

AK LEGISLATURE SPECIAL COMMITTEE FILES SCOMM 155 3315

discharge the duty to consult and accommodate. In summary, the process by which the duty to consult is discharged by the Crown would likely be examined on a standard of reasonableness, while the government assessment of the seriousness of the claim or impact of the infringement would be judged on a standard of correctness.

(i) *The Process – Standard of Reasonableness*

The process by which the Crown discharges its duty to consult will be judged by whether the government has made reasonable efforts to inform or consult.

“The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required ... The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.” (*Haida* at paragraph 62)

(ii) *The Scope and Content of the Duty to Consult and Accommodate – Standard of Correctness*

The scope and content of the duty to consult and accommodate varies with the circumstances. The Supreme Court of Canada found that in general terms, “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 a right or title claimed” (*Haida* at paragraph 39). The kind of duties that may arise in different situations fall upon a “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 that notice. . . .

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.

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. 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 Aboriginal peoples with respect to the interests at stake.” (*Haida* at paragraphs 43-45)

Government efforts at making these assessments will be judged by a standard of correctness.

“Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness.” (*Haida* at paragraph 63)

Given the higher standard of review, government assessments of the seriousness of the claim or impact of infringement might usefully err on the conservative side (towards greater consultation)—at least until the boundaries are more clearly defined.

(b) Third Parties Not Under Duty to Consult or Accommodate

The Supreme Court firmly rejected the Court of Appeal’s finding that the duty to consult and accommodate extended to Weyerhaeuser. The Supreme Court held that the duty to consult rests solely with the Crown — provincial and federal.

(i) Duty to Consult for Private Citizens

Justice Lambert of the Court of Appeal concluded that Weyerhaeuser had a duty to consult the Haida, and that the duty came from a number of sources. Firstly, s.35(1) of the *Forest Act* provides a clear statutory obligation on the holder of a tree farm licence to consult with persons who use the Tree Farm area for purposes other than timber production. This requirement was also reflected in the terms of the tree farm licence. Secondly, the duty was based on the constructive trust principles of ‘knowing receipt’. Weyerhaeuser held its title to the tree farm licence as a constructive trustee and, as a result, owed a third party fiduciary duty to the Haida. Finally, in the Lambert J.A.’s opinion, Weyerhaeuser had an obligation to justify the *prima facie* infringement of the Haida’s Aboriginal rights and/or title. Being both a party to the Crown’s *prima facie* infringements, as well as an independent infringer at the level of activities and operations, Weyerhaeuser was obligated to justify the infringements in which it was participating.

The Supreme Court firmly rejected all of these reasons and found that the Crown alone remains legally responsible for the consequences of its actions and interactions with third

parties that affect Aboriginal interests. The Court did acknowledge that the Crown can delegate "procedural aspects of consultation" to third parties. The Court suggested that the terms of the tree farm licence that mandated Weyerhaeuser to specify measures it would take to identify and consult with "Aboriginal people claiming an Aboriginal interest in or to the area" was merely an example of such delegation. Ultimate legal responsibility for consultation and accommodation rests with the Crown.

The Court also rejected the application of the trust law doctrine of "knowing receipt". The Court found that the duty to consult is distinct from the fiduciary duty owed in relation to particular Aboriginal interests. The Court noted that there was a distinction between the "trust-like" relationship between the Crown and Aboriginal peoples and a true "trust" and found there was no reason to import the doctrine of knowing receipt into the special relationship between the Crown and Aboriginal peoples (paragraph 54).

Finally, the Court also rejected the notion that imposition of a duty to consult on private individuals may be necessary to provide an effective remedy, which had been suggested by Finch C.J.B.C. The Court stated, "the remedy tail cannot wag the liability dog" and noted that the Province retains significant and ongoing powers (including control by legislation), which give it a powerful tool to respond to its legal obligations (paragraph 55). As a result, third parties are under no legal duty to consult or accommodate Aboriginal concerns and cannot be held liable for the Crown's failure to consult.

It has become increasingly common for industrial proponents of development projects to rely on direct communications and consultations with Aboriginal groups, and agreements resulting from those consultations, as a means to manage project risks associated with governments' failure to consult, or consult adequately, with Aboriginal groups about the proposed project or development. The increased clarity resulting from the *Haida* and *Taku* decisions may reduce, but not eliminate, risks associated with the adequacy of Crown consultations. While the Supreme Court has clarified that third parties cannot be liable to Aboriginal groups for the Crown's breach of duty, the permits, licences and other authorizations granted by the Crown remain subject to legal challenge, which can have an

equally significant impact upon the recipients of such Crown authorizations. Thus, third parties will still have an interest in seeing that the government properly discharges its duty (and in the least time possible). In addition, industrial proponents are likely to continue to rely on direct negotiations/consultations with Aboriginal groups to reduce the risk of challenges to its Crown authorizations (as well as to comply with any statutory or contractual consultation obligations).

(c) Consultation Through Regulatory Processes

In *Taku*, the Supreme Court confirmed that the Province was not required to establish a separate consultation process to address Aboriginal concerns. The Court confirmed that the B.C. *Environmental Assessment Act* process, which provides for direct First Nation participation in project reviews, was a suitable process for Crown consultation with Aboriginal groups regarding overall project approvals.

