* to engage in processes of consultation and accommodation if they consider another lawful approach, such as litigation, to be in their best interests.[261]

A third aspect of the general frame of reference for the consultation mandated by the Court, closely related to the honour of the Crown and good faith, is that the consultation must be meaningful. Invoking the foundational precept, laid down in *Sparrow*, that "s. 35(1) is a solemn commitment that must be given meaningful content",[262] the Court (*per* McLachlin C.J.C.) in *Haida* held:

> In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances.[263]

Writing for the Court in *Mikisew*, in his characteristically pithy manner, Binnie J. captured the essence of the point:

> Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.[264]

It appears that in order to be meaningful the consultation must be understood and acknowledged by the parties as such and must be deliberate.[265]

Meaningful consultation is responsive — a fourth aspect of the general frame of reference:

> Responsiveness is a key requirement of both consultation and accommodation.[266]

> ... consultation ... does not mean that a veto, even a "pocket veto" of delay, is necessarily part of the process.

261 *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2005] B.C.J. No. 713, [2005] 3 C.N.L.R. 35, at paras. 26-30 (B.C.S.C.). See above, this Section, Subsection ii.

262 *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1108 (S.C.C.), cited in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 33 (S.C.C.). See above, Chapter 1, Section C, Subsection i.

263 *Haida*, *ibid.*, at para. 41. See also paras. 10, 33, 42, 46, 76, 79; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 2, 29 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 67 (S.C.C.).

264 *Mikisew*, *ibid.*, at para. 54.

265 *Dene Tha' First Nation v. Canada (Minister of the Environment)*, [2006] F.C.J. No. 1677, [2007] 1 C.N.L.R. 1, at para. 113 (F.C.):

> The first time that the Crown reached out to the Dene Tha' was at this meeting. Consultation is not consultation absent the intent to consult. Consultation cannot be meaningful if it is inadvertent or *de facto*. Consultation must represent the good faith effort of the Crown (reciprocated by the First Nation) to attempt to reconcile its sovereignty with pre-existing claims of rights or title by the First Nation. Thus it is relevant that at the time of this meeting the CCU [Crown Consultation Unit] asserted it was not engaged in aboriginal consultation as no application for the MGP [Mackenzie Gas Pipeline] had been filed. The Ministers cannot now argue that the CCU was engaged in consultation.

Different situations require different responses.[267] Very often the appropriate "level of responsiveness" is accommodation, *i.e.*, "adapting decisions or policies in response" to aboriginal concerns.[268] But there may occur "disagreement as to the adequacy of its [the Crown's] response to Aboriginal concerns". In those instances the Crown "may be required to make decisions" in the face of the disagreement.[269] Especially in cases of asserted but not yet established s. 35(1) rights, it appears, "[b]alance and compromise will then be necessary".[270]

It was settled in *Nikal* that "the concept of reasonableness" forms a fifth aspect of the general frame of reference of consultation.[271]

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.[272]

But in addition to constituting a positive obligation, reasonableness effectively serves to moderate the severity of the duty.

> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.[273]

Consonant with the honour of the Crown, the good faith of the parties, the requirements that consultation be meaningful and responsive, and that it be

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[266] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 25 (S.C.C.).

[267] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 41 (S.C.C.).

[268] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 32, 42 (S.C.C.). See also para. 46; *Haida*, *ibid.*, at paras. 46-47.

[269] *Haida*, *ibid.*, at para. 45; *Taku River*, *ibid.*, at para. 42.

[270] *Haida*, *ibid.*, at paras. 45, 48; *Taku River*, *ibid.*, at para. 42. For the distinction between asserted but not yet established s. 35(1) rights and established s. 35(1) rights in relation to this point, see above, this Section, Subsection ii.

[271] *R. v. Nikal*, [1996] S.C.J. No. 47, [1996] 1 S.C.R. 1013, at para. 110 (S.C.C.) (*per* Cory J.).

[272] *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 1880, [1999] 4 C.N.L.R. 1, at para. 160 (B.C.C.A.) (*per* Finch J.A.), affirmed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 64 (S.C.C.).

[273] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 62 (S.C.C.). See also para. 22. Concerning reasonableness in accommodation, see below, this Section, Subsection v. Concerning reasonableness as the standard in judicial review of the Crown's performance of its duty to consult, see below, this Section, Subsection vi.

measured by the criterion of reasonableness, there is no prohibition of "hard bargaining" in the course of consultation. This dispensation may be seen as a sixth element of the general frame of reference provided by the Supreme Court.

> Mere hard bargaining ... will not offend an Aboriginal people's right to be consulted.[274]

The seventh element is the Court's reminder that:

> In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.[275]

Whether or not the government "adopt[s] dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex and difficult cases",[276] "[g]eneral principles of administrative law" are relevant in judicial review of performance of the duty,[277] though the duty of consultation exists over and above the "broad, common law 'duty of fairness' based on the general rule that an administrative decision that affects the 'rights, privileges or interests of an individual' triggers application of the duty of fairness".[278]

It follows that the actual shape and content of consultation between the Crown and aboriginal peoples, as marked out in accordance with the spectrum described in *Haida*,[279] and with the duty of consultation's purpose, institutional situation and general frame of reference, has two ingredients: — it has "both informational and response components". That the law envisions reciprocal provision of information and response is apparent from the depictions in *Haida* and *Mikisew* of "the lower end of the spectrum":

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.[280]
>
> The duty here has both informational and response components. In this case, given that the Crown is proposing to build a fairly minor winter road on *surrendered*

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[274] *Haida, ibid.*, at para. 42.