“The Province was not required to develop special consultation measures to address TRTFN’s [Taku River Tlingit First Nation’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.” (paragraph 40)

The Court noted the extensive (although not consistent) participation of the Taku River Tlingit in multiple stages of the review and concluded that, by the time the assessment was concluded, the concerns of the First Nation were well understood and had been meaningfully discussed. Thus, the Court concluded that the Province “had thoroughly fulfilled its duty to consult” (paragraph 41).

The Court noted that further, more detailed consultations would occur through the project permitting phase, as well, allowing the Crown to continue to discharge its obligation to consult and, where necessary, accommodate Aboriginal concerns.

(i) Reconsidering Regulatory Processes

The Court recognized that government may establish regulatory schemes to address procedural aspects of consultation, and suggested that government could establish dispute

resolution processes to handle complex or difficult cases. One manner that the governments, federal or provincial, may choose to move forward is the creation or expansion of regulatory regimes to ensure that the procedural requirements identified by the Court are followed. The Supreme Court clearly invites this approach.

"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." (*Haida* at paragraph 51)

Governments will have to determine whether existing decision-making processes are adequate to facilitate the necessary scope and extent of consultation. Where modification is necessary, government will face a choice between integrating consultation obligations into the duties of statutory decision-makers or to lay a new process focused exclusively on Aboriginal consultation over a current regulatory structure. There has already been some evidence of governments reconsidering regulatory schemes in response to the Supreme Court decisions.

(ii) *Case Study: The Mackenzie Gas Project – Regulatory Review by the National Energy Board*¹

The National Energy Board had issued a Memorandum of Guidance ("MOG") on Consultation with Aboriginal Peoples in March 2002. Following the decision of the Supreme Court of Canada in *Haida* and *Taku*, the Board determined that its former MOG did not accurately reflect the law as stated in these two cases. As a result, the Board withdrew its MOG for "reconsideration and review" on August 3, 2005. The Board stated that it intended to continue to monitor legal and policy developments and to engage with Aboriginal groups, industry representatives and government departments prior to issuing any further guidance document on this matter. While to date there has not been an updated MOG published by the National Energy Board, they have given some indication as to the expectations it has concerning the evidence to be included in project applications to the

¹ In the interest of full disclosure, it should be noted that the author is co-counsel to the Government of the Northwest Territories in the National Energy Board GH-1-2004 proceeding.

Board. In addition to the Generic Information Request and the Filing Manual Section 3.3.3, applications for project approval to the Board, the applicant must also include:²

- Identification of all the First Nations communities that may be affected by the project and how they were identified;
- When and how they were contacted and who was contacted;
- Evidence that the applicant has provided potentially affected Aboriginals with a project overview that clearly explains the nature of the project, its routing, proposed construction periods and possible environmental and socio-economy impacts and information regarding the applicant's proposed measures to minimize such impacts;
- Documentation and summaries of any meetings with those potentially affected Aboriginal people. Confidential discussions need not be revealed but the evidence should include enough detail to enable the Board to understand the general issues discussed;
- Information as to the concerns raised by Aboriginal people, and whether or not those concerns are still outstanding or have been addressed by the applicant;
- An analysis of the potential impacts of the project on the exercise of traditional practices such as hunting, fishing, trapping and gathering; and,
- Any other matters that may be relevant to the application, e.g. information about discussions provincial or federal government departments or agencies may have had with Aboriginal groups potentially affected by the project.

In relation to one particular project, the Mackenzie Gas Project, the federal government has established a project-specific team known as the Crown Consultation Unit. Several departments, including Environment Canada, Fisheries and Oceans Canada, Indian and Northern Affairs Canada, National Resources Canada, and Transport Canada committed to work together to coordinate their consultation activities to avoid overlap and duplication. The government, in correspondence with the National Energy Board, also stated that it was "mindful of the need to minimize 'consultation fatigue' in the communities".

² This information was provided in a letter dated February 10, 2006 to Senior Legal Counsel for Terasen Pipelines Inc. from the Secretary of the National Energy Board.

The Crown Consultation Unit has been assigned the role of coordinating and facilitating consultation activities with Aboriginal groups; documenting identified concerns; and managing information obtained through these consultation processes. It represents the Federal Crown and receives functional guidance from a Federal Advisory Committee, which includes senior representatives from the five departments referred to above. It is also supported by a Staff Working Group and a Legal Advisory Group representing those same federal departments. The federal government's approach was expressly stated to be in response to the Supreme Court's decisions in *Haida* and *Taku*. It is too early to judge the results. It is notable that the Crown Consultation Unit, while having full intervenor status, did not file full and formal evidence on the deadline assigned for intervenor evidence. They chose to defer filing evidence.

"Consultation is an iterative process and will evolve over the course of the review process. The Government of Canada will file further evidence on Crown consultation activities with Aboriginal groups with the NEB at the beginning of Phase 5 of its Public Hearing Process [the oral hearing phase]. The Crown believes that filing its evidence as proposed would ensure that the NEB has a complete record of Crown consultation activities undertaken to that point in time prior to making its decision on the project."

It remains to be seen whether this new model will prove to be effective in fulfilling the Crown's consultation requirements and whether it will meet with approval of Aboriginal and other participants in the regulatory review process. It is an experiment worth watching.

(iii) *Guidance for Decision-Makers*

In *Haida*, the Court comments, with seeming approval, on the British Columbia Provincial Policy for Consultation with First Nations (October 2002) and states that such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.

The British Columbia provincial consultation policy identifies the following stages in the consultation process:

- Pre-Consultation Assessment – Assessing whether an activity requires consultation;

- Stage 1 – Initiate Consultation

- Stage 1(a) – Consultation Activities – Initial consideration of Aboriginal interests identified or raised by potentially affected First Nations;

- Stage 1(b) – Considering Aboriginal Interests – Evaluating the “soundness” of Aboriginal interests (i.e. whether they may be subsequently proven to exist);

- Stage 2 – Consider the impact of the decision on Aboriginal interests;

- Stage 3 – Consider whether any likely infringement of Aboriginal interests could be justified in the event those interests were proven subsequently to be existing Aboriginal rights and/or title;

- Stage 4 – Look for opportunities to accommodate Aboriginal interests and/or negotiate resolution bearing in mind the potential for setting precedents that may impact other Ministries or agencies.

(page 22ff of the BC Provincial Consultation Policy)

The Provincial Policy clearly allows broad leeway of interpretation and application. On page 16, the Policy emphasizes that “consistent application of this Policy across government is essential”. However, on page 25, it acknowledges that “there are many ways to consult within the four stages of consultation”. How to apply a policy “consistently” but “in many ways” has proven to be a challenge. The consideration of precedents (in Stage 4) also opens the possibility that the accommodation offered in any given circumstances may be driven by factors other than the accommodation that such circumstances would suggest is required.

(d) Moving Forward

Despite the greater clarity and limits provided by these decisions, they highlight the need for continued development of approaches to consultation with Aboriginal communities. It will likely take some time for governments and Aboriginal groups to respond and adapt to the Court’s directions on Aboriginal consultations. Those responses could have important consequences for current government and industry consultation practices, including the

negotiation of impact benefit agreements. While the cases underscore that consultation is a Crown responsibility, resource developers and other third parties must continue to take a proactive approach to working with governments and Aboriginal groups to ensure that consultation obligations are properly understood and carried out. The Crown must develop robust accommodation policies and/or regulatory schemes that will fulfil its duty to Aboriginal groups and provide greater certainty to recipients of Crown authorizations.

IV. What's Happened Since in the Context of Assented but Unproven Rights and Title?

As the Supreme Court noted in *Haida*:

"This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. 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." (paragraph 11)

Since the release of the *Haida* and *Taku* decisions in November 2004, several courts have taken some tentative steps towards filling in the general framework established by the Supreme Court of Canada.

(a) Consultation in Respect of Previous Decisions (that were the subject of consultations)

In *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 B.C.S.C. 283, Powers J. of the British Columbia Supreme Court considered an application by the Homalco Indian Band for judicial review of the decision of the Ministry to approve an amendment to the licence of an aquaculture company (allowing the raising of Atlantic Salmon, as opposed to the original Pacific Salmon). The Ministry argued that their obligation to consult related only to the amendment to the licence, since the existence and location of the site and evidence regarding potential harm to wild salmon stocks or marine life had already been considered in the initial approval. The Ministry concluded that the scope and content of consultation was at the low end of the scale.

Powers J., applying the standard of review of correctness, concluded that the Ministry had not correctly evaluated the potential impact and its response did not amount to the necessary level of consultation.

"I agree that matters which have been extensively consulted on in the past do not require a full repetition of that consultation. However, that does not mean that these matters do not continue to be the subject of review and further consultation in light of additional knowledge or information." (paragraph 49)

In the result, the application was adjourned to allow the Ministry to continue consultation.

(b) Consultation in Respect of Previous Decisions (that were not the subject of consultations)

One of the lengthier examples of extended consultation involves the decision of the B.C. Minister of Forests consenting to the change of control of Skeena Cellulose Inc., which was challenged by three Aboriginal groups. When it first came before the Court in the fall of 2002 (*Gitksan and other First Nations v. British Columbia (Minister of Forests)*, 2002 B.C.S.C. 1701), Tysoe J. found that the Minister had not fulfilled the duty of consultation and accommodation, but declined to quash the decision and adjourned the matter to give the Minister the opportunity to fulfil his duty. In late 2004, the Gitanyow First Nation again sought a declaration that the Minister had failed to provide meaningful and adequate consultation and accommodation and other forms of relief (*Gwasslam v. British Columbia (Minister of Forests)*, 2004 B.C.S.C. 1734). Again, the Court concluded that the Crown had not yet fulfilled its duty of consultation and accommodation with respect to the transfer (paragraph 60). The Court granted a declaration to that effect, but declined the remaining relief sought by the Gitanyow and indicated that the parties should resume negotiations with liberty to return to Court if the negotiations failed (paragraph 65ff).