[275] *Haida, ibid.*, at para. 41.

[276] *Haida, ibid.*, at para. 44. See also para. 51 and above, this Subsection, footnote 241.

[277] *Haida, ibid.*, at para. 60. See below, this Section, Subsection vi.

[278] *Haida, ibid.*, at paras. 28, 31; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 23-24 (S.C.C.). See above, this Section, Subsection ii.

[279] *Haida, ibid.*, at para. 43:

> [T]he concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances.

[280] *Haida, ibid.*, at para. 43; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at para. 32 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 34 (S.C.C.).

> lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation. I believe the Crown's duty lies at the lower end of the spectrum. The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been done here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights. ... [emphasis in original][281]

The "reciprocal onus" of the aboriginal party "to carry their end of the consultation" also comprises both informational and response components.[282]

Those elements characterize as well the "deep consultation" at the other end of the spectrum. The difference in terms of shape and content, identified by the Court to date, appears to consist in a greater degree of procedural formality at the upper level.

> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light.[283]

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[281] *Mikisew*, *ibid.*, at para. 64. See also para. 55.

[282] *Mikisew*, *ibid.*, at para. 65, and see above, this Subsection, text at footnote 258.

[283] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 44-45 (S.C.C.). One example of successful accomplishment of "deep consultation" is provided in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 40-41 (S.C.C.):

> The Province was not required to develop special consultation measures to address TRTFN's concerns, outside of the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples.
>
> The Act permitted the [Project] Committee to set its own procedure, which in this case involved the formation of working groups and subcommittees, the commissioning of studies, and the preparation of a written recommendations report. The TRTFN was at the heart of decisions to set up a steering group to deal with Aboriginal issues and a subcommittee on the road access proposal. The information and analysis required of

In *Haida* the Supreme Court (*per* McLachlin C.J.C.) quoted passages in a document published by the New Zealand government to guide its consultation with the Mäori as providing insight into the shape and content of the Crown's duty of consultation in Canadian law:

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ...
>
> .....
>
> ... genuine consultation means a process that involves ...:
>
> - gathering information to test policy proposals
> - putting forward proposals that are not yet finalised
> - seeking Mäori opinion on those proposals
> - informing Mäori of all relevant information upon which those proposals are based
> - not promoting but listening with an open mind to what Mäori have to say
> - being prepared to alter the original proposal
> - providing feedback both during the consultation process and after the decision-process[284]

v. Meaning of accommodation

Laws in Canada must accommodate s. 35(1) rights.[285] The Supreme Court has said as well that laws must "be accommodated with the Crown's special

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> Redfern [the project proponent] were clearly shaped by TRTFN's concerns. By the time that the assessment was concluded, more than one extension of statutory time limits had been granted, and in the opinion of the project assessment director, "the positions of all of the Project Committee members, including the TRTFN had crystallized" (Affidavit of Norman Ringstad, at para. 82 (quoted at para. 57 of the Court of Appeal's judgment)). The concerns of the TRTFN were well understood as reflected in the Recommendations Report and Project Report, and had been meaningfully discussed. The Province had thoroughly fulfilled its duty to consult.

[284] *Haida, ibid.*, at para. 46, quoting New Zealand, Ministry of Justice, *A Guide for Consultation with Mäori* (Wellington: The Ministry, 1997), at 21, 31.

[285] *R. v. Sioui*, [1990] S.C.J. No. 48, [1990] 1 S.C.R. 1025, at 1072 (S.C.C.); *R. v. Gladstone (Gladstone No. 1)*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723 (S.C.C.) (at para. 64 *per* Lamer C.J.C., and paras. 170, 172 *per* McLachlin J.); *R. v. Adams*, [1996] S.C.J. No. 87, [1996] 3 S.C.R. 101, at para. 54 (S.C.C.); *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.) (at paras. 164, 167, 169 *per* Lamer C.J.C. and para. 203 *per* La Forest J.); *R. v. Sundown*, [1999] S.C.J. No. 13, [1999] 1 S.C.R. 393, at para. 46 (S.C.C.); *R. v. Marshall (Marshall No. 1)*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456 (S.C.C.) (at paras. 61, 64 *per* Binnie J., and paras. 111-12 *per* McLachlin J., dissenting on other grounds); *R. v. Marshall (Marshall No. 2)*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at para. 22 (S.C.C.); *R. v. Morris*, [2006] S.C.J. No. 59, [2006] 2 S.C.R. 915, at para. 125 (S.C.C.) (*per* McLachlin C.J.C. and Fish J. dissenting on other grounds); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 50 (S.C.C.). In *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 313 (S.C.C.), McLachlin J. said that the rights must "be legally accommodated within the framework of non-aboriginal law".