Notably, in both decisions, the Court looked beyond the potential infringement arising from the immediate decision being contemplated. The Court found that where there are past instances of a failure of consultation, that the government is required to remedy the past defects before a further dealing with the same licence.

"If a forest tenure licence has been issued in breach of the Crown's duty to consult, the duty continues and the Crown is obliged to honour its duty each time it has a dealing with the licence." (*Gitksan*, paragraph 81)

The *Gitksan* decision predated the Supreme Court of Canada's decisions in *Haida* and *Taku*. However, in *Gwasslam*, Tysoe J. concluded that "the same reasoning applies to the duty as founded in the honour of the Crown." (paragraph 43). Thus, even if a decision was not challenged at the time it was made, the permit could be vulnerable upon renewal (or any subsequent "dealing") if there has been a previous, unremedied breach of the Crown's duty to consult and accommodate (*Gwasslam*, paragraph 46).

If this theory is generally accepted, it introduces potential enormous uncertainty and complication to the consultation process. Given the different standards and approaches of past governments and past generations, it is safe to assume that there were an enormous number of licences, permits and other authorizations issued in the past without any consultation whatsoever. If the logic of Tysoe J. is accepted, any minor amendment, extension or renewal of any of these permits has the potential of reopening the entire history of consultation in relation to that permit. Countless existing permits (which are not subject to present challenges) may have this latent defect.

(c) Duty to Consult in Respect of Decisions Regarding Private Land

The consultation authorities discussed above all arose in connection with Crown land or Crown tenure. The courts have also had to consider whether a duty to consult with Aboriginal groups exists with respect to private land.

(i) *R. v. Badger*

In *R. v. Badger*, [1996] 1 S.C.R. 771, the Supreme Court of Canada indicated that treaty rights (in that case, hunting rights) can be exercised on private land where that land is not subject to a visible, incompatible land use. It is similarly arguable that an Aboriginal right to hunt could be exercised on private lands not subject to a visible, incompatible use. If so, then a government decision authorizing an incompatible use (such as subdividing property for residential development) could trigger the duty to consult.

(ii) *Hupacasath First Nation v. British Columbia*

In *Hupacasath First Nation v. British Columbia*, [2005] BCSC 1712, the Supreme Court of Canada considered an application for judicial review of two decisions by the Minister of Forests granting Weyerhaeuser's requests to remove privately owned land from Tree Farm Licence 44 and to determine a new allowable annual cut under the licence. The Hupacasath First Nation argued that the Minister had breached the Crown's duty to consult in allowing the requests. In response, the Minister of Forests and Brascan corporation, subsequently renamed Brookfield Asset Management Inc. (who had since purchased the private land from Weyerhaeuser) argued that the land was privately owned and accordingly, there was no duty to consult on the part of the Crown.

After concluding that the Minister had prior knowledge of the existence of potential Aboriginal rights on the private land and surrounding Crown land, Madame Justice Smith contemplated whether there could be Aboriginal rights on the private land in question and if so, whether the Crown had contemplated conduct that might adversely affect those rights. Madame Justice Smith concluded:

"...that existing aboriginal and treaty rights, for example to hunt or fish, may be exercised on unoccupied private land if the activity is permitted by statute or common law and is not prohibited by the private landowner." (paragraph 180)

After concluding that there was reason to believe that potential Aboriginal rights existed on the private land in question, the Court considered whether the actions of the Crown might have adversely affected those rights. The Court concluded that sale of the private land could lead to development that was inconsistent with Aboriginal rights and as such, the Minister ought to have known that the contemplated conduct had the potential to adversely affect the Hupacasath First Nation's Aboriginal rights. Consequently, the Court concluded that in reaching its decision to accept or deny Weyerhaeuser's requests, the Crown had a duty to consult the Hupacasath First Nation.

Once triggered, Madame Justice Smith went on to consider the extent of the duty to consult required:

"The Crown's duty with respect to alleged aboriginal rights on the Removed Land is at a low level and does not require "deep consultation". It does require informed discussion between the Crown and the HFN in which the HFN have the opportunity to put forward their views and in which the Crown considers the HFN position in good faith and where possible integrates them into its plan of action. The Crown has not met that duty." (paragraph 274)³

The *Hupacasath* decision extended the Crown's duty to consult to private land in situations where the Crown's contemplated actions might adversely affect Aboriginal rights and title. However, the requirements needed to fulfill the duty to consult may be less in instances involving private land than in instances involving Crown land.

While this decision has the potential to initiate significant change in consultation where private lands are involved, a recent decision by the Court of Appeal of Alberta in *Paul First Nation v. Parkland (County)*, 2006 ABCA 128 has the potential to limit its application.