fiduciary relationship with First Nations."[286] In *Delgamuukw* the concurring reasons of La Forest J. explicitly drew the connection between accommodation and "notifying and consulting aboriginal peoples with respect to the development of the affected territory", as well as between accommodation and "fair compensation".[287] In *Marshall No. 2* the full Court adopted and accentuated that connection:

> [T]he process of accommodation of the treaty right may best be resolved by consultation and negotiation of a modern agreement for participation in specified resources by the Mi'kmaq rather than by litigation.[288]

Illustrating the fact that there is sometimes an element of reciprocity in accommodation, the Court has held that treaties are to be interpreted in the way "that best accommodates the interests of the parties at the time the treaty was signed".[289]

The more recent cases, *Haida*, *Taku River* and *Mikisew*, that have shed light upon the meaning of accommodation have done so in the course of considering the specific duty of the Crown, arising from the need to uphold its honour, to consult with and, if called for, accommodate the interests of aboriginal peoples. The cases have treated consultation and accommodation as two stages in one process, albeit allowing for the caveat that accommodation is not the inevitable result of every instance of consultation. Because of this close functional linkage, virtually everything said above concerning the meaning and content of the Crown's duty of consultation[290] is equally pertinent to its duty of accommodation of s. 35(1) rights and claims where such accommodation is warranted.

The meaning and content of accommodation as a product of consultation was described by the Supreme Court (*per* McLachlin C.J.C.) in *Haida*:

> When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely

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[286] *R. v. Côté*, [1996] S.C.J. No. 93, [1996] 3 S.C.R. 139, at para. 81 (S.C.C.); *Haida*, *ibid.*, at para. 50.

[287] *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 203 (S.C.C.) (*per* La Forest J.).

[288] *R. v. Marshall (Marshall No. 2)*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533, at para. 22 (S.C.C.). The point is equally applicable in the case of aboriginal rights. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 47 (S.C.C.).

[289] *R. v. Marshall (Marshall No. 1)*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456, at para. 39 (S.C.C.) (*per* Binnie J.). *R. v. Sioui*, [1990] S.C.J. No. 48, [1990] 1 S.C.R. 1025, at 1069 (S.C.C.), where the Court (*per* Lamer J.) used the word "reconciles". The majority in *Marshall No. 1* thus suggests that in this context accommodation is, or nearly is, synonymous with reconciliation, which is the "fundamental objective of the modern law of aboriginal and treaty rights": *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at para. 1 (S.C.C.). For concurring reasons intimating that accommodation may involve a degree of reciprocity, see *Mitchell v. Canada (Minister of National Revenue - M.N.R.)*, [2001] S.C.J. No. 33, [2001] 1 S.C.R. 911, at para. 164 (S.C.C.) (*per* Binnie J.)

[290] See above, this Section, Subsection iv.

> affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. ...
>
> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.
>
> This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.
>
> ... Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.[291]

It appears that interim measures adopted to accommodate the exercise of rights claimed but not established may have legal force even where they have the effect of suspending application of a statute in respect of persons covered by the interim measure, a result otherwise prohibited by unwritten constitutional law.[292] Where the purpose of such measures is fulfillment of obligations under s. 35(1) of the *Constitution Act, 1982* and the honour of the Crown, it has been held that convictions inconsistent with the measures must be set aside.

> The Supreme Court in *Haida* emphasized that the constitutional imperative must be understood generously. In my view, this means that where a course of action results in an accommodation (even a temporary one), the Aboriginals in question must be able to rely on the accommodation. If not, the constitutional imperative has not been adequately fulfilled.[293]

Although *Haida* dealt with the Crown's duty of consultation and accommodation where the s. 35(1) rights are asserted but not yet proved or otherwise established, in *Mikisew* the Court (*per* Binnie J.) affirmed that most of what was held in *Haida* applies also where the accommodation is in respect of established rights:

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[291] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 47-50 (S.C.C.). See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, at paras. 25, 42 (S.C.C.).

[292] For the constitutional law apart from s. 35(1), see *R. v. Catagas*, [1977] M.J. No. 73, 81 D.L.R. (3d) 396 (Man. C.A.); *R. v. Kelley*, [2007] A.J. No. 57, [2007] 2 C.N.L.R. 332, at para. 71 (Alta. Q.B.), citing P.W. Hogg, *Constitutional Law of Canada*, looseleaf ed. (Toronto: Carswell 1997), at 31-5. See above, Chapter 1, Section C, Subsection iii, and this Chapter, Section A.

[293] *Kelley, ibid.*, at para. 66. See also paras. 53, 85-86, and above, this Chapter, Section A.

> [T]he Crown is ... under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168).
>
> .....
>
> Had the consultation gone ahead, it would not have given the Mikisew a veto over the alignment of the road. As emphasized in *Haida Nation*, consultation will not always lead to accommodation, and accommodation may or may not result in an agreement. There could, however, be changes in the road alignment or construction that would go a long way towards satisfying the Mikisew objections.[294]

Unclear, however, is the extent to which the emphasis placed in *Haida* on "balancing interests", "give and take" and "compromise" applies where the s. 35(1) rights are established rather than only claimed. No doubt consultation and accommodation always demand balance and compromise to some degree,[295] a fact underscored by the Court's findings that the parties to consultation have no duty to agree, and the facts that infringements of established s. 35(1) rights may be justified, and that where in the assessment of justification the consultation that occurred is under review "the concept of reasonableness" applies,[296] suggest that balance and compromise are always present in the accommodation of established s. 35(1) rights. But perhaps accommodation of established rights requires less solicitude for "other societal interests" and more for the s. 35(1) rights than is the case in the *Haida* and *Taku River* circumstance.[297] In any event, the spectrum device prescribed in *Delgamuukw* and, using that word, in *Haida* is certainly employable to discover the fitting measure of balance and compromise.

vi. Judicial review of the Crown's performance of consultation and accommodation

Performance by the Crown of its duty of consultation and accommodation may come to be reviewed by a court in either of two distinct ways. The first circumstance identified by the Supreme Court of Canada, in *Sparrow* and then in *Badger* in the treaty rights context, is consultation weighed as part of the justification analysis where there has been already an infringement of a s. 35(1) right.[298] More recently, in *Haida*, *Taku River* and *Mikisew*, the Court has identified consultation as a procedural right, and concomitant duty of the Crown, performance of which may be challenged and assessed independently of the justification analysis.[299] Conrad J.A. of the Alberta Court of Appeal has analyzed,

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[294] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, [2005] 3 S.C.R. 388, at paras. 55, 66 (S.C.C.).

[295] See above, this Section, Subsections ii and iv.

[296] See above, Chapter 1, Section C, Subsection i, and above, this Section, Subsection iv.

[297] See above, this Section, Subsection ii.

[298] See above, Chapter 1, Section C, Subsection i.

[299] See above, this Section.

on the basis of close readings of *Mikisew* and *Haida*, the two occasions for judicial review of the Crown's consultation efforts, usefully summarizing when each is germane.

> I do not agree ... that *Mikisew Cree* alters the analysis from *Sparrow* and *Badger* such that consultation ought to be considered outside of the two-part infringement analysis in every case. It is, in my view, significant that *Mikisew Cree* involved the **proposed** taking up of land — that the court was asked to evaluate whether an action which **had not yet occurred** would infringe the applicants' treaty rights. The court held that, where a government action was still merely a proposal, it was appropriate to evaluate not only the potential implications of the anticipated project, but also the Crown's process for determining whether the project should proceed. This is distinguishable from situations where the Crown has already completed its substantive action, as was the case in both *Sparrow* and *Badger* where the laws alleged to infringe the rights of the claimants were already in force before the issue went to court.
>
> .....
>
> In sum, where a claimant is alleging that a completed government action is interfering with an established aboriginal or treaty right, he or she must show that a *prima facie* infringement has occurred before the court will examine any other factors. In such circumstances, consultation is considered in the justification portion of the analysis. Where, however, a lack of consultation is alleged **before** a *prima facie* infringement can be conclusively shown — either because the government has not yet acted or because the right in question has not yet been established — the court may nonetheless consider the breach of process rights alone.
>
> This modified approach is particularly appropriate where the irreversible use of land is being proposed, as it allows the court to remedy a lack of consultation before the land in question becomes permanently altered. (Boldface in original.)[300]

Smith J. of the British Columbia Supreme Court has well summarized the "three-step process", emerging from *Haida*, *Taku River* and *Mikisew* and lower court authorities, for judicial analysis of the course of consultation and accommodation where it is put in issue prior to occurrence of a *prima facie* infringement (*i.e.*, pursuant to Conrad J.A.'s "modified approach"):

> First, in determining whether a duty to consult arises, the court must assess whether the Crown has knowledge, real or constructive, of the potential existence of the aboriginal rights. Second, the court must determine if the Crown contemplated conduct that might adversely affect those rights. If there is such knowledge and contemplated conduct, then the court must take the third step and consider the scope and content of the duty to consult and accommodate, and whether that duty has been met. Determining the scope and content of the duty necessitates a preliminary assessment of the strength of the case supporting the existence of the right, and a consideration of the seriousness of the potentially adverse effect upon the rights claimed.[301]

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[300] *R. v. Lefthand*, [2007] A.J. No. 681, [2007] 4 C.N.L.R. 281, at paras. 161, 168 (Alta. C.A.) (*per* Conrad J.A.), leave to appeal refused [2007] S.C.C.A. No. 468 (S.C.C.).

[301] *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 2653, [2006] 1 C.N.L.R. 22, at para. 138 (B.C.S.C.).

Where an aboriginal claimant pursues this "modified approach", the remedies available to it include declaration and injunction in equity[302] and public law remedies, including declaration and injunction, available in the course of judicial review of administrative action.[303] Southin J.A. of the British Columbia Court of Appeal has cogently argued that the proper way to seek judicial enforcement of the Crown's duty to consult is by action for an injunction and not by statutory judicial review.[304]

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[302] See below, Chapter 4, Section C, Subsection v. In *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] O.J. No. 3140, 272 D.L.R. (4th) 727 (Ont. S.C.J.), the Ontario Superior Court (*per* Smith J.) granted an interim injunction to the aboriginal plaintiff by counterclaim but later declined to continue it as an interlocutory injunction, instead making a declaratory order requiring consultation under the ongoing supervision of the Court: see below, this Subsection, footnote 314.