(iii) *Paul First Nation v. Parkland (County)*

The Alberta Court of Appeal case *Paul First Nation v. Parkland (County)* involved an application by the Paul First Nation for leave to appeal a decision by the Subdivision and Development Appeal Board of Parkland County (SDAB) approving the development of a gravel pit by Burnco Rock Producers Ltd. (Burnco). In deciding whether or not to uphold the decision granting the permit, the SDAB held a public hearing and gave notice to adjacent landowners. A representative of the Paul First Nation attended the hearing and made representations, but otherwise there was no consultation on the development between the SDAB and the Paul First Nation. As was there were no consultations between Burnco and the Paul First Nation. As part of their argument, the Paul First Nation argued that the SDAB had a duty to ensure that Burnco had consulted with the Paul First Nation.

³ The Court concluded that the duty with respect to Crown land was higher: "The duty on the Crown with respect to the effect of the removal decision on aboriginal rights asserted on Crown land is higher, and requires something closer to "deep consultation"/ On the evidence, the Crown did not meet that duty." (paragraph 275)

In rendering their decision the Alberta Court of Appeal recognized the *Hupacasath* decision that developments on private land could give rise to a duty to consult. However, the Court distinguished the *Hupacasath* case from the case at bar saying that this was not one of those situations as there was no extensive involvement of the government in the development. In speaking of the *Hupacasath* decision, Justice Ritter clarified that:

“...any such duty must be restricted to the facts of that case as it involved an operative transfer of the lands into a publicly funded government program followed by an attempt to transfer the lands out of that program. The extensive involvement of the government was the primary factor that precipitated the duty to consult in that instance.” (paragraph 14)

Justice Ritter's decision appears to be an attempt to distinguish the *Hupacasath* case into obscurity. However, with respect, the distinction drawn by Justice Ritter does not seem to withstand scrutiny. It is not the “extensive involvement” of the government that is the controlling factor, but the potential for a government decision to adversely impact Aboriginal or treaty rights. It is not difficult to imagine a situation where the government is not “extensively involved” but is tasked with making decisions (e.g. granting approvals) that have the potential for serious adverse impact on Aboriginal interests. The existence of a duty to consult in relation to matters on private lands appears to be a judicial issue that we have not heard the last of.

(d) Appropriate Procedure: Judicial Review or Ordinary Action

In *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 B.C.C.A. 128, the British Columbia Court of Appeal considered an appeal from the dismissal of a judicial review of a decision of the Crown authorizing the sale of lands (an existing golf course) to the University of British Columbia. In the Court of Appeal, Southin J.A. commented that the claims asserted by the First Nations were inapt to the process under the *Judicial Review Procedure Act* because the First Nation did not assert that the transaction in issue was not authorized by statute. In other words, no administrative grounds were asserted (paragraph 16ff). The Musqueam's claim was based on a claim for Aboriginal title to the land in question. Southin J.A. stated the opinion that for an Aboriginal band to invoke the rights conferred upon it by the judgement of the Supreme Court of Canada in *Delgamuukw* is

to bring an action against the Crown asserting Aboriginal title.⁴ As discussed below, the vast majority of challenges still proceed by way of judicial review.

(e) Challenge to Government "Policy" vs. Government "Decisions"

In *Haida*, the Court stated that the duty to consult will arise when the Crown has knowledge of the potential existence of Aboriginal interests and "contemplates conduct" that may adversely affect it. The phrase "contemplates conduct" employed by the Supreme Court of Canada leaves open the possibility that it is more than simply government "decisions" regarding specific authorizations or applications that may be subject to challenge.

In *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 B.C.S.C. 697, the British Columbia Supreme Court was faced with what, in effect, was a challenge to government policy of offering Forest Range Agreements as accommodation for infringement from forestry operations. In March 2003, the BC Ministry of Forests announced its forestry revitalization plan, which included offering Forest Range Agreements as a strategic policy approach to fulfilling the Province's duty to consult with Aboriginal peoples. The program was designed as a "fast-track" program that provided the First Nation with economic accommodation for forestry infringements within its territory, but did not require it to prove the strength of its claim to the asserted territory. The amount was calculated on the registered population of the Indian Band to whom the offer was made. The Huu-Ay-Aht First Nation brought an application for a declaration that the Crown was obliged to consult in good faith with the First Nation regarding forestry permits, and that a population-based formula to determine accommodation under the Forest and Range Agreement was not in good faith and did not fulfil the Crown's obligations.

⁴ In the result, the Court concluded that the consultation process was insufficient (paragraph 94), but found that there was a "fair probability that some species of economic compensation would be likely found to be appropriate for a claim involving infringement of Aboriginal title relating to the land of the type of this long-established public golf course located in the built up area of a large metropolis" (paragraph 98). The Court ordered the suspension of the operational Order-in-Council authorizing the sale for two years in order to provide opportunity for the parties to seek to reach some agreement, failing which, the parties are at liberty to bring the matter back to Court.

The Court first addressed the issue of whether it could hear such a challenge in a judicial review application and concluded that it could. The Court noted that most of the cases on this subject have been commenced by petition seeking judiciary review (paragraph 98).