[303] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 was a judicial review petition for a declaration; [2002] B.C.J. No. 378, [2002] 6 W.W.R. 243, at paras. 15, 60 (B.C.C.A.). The Supreme Court: [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at paras. 12-15 (S.C.C.) (*per* McLachlin C.J.C.), set out several reasons why the Haida were not restricted to seeking an interlocutory injunction. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.) was a petition to quash a Minister's decision (paras. 19-20), as was *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2004] F.C.J. No. 277, [2004] 3 F.C. 436, at paras. 65-66 (F.C.A.).

[304] *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2005] B.C.J. No. 444, 251 D.L.R. (4th) 717, at paras. 16-20 (B.C.C.A.) (*per* Southin J.A.):

> The *Judicial Review Procedure Act*, invoked below, is inapt to the claims asserted here because the appellant does not assert that the transaction in issue is not authorized by statute. To put it another way, no administrative grounds are asserted. ...
>
> These cases arising from aboriginal land claims address themselves, in substance, not to whether powers conferred by an enactment are lawfully exercised, but to an overarching constitutional imperative.
>
> ....
>
> The correct way, in my opinion, for an aboriginal band to invoke the rights conferred upon it by the judgment of the Supreme Court of Canada in *Delgamuukw v. British Columbia* ..., as elucidated by the judgment of the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* ..., is by action against the Attorney General in which the plaintiffs plead along these lines:
>
> 1. The plaintiffs assert an aboriginal title to [*here give the legal descriptions*] and have done so heretofore
>
> Particulars of Prior Assertion
>
> [*Here insert particulars.*]
>
> 2. Pursuant to an Act of the Legislature of British Columbia [*giving particulars*], the Minister of *this* or *that* has done or proposes to do *this* or *that*, e.g., to grant X lands within the purview of the claim.
>
> 3. The plaintiffs are engaging with the Province of British Columbia and the Government of Canada in treaty negotiations pursuant to: ---------- ----------.
>
> 4. The Minister of X has failed in his duty on behalf of the Crown to consult with the plaintiffs concerning such proposed grant and has failed to accommodate the particulars of the concerns expressed by the plaintiffs. [*Here insert those concerns.*]
>
> WHEREFORE THE PLAINTIFFS CLAIM:

> I do not overlook what was said in *Haida* about the inutility in land claims cases of injunctions. But, as I understand the reasons of the Chief Justice of Canada, she is addressing interlocutory injunctions in a proceeding to establish aboriginal title, whereas I am addressing injunctions both interlocutory and permanent in aid of a right to be consulted and accommodated, a related but different right unknown either to law or to equity before the judgment in *Delgamuukw*.[305]

Nevertheless, the particular case before Southin J.A. was allowed to proceed as a petition under the *Judicial Review Procedure Act*,[306] as have the leading cases on consultation and accommodation and many others.[307]

In *Haida* the Supreme Court (*per* McLachlin C.J.C.) addressed the "standard of review the court should apply in judging the adequacy of the government's efforts" in the discharge of the Crown's duty of consultation and accommodation. Though it disclaimed ability to answer the question where (as in *Haida*) the government "has established no process for this purpose",[308] the Court did

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> 1. An injunction restraining the defendants and any other Ministry of the Crown from granting to X [*here insert whatever it is which is in issue*] unless and until the concerns of the plaintiffs are duly accommodated or a treaty has been made between Her Majesty the Queen in right of British Columbia and the plaintiffs.

The legal necessity of prior assertion is unclear. And the making of treaties with aboriginal peoples is within the exclusive authority of the Crown in right of Canada under s. 91(24) of the *Constitution Act, 1867*: *St. Catharines Milling and Lumber Co. v. The Queen*, [1887] S.C.J. No. 3, 13 S.C.R. 577 (S.C.C.) (at 615 *per* Strong J., and 667 *per* Gwynne J. (both dissenting on other grounds), aff'd 14 App. Cas. 46 (U.K.P.C.); *Ontario v. Canada (Treaty No. 3 Annuities)*, [1909] S.C.J. No. 28, 42 S.C.R. 1, at 126 (S.C.C.) (*per* Duff J., Maclennan J. concurring); *Mitchell v. Peguis Indian Band*, [1990] S.C.J. No. 63, [1990] 2 S.C.R. 85 (S.C.C.) (at 124 *per* La Forest J., and 115 *per* Wilson J.); *R. v. Howard*, [1994] S.C.J. No. 43, [1994] 2 S.C.R. 299, at 308 (S.C.C.). See below, Chapter 5, Section A. In British Columbia, however, the British Columbia Treaty Commission Agreement of 1992 and the federal and provincial statutes in respect of it (*British Columbia Treaty Commission Act*, S.C. 1995, c. 45 and *Treaty Commission Act*, R.S.B.C. 1996, c. 461) make the provincial Crown a party to the treaties negotiated thereunder: see *Gitanyow First Nation v. Canada*, [1999] B.C.J. No. 659, 66 B.C.L.R. (3d) 165 (B.C.S.C.). For Ontario, see para. 6 of the agreement of April 16, 1894 appended to *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands*, S.C. 1891, c. 5 and the corresponding provincial statute, S.O. 1891, c. 3.

[305] *Musqueam*, *ibid.*, at para. 21.

[306] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[307] See *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 1062, [2005] 3 C.N.L.R. 74, at paras. 98, 104 (B.C.S.C.).

[308] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 60 (S.C.C.). The lacuna to which the Court referred appears to be a prescribed process by which the Crown's duty is to be carried out. In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550, the process under the *Environmental Assessment Act* served the purpose: *Taku River*, at paras. 2, 22, 33, 36, 40-41, and see above, this Section, Subsection iv. It is apparent that the Court favours the creation by governments of regulatory schemes, or at least prescribed operational guidelines, to structure performance of the duty of consultation and accommodation: *Haida*, at para. 51:

> 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

recount the "[g]eneral principles of administrative law" which govern the matter,[109] emphasizing that the focus here "is not on the outcome, but on the process of consultation and accommodation".[110]

Citing the standard of correctness applicable where the issue is one of law and the standard of reasonableness where the issue is fact, mixed fact and law, or process, the Court considered in turn the question of the existence or extent of the duty to consult and accommodate, and the process itself:

> On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. 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. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. 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: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play. ... So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.[111]

It will no doubt prove easier for courts to gauge the reasonableness of consultation processes than of the accommodation measures adopted by the Crown. In *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* Hall J.A. of the British Columbia Court of Appeal said that at this stage of development of the law:

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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.

[109] *Haida*, *ibid.*, at para. 60.

[110] *Haida*, *ibid.*, at para. 63.

[111] *Haida*, *ibid.*, at paras. 61-62.

> ... it is too early to be at all categorical about the ambit of appropriate accommodative solutions that have to work not only for First Nations people but for all of the populace having a broad regard to the public interest.[312]

He urged that "any such arrangement should be left to a negotiating process between the consulting parties" and "I would not wish to limit the parties from engaging in the broadest consideration of appropriate arrangements".[313]

In a number of cases courts have, after finding and delineating the Crown's duty to consult, made an order setting out direction to the parties and retaining jurisdiction to guide the process.[314]

vii. When consultation and accommodation are not required

It appears that the Crown's legal duty of consultation and accommodation exists only where rights, claimed or established, of an aboriginal people under s. 35(1) of the *Constitution Act, 1982* are in issue. The Ontario Divisional Court (*per* Pardu J.) held:

> An aboriginal right or prospective right is required to trigger the Haida/Mikisew duty to consult. There is no authority for the proposition that an interest that does not go as far is sufficient to trigger the duty. As Phelan J. noted in *Dene Tha' First Nation v. Canada*, [2006] F.C.J. No. 1677 [[2007] 1 C.N.L.R. 1] at paragraph [84], ...
>
> There are two key aspects to this [Haida Nation Duty to Consult] triggering test. First there must be either an existing or potentially existing aboriginal right or title that might be affected adversely by Crown's contemplated conduct. Second, the Crown must have knowledge (either subjective or objective) of this potentially existing right or title and contemplate conduct might adversely affect it (words in square brackets added by Ontario court).[315]

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[312] [2005] B.C.J. No. 444, 251 D.L.R. (4th) 717, at para. 97 (B.C.C.A.).

[313] *Musqueam, ibid.*, at paras. 99-100 (*per* Hall J.A.). In concurring reasons Lowry J.A. said, at paras. 104-05, that he did not endorse Hall J.A.'s remarks on this subject, but in fact he agreed with the quoted passages, urging that "these and other related questions that were not directly addressed in argument before us are now best left entirely to the parties unfettered by judicial commentary".

[314] *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, [2005] B.C.J. No. 401, 39 B.C.L.R. (4th) 263, at para. 127 (B.C.S.C.); *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 2653, [2006] 1 C.N.L.R. 22, at paras. 321-26 (B.C.S.C.); *Dene Tha' First Nation v. Canada (Minister of the Environment)*, [2006] F.C.J. No. 1677, [2007] 1 C.N.L.R. 1, at paras. 131-34 (F.C.); *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 1841, [2007] 3 C.N.L.R. 181, at paras. 182-89 (Ont. S.C.J.); and [2007] O.J. No. 2214, [2007] 3 C.N.L.R. 221, at paras. 15-20, app. A, B, C (Ont. S.C.J.).

[315] *Hiawatha First Nation v. Ontario (Minister of Environment)*, [2007] O.J. No. 506, [2007] 2 C.N.L.R. 186, at para. 50 (Ont. Div. Ct.). The Court in *Dene Tha', ibid.*, relied on *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511, at para. 35 (S.C.C.):

> But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River*

Courts may find no basis for requiring consultation and accommodation if a s. 35(1) claim is not properly before it,[116] or if it is able to find that the right claimed does not exist,[117] or if the claimant people occupy lands far remote from the territory in question, which territory is in close proximity to the lands of other aboriginal peoples,[118] or if the rights claimed have been surrendered.[119]

The Crown's obligation to consult does not apply in every case where a s. 35(1) right is established or credibly claimed. It is a matter of considerable doubt whether the duty exists in relation to proposed legislation or, if it may exist in that connection, under what circumstances.[120] A judge of the Federal Court, Trial Division (*per* MacKay J.) declined to strike, as disclosing no reasonable cause of action, a pleading seeking "a declaration that in the future the defendants [Canada], when enacting statutes with respect to First Nations people, must act within the honour of the Crown and its fiduciary duty to uphold treaty rights by conducting meaningful consultations with full disclosure of such proposed statutes to the leadership of the First Nations of Canada".[121] In two other cases, both prior to *Haida*, judges of the same court (*per* Simpson and Dawson JJ.) considered the proclamation of regulations a public law duty and so, in the absence of special circumstances, they were unable to find a fiduciary duty to consult.[122] Then, in a case subsequent to the identification in *Haida* of the

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First Nation v. British Columbia (Ministry of Forests), [1997] 4 C.N.L.R. 45 (B.C.S.C.), at 71, *per* Dorgan J.