"It is apparent that the Courts have not been pedantic or overly restrictive in the type of action which it regards as a 'decision' when it comes to declaratory relief following review of whether the Crown has discharged its obligation to consult with First Nations." (paragraph 99)

"In this case, the FRA initiative is a creature of statute, the *Forestry Revitalization Act* and the *Forestry Act*, which enable the Province to make specific agreements with First Nations regarding forest tenure. The FRA is a vehicle that the Ministry chose to deliver those specific agreements. The concept of 'decision' should not be strictly applied when there is legislative enablement for government initiative that directly affects the constitutional rights of First Nations. ... The petitioners are entitled to seek declaratory relief under the JRPA that the FRA policy does not meet the Crown's constitutional obligation to consult the HFN." (paragraph 104)

The Court allowed the application and found that the Crown had a duty to consult with the First Nation. The Crown was obligated to design a process for consultation before operational decisions were made and was ordered to establish a reasonable consultation process for future consultation with respect to economic accommodation for ongoing forestry activity within the territory. The failure of the Crown to consider the strength of the claim or the degree of infringement represented a complete failure to meaningfully consult (paragraphs 116 and 126).

In the aftermath of the decision, the Crown had originally filed an appeal. The appeal was eventually dropped and instead a revised template called the Interim Agreement on Forest & Range Opportunities was adopted by the provincial government. The government claimed that the new agreement reflected the *Huu-Ay-Aht First Nation* decision and provided for greater consultation.

(f) Remedy

As is evident from several of the above decisions (Homolko, Skeena, UBC, etc.), the Courts generally have been reluctant to grant a final remedy and quash a government decision.

They have tended, instead, to limit the decision to granting a declaration that the government has a duty to consult and then adjourning the matter (or suspending the operation of the decision) to allow the government and the First Nation the opportunity to continue consultations.

In *Musqueam Indian Band v. Richmond (City)* 2005 B.C.S.C. 1069, Brown J. of the British Columbia Supreme Court considered a challenge to the decision of the B.C. Lottery Corporation (an agent of the Crown) to move and expand a casino to lands which it knew were subject to Musqueam claims. The Crown did not consult prior to this decision. The Court found that the Crown's contemplated move of the casino to the claimed lands triggered a duty to consult and that consultation did not take place at the earliest stages, before irrevocable steps had been taken. However, in considering the appropriate remedy, the Court concluded that because the harm suffered by the Musqueam, failure to consult and potentially accommodate, is compensable, it was not appropriate to set aside the decision, close the casino and cause consequential damage. The Court issued a declaration that the Crown had a duty to consult and suggested that the parties can assess the strength of the claim and the appropriate scope and content of the duty to consult and accommodate and invited them to return to the Court if they could not agree.

A similar approach to remedies was taken in *Hupacasath First Nation v. British Columbia* 2005 B.C.S.C. 1712. Despite the finding of a duty to consult and a breach of that duty, the British Columbia Supreme Court decided that the Minister's decisions should not be quashed or set aside:

"In light of the substantial prejudice to third parties which could flow from quashing or suspending the removal decision, compared with the lesser prejudice which could befall the HFN if the removal decision is left in effect, I have concluded that the removal decision should not be quashed or set aside." (paragraph 317)

Instead, the Court found an appropriate remedy to be the order of a completion of consultations and accommodation.

V. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*

(a) Background and Lower Court Decisions

The discussion above has focused on the decisions of the Courts regarding the duty of the Crown to consult and accommodate the interests of Aboriginal people in the context of asserted but unproven claims. The *Haida* and *Taku* cases clarify the scope of the duty to consult and circumstances where Aboriginal rights or title have been asserted, but have not yet been proven or confirmed, either through litigation or through the negotiation of a land claim agreement or treaty.

These cases of potential rights or title should be distinguished from cases such as *R. v. Sparrow*, [1990] 1 S.C.R. 1075, in which an Aboriginal right (in that case, the right to harvest fish) was adjudicated and confirmed as an existing right. In such circumstances, the Crown had an obligation to consult and an obligation to meet the test of "justification" for any proposed infringement of the legally confirmed Aboriginal right.

In Canada, there is a patchwork of settled claims, starting with the numbered treaties, through modern land claims agreements and treaties, and the various agreements-in-principle currently under negotiation. Consideration must be given to how and to what extent the concepts of consultation, accommodation and justification may continue to apply with respect to landed resource decisions on Crown land in the post-treaty context.

(i) Consultation Under the Numbered Treaties

Between 1871 and 1923, the federal government, and various Aboriginal people entered into 11 numbered treaties covering most of the provinces of Ontario, Manitoba, Saskatchewan, Alberta, plus the Mackenzie District of the Northwest Territories and the northeast corner of British Columbia. Treaty Number 8 was negotiated in 1899 and was adhered to by a number of bands that lived in what are now Alberta, Saskatchewan, British Columbia and the Northwest Territories.

Treaty Number 8 contains the following clause (which is included in similar terms in most of the other numbered treaties):

"And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

The numbered treaties did not expressly incorporate the concepts of consultation, accommodation and justification in relation to land that is "required or taken up."

The Courts have specifically considered the question of the duty of the Crown to consult before making land and resource decisions which might affect Aboriginal interests under Treaty Number 8. This consideration by the Courts has recently culminated in the decision from the Supreme Court of Canada in *Mikisew Cree*. However, in order to fully frame the issues at stake in this decision, it may be useful to briefly examine two Court of Appeal decisions that preceded the Supreme Court's decision, namely the BC Court of Appeal's decision in the case of *Halfway River First Nation v. B.C. (Ministry of Forests)*, 1999 B.C.C.A. 470, and the Federal Court of Appeal's decision (which was the subject of the appeal to the Supreme Court of Canada) in *Canada (Canadian Heritage) v. Mikisew Cree First Nation*, 2004 F.C.A. 66.

(ii) *The Halfway River Case*

In the *Halfway River* case, the British Columbia Ministry of Forests issued a cutting permit over certain lands within the area of northeast British Columbia covered by Treaty Number 8. The Halfway River First Nation challenged the issuance of the cutting permit through judicial review proceedings on the grounds that, *inter alia*, the Crown had a legal obligation to consult with the Halfway River First Nation before issuing the permit, and that the Crown had failed in meeting that obligation. The Crown and forest products company that had received the permit argued that the Crown had an independent right under the terms of the treaty to take up lands for lumbering and other purposes, that the rights of hunting, trapping

and fishing were consequently limited, and that the issuance of the cutting permit, therefore, did not amount to an infringement, giving rise to the legal obligation to consult.

The British Columbia Court of Appeal found that the Aboriginal right of hunting, trapping and fishing, on the one hand, and the Crown's right to regulate or to take up lands, on the other hand, "cannot be given meaning without reference to one another". The Court found that "the Crown's right to take up land cannot be read as absolute or unrestricted", and that "a balancing of the competing rights of the parties to the Treaty was necessary" (see paragraph 134 of the decision). The Court also found that the enactment of s. 35 of the Constitution Act in 1982, "improved the position" of the First Nation signatories to the Treaty by confirming that their rights "cannot be infringed or restricted other than in conformity with constitutional norms" (see paragraph 135 of the decision).

Chief Justice Finch concluded as follows:

I respectfully agree with the learned Chambers Judge 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. (See paragraph 144 of the decision) [Emphasis added.]

The Chief Justice went on to confirm that the approach set out in the *Sparrow* case is therefore applicable in deciding whether infringement of a treaty right is justified, requiring consideration of the following questions (said in *Sparrow* not to be an exhaustive or exclusive list):

- I. *Whether the legislative or administrative objective is of sufficient importance to warrant infringement;*
- II. *Whether the legislative or administrative conduct infringes the treaty right as little as possible;*
- III. *Whether the effects of infringement outweigh the benefits derived from the government action; and*
- IV. *Whether adequate meaningful consultation has taken place.*

The Court found that, while the decision of the Ministry of Forests that the harvesting authorized under the cutting permit would have minimal impacts on hunting, fishing or trapping, the Crown had not met the requirements of consultation:

... namely to provide in a timely way information the aboriginal group would need in order to inform itself on the effect of the proposed action, and to ensure that the aboriginal group had an opportunity to express their interests and concerns. (See paragraph 165 of the decision)

This interpretation of the treaty uses the adoption of s. 35 in 1982, as a vehicle for modifying the existing Aboriginal and treaty rights, through the imposition of restrictions on the exercise of treaty rights by the Crown. The Court imposed the more demanding standard of "justification" based on the *Sparrow* test, applicable to potential interference with established rights or title in the absence of any express consultation requirements in the text of the Treaty.

(iii) *The Federal Court of Appeal Decision in the Mikisew Cree Case*

In the *Mikisew Cree* case, the Federal Court of Appeal reached a different conclusion respecting the interpretation and application of Crown duties and Aboriginal rights under Treaty Number 8.

The case arose out of a proposal to re-establish a winter road through Wood Buffalo National Park for winter access from four communities in the Northwest Territories to the highway system in Alberta. The Mikisew Cree First Nation, a Treaty 8 signatory based in Fort Chipewyan, Alberta, objected to the proposed road on the grounds that it would infringe on their hunting and trapping rights under Treaty 8.

Parks Canada had provided a standard information package about the road to the First Nation, and the First Nation was invited to informational open houses along with the general public. Parks Canada did not consult directly with the First Nation about the road, or about means of mitigating impacts of the road on treaty rights, until after important routing decisions had been made.

The First Nation challenged the decision of the Minister of Canadian Heritage, the Minister responsible for Parks Canada, to authorize the construction of the road on the grounds that the Minister had not adequately consulted the First Nation about the road. The Mikisew Cree relied on the decision of the British Columbia Court of Appeal in the *Halfway River* case.

The First Nation's challenge was successful at trial, but on appeal the Federal Court of Appeal held, in a 2-1 split decision, that no Crown consultation obligation was triggered by the approval of the winter road.

The Province of Alberta, an intervenor at the Court of Appeal, argued that the approval of the construction of the winter road was a "taking up" of land as contemplated in the provisions of Treaty Number 8, that the hunting, trapping and fishing rights were expressly "subject to" such taking up of land, and that therefore there was no infringement of the treaty rights. The Federal Crown did not rely on this argument at the hearing of the appeal (although it did rely on the argument in the court below).