But see *Mushkegowuk Council v. Ontario*, [1999] O.J. No. 3170, [1999] 4 C.N.L.R. 76, at para. 27 (Ont. S.C.J.), where a judge of the Ontario Superior Court (*per* Pitt J.) declared that amendments to provincial legislation which placed administrative burdens on bands could not apply without "meaningful consultation and explicit concurrence of the band councils and bands". There was no finding of a s. 35(1) right. The Court of Appeal set aside the judgment on grounds not addressed by Pitt J., saying "we want to make it clear that in disposing of the case in the way we do, we are not addressing the merits of the issues considered by [the trial judge]. We should not be taken as coming to any conclusion one way or the other on those issues.": [2000] O.J. No. 641, 184 D.L.R. (4th) 532, para. 1 (Ont. C.A.).

[116] *Native Council of Nova Scotia v. Canada (Attorney General)*, [2007] 2 C.N.L.R. 233, at paras. 40-50 (F.C.), aff'd [2008] F.C.J. No. 499, 2008 FCA 113 (F.C.A.).

[117] In *Pictou v. Canada*, [2003] F.C.J. No. 33, [2003] 2 F.C. 737, at paras. 26-31 (F.C.A.), leave to appeal refused [2003] S.C.C.A. No. 107 (S.C.C.) the Federal Court of Appeal Stone J.A. held, that the 1760-61 treaties of peace and friendship between the Mi'kmaq and the British did not require the Crown to consult with the Mi'kmaq prior to imposing on the latter legislative burdens such as those concerning collection of goods and services tax, in respect of transactions with non-Indians in the mainstream economy, in the *Excise Tax Act*, R.S.C. 1985, c. E-15, Part IX.

[118] *Kelly Lake Cree Nation v. British Columbia (Minister of Energy and Mines)*, [1998] B.C.J. No. 2471, [1999] 3 C.N.L.R. 126, at paras. 157-65 (B.C.S.C.); *Chemainus First Nation v. British Columbia Assets and Lands Corp.*, [1999] B.C.J. No. 682, [1999] 3 C.N.L.R. 8, at para. 25 (B.C.S.C.).

[119] *Hiawatha First Nation v. Ontario (Minister of the Environment)*, [2007] O.J. 506, [2007] 2 C.N.L.R. 186, at paras. 52-60 (Ont. Div. Ct.).

[120] See below, Chapter 4, Section A.

[121] *Federation of Saskatchewan Indian Nations v. Canada*, [2003] F.C.J. No. 429, 230 F.T.R. 29, at paras. 22(4)-24 (F.C.T.D.). See below, Chapter 4, Sections A and B.

[122] *Squamish Indian Band v. Canada*, [2000] F.C.J. No. 1568, 207 F.T.R. 1, at para. 521 (F.C.T.D.); *Treaty Eight First Nations v. Canada (Attorney General)*, [2003] F.C.J. No. 1009 (*sub nom. Halcrow v. Canada (Attorney General)*, [2003] 4 F.C. 1043, at paras. 67-71 (F.C.T.D.).

honour of the Crown as the principle on which the duty of consultation turns, Slatter J.A. of the Alberta Court of Appeal held:

> There can ... be no duty to consult prior to the passage of legislation, even where aboriginal rights will be affected: *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40. It cannot be suggested that there are any limits on Parliament's right to amend the *Indian Act*. It would be an unwarranted interference with the proper functioning of the House of Commons and the Provincial Legislatures to require that they engage in any particular processes prior to the passage of legislation. The same is true of the passage of regulations and Orders in Council by the appropriate Executive Council. Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them. Once enactments are in place, consultation only becomes an issue if a *prima facie* breach of an aboriginal right is sought to be justified: *Mikisew Cree* at para. 59.[323]

It has been held that the Attorney General is under no duty to consult with an aboriginal people in the exercise of prosecutorial discretion to stay a private prosecution commenced by the people in purported defence of aboriginal rights.[324]

It seems clear that once the government has conducted appropriate consultation, the result of which is reflected in appropriate accommodation measures in respect of s. 35(1) rights, the Crown's honour does not require further consultation in respect of specific measures in implementation of the overall strategy settled upon.

> There is ... no duty to consult with respect to every minute decision made by government. If there has been adequate consultation with respect to a program or regime of regulation or development, that will satisfy the constitutional requirement for consultation. It is not thereafter necessary to consult again with respect to every administrative decision made to implement that strategy: *R. v. Douglas*, [2007] B.C.J. No. 891, 2007 BCCA 265 [(2007), 278 D.L.R. (4th) 653], at para. 42. That is so even if some particular decision arguably takes the program in a different direction or expands somewhat the parameters of the regime, so long as the new direction was fairly within the scope of the original consultation.[325]

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[323] *R. v. Lefthand*, [2007] A.J. No. 681, [2007] 4 C.N.L.R. 281, at para. 38 (Alta. C.A.) (*per* Slatter J.A.), leave to appeal refused [2007] S.C.C.A. No. 468 (S.C.C.). Conrad and Watson JJ.A. concurred in the result. The former found it unnecessary to consider the consultation point. Watson J.A. said, at para. 194:

> Courts should be chary of declaring justiciable (and thus subject to judicial review) a *legislative* process of Parliament, when (a) the product of the legislative process, *viz.* the legislation, is already sufficiently vulnerable to Constitutional evaluation and response and (b) the consequences of the legislation are capable of remedy under law if need be. It is not necessary here to pronounce on what sort of regulatory activity by government would be a legislative process in that sense, nor to discuss what the reach of justiciability might be in any event. [emphasis in original]

[324] *Labrador Métis Nation v. Canada (Attorney General)*, [2005] F.C.J. No. 1208, 276 F.T.R. 219, at paras. 18-26 (F.C.), aff'd [2006] F.C.J. No. 1816, 277 D.L.R. (4th) 60 (F.C.A.).

[325] *R. v. Lefthand*, [2007] A.J. No. 681, [2007] 4 C.N.L.R. 281, at para. 40 (Alta. C.A.) (*per* Slatter J.A.), leave to appeal refused [2007] S.C.C.A. No. 468 (S.C.C.) ("*Lefthand*"). See also Watson J.A., at para. 193. In *R. v. Douglas*, [2007] B.C.J. No. 891, 278 D.L.R. (4th) 653 (B.C.C.A.), leave to appeal refused [2007] S.C.C.A. No. 352 (S.C.C.), the British Columbia Court of Appeal case cited in *Lefthand*, Finch J.A. said, for the Court, at para. 42:

In most circumstances the Crown is not under a duty to consult with aboriginal peoples concerning development activity on privately held lands in which it has no regulatory role. In a case in which a municipal subdivision and development board had approved a gravel pit, Ritter J.A. of the Alberta Court of Appeal declined to grant leave to appeal to an Indian band which claimed that an access road might adversely affect its aboriginal rights, holding "There is no duty of consultation on the Crown or landowners regarding privately owned lands." He was obliged to distinguish a British Columbia Supreme Court case which held that in its "unique circumstances" the duty to consult was not precluded by the fact that the lands in question were privately held.[124] Ritter J.A. found that the latter "must be restricted to the facts of that case":

> The extensive involvement of the government was the primary factor that precipitated the duty to consult in that instance.[125]

E. INTERPRETATION OF STATUTES

The honour of the Crown requires that "statutes relating to Indians" (as well as treaties and constitutional provisions) be "liberally construed and doubtful expressions resolved in favour of the Indians".[126]

No such principle existed prior to s. 35(1) of the *Constitution Act, 1982*. On the "substantive question involved" in *R. v. Sikyea* in 1964, the Supreme Court of Canada (Hall J.) expressly agreed "with the reasons for judgment and the conclusions of Johnson J.A." for the Northwest Territories Court of Appeal.[129] Justice Johnson had thought it clear:

> ... that the rights given to the Indians by their treaties as they apply to migratory birds have been taken away by this Act [the *Migratory Birds Convention Act*, R.S.C. 1952, c. 179, implementing the international Migratory Birds Convention] and its Regulations. How are we to explain this apparent breach of faith on the part of the Government, for I cannot think it can be described in any other terms? This cannot be described as a minor or insignificant curtailment of these treaty rights, for game birds have always been a most plentiful, a most reliable and a readily obtainable food in large areas of Canada. I cannot believe that the Government of Canada realized that in implementing the Convention they were at the same time breaching the treaties that they had made with the Indians. It is much more likely that these obligations under the treaties were overlooked — a case of the left hand having forgotten what the right hand had done. The subsequent history of the Government's dealing with the Indians would seem to bear this out.[130]

> Having conducted appropriate consultations in developing and implementing its fishing strategy, DFO is not required to consult each First Nation on all openings and closures throughout the salmon fishing season, where those actions were consistent with the overall strategy.

[124] *Hupacasath First Nation v. British Columbia (Minister of Forests)*, [2005] B.C.J. No. 2653, [2006] 1 C.N.L.R. 22, at paras. 182-200 (B.C.S.C.).

[125] *Paul First Nation v. Parkland (County)*, [2006] 3 C.N.L.R. 242, at para. 14 (Alta. C.A.).

[126] *Nowegijick v. The Queen*, [1983] S.C.J. No. 5, [1983] 1 S.C.R. 29, at 36 (S.C.C.).

[129] *R. v. Sikyea*, [1964] S.C.J. No. 42, [1964] S.C.R. 642, at 646 (S.C.C.) ("*Sikyea*").

[130] *R. v. Sikyea*, [1964] N.W.T.J. No. 1, 43 D.L.R. (2d) 150, at 158 (N.W.T.C.A.).