By a majority, the Federal Court of Appeal found that the treaty included a geographical limitation on the existing hunting rights where there was a "visible, incompatible land use". It found that the taking up of land for a winter road, and the prohibition of the use of firearms on or within 200 metres of the road, was such a visible, incompatible land use. The Court noted that s. 35 of the *Constitution Act*, 1982 protected "existing" Aboriginal and treaty rights. The Court found that the intention of the parties to the treaty included the acceptance of settlement and other uses of land that would restrict rights to hunt, "so long as sufficient unoccupied land would remain to allow them to maintain their traditional way of life". (See paragraph 17.) The Court noted that the land required for the road corridor was only 23 square kilometres out of the 44,807 square kilometres of Wood Buffalo National Park and the 840,000 square kilometres encompassed by Treaty Number 8. It found that this was not a case "where no meaningful right to hunt remains". (See paragraph 18.)

The majority decision⁵ concluded:

[19] The treaty right to hunt has always been limited by the fact that hunting is not permitted on land that has been taken up. It is the right to hunt on land which is not required for settlement, mining, lumbering, trading or other purposes which obtained constitutional protection when s. 35 came into force.

...

[21] Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of s. 35.

(b) *Mikisew Cree* - Supreme Court of Canada Decision

On November 24, 2005, the Supreme Court of Canada handed down its decision in the case of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.⁶ In the decision, the Supreme Court confirmed that, while governments have the power under treaties to authorize land uses which infringe on treaty rights, the exercise of that power imposes on governments a duty to consult where the taking up of land adversely affects those rights.

Consistent with other recent Supreme Court of Canada decisions which have emphasized the need for ongoing reconciliation of aboriginal interests into government decision-making, the Supreme Court overturned the Federal Court of Appeal's decision, and crafted a decision that balances governments' need to manage lands and resources in the broader public interest with proper consideration of impacts on treaty rights in governments' decision-making processes. The Supreme Court found that, because the taking up adversely affected the First Nation's treaty right to hunt and trap, Parks Canada was required to consult with the Mikisew Cree before making its decision. As Parks Canada had failed to do so, the Supreme Court set aside the Minister's approval of the winter road, and sent the matter back to the Minister for reconsideration in accordance with the decision.

⁵ The Honourable Madam Justice Sharlow issued dissenting reasons in which she adopted the reasoning in the *Halfway River* case.

⁶ 2005 SCC 69.

(i) *Power to Take Up Land Confirmed*

The first point in the decision, and perhaps the most fundamental, is the Supreme Court's recognition that the purpose of Treaty 8 and other post-Confederation treaties was to open up lands in Canada for settlement and development. The treaties were not a guarantee to First Nations that their hunting, trapping and fishing activities would remain as they were in 1899. Rather, the treaties put First Nations on notice that lands would be taken up over time for other uses.

While Treaty 8 lists a number of purposes for which lands may be taken up by governments, the Supreme Court emphasized that this list — "settlement, mining, lumbering, trading or other purposes" — should not be read restrictively. This is important for resource activities such as oil and gas development, which are not included in the list of purposes but which are very important purposes for which lands are taken up for development today.

In the *Badger* decision, the Supreme Court had held that Treaty 8 hunting rights were circumscribed by geographic limits and by specific forms of government regulation. In *Mikisew Cree*, the Supreme Court held that Treaty 8 rights are further limited by the Crown's right to take up lands, subject to the consultation obligations set out in the decision.

(ii) *Honour of Crown Requires Consultation Where Taking Up Infringes Treaty Rights*

The Supreme Court recognized that there is an "uneasy tension" between governments' power to take up lands under treaties and the treaties' promises of continued hunting, trapping and fishing. To balance governments' powers against the need to protect treaty rights, the Court stated that, while the right to hunt and trap under the treaties is limited by the governments' power to take up lands, in exercising that power governments must inform themselves of the potential impact of that taking up on the exercise of treaty rights. Where treaty rights are infringed, a government must discharge its obligation to consult and, if appropriate, accommodate First Nations' interests *before* reducing the geographic area over which treaty rights may be exercised. The Court held that Treaty 8 confers on the Mikisew

Cree substantive rights (hunting, trapping, and fishing) along with the procedural right to be consulted about infringements of the substantive rights.

(iii) *Not Every Taking Up of Land is an Infringement*

At the same time, the Court held that not every taking up of land under the treaty will trigger the Crown's duty to consult. The Court rejected conclusions of the BC Court of Appeal in *Halfway River* that *any* taking up of land would constitute an infringement of treaty rights. However, the Court indicated that a low threshold would apply to trigger Crown consultation obligations, consistent with the standards set out in the *Haida Nation* and *Taku River Tlingit* decisions. Governments are required to consult before taking up land where that taking up "might adversely affect" the exercise of treaty rights. Given that a taking up of land by definition removes that land from the exercise of treaty rights, it is difficult to envision circumstances where the duty to consult would not be triggered. In this case, the Court held that the taking up of land for the construction of the winter road would adversely affect the treaty hunting and trapping rights of the Mikisew Cree.

(iv) *Sliding Scale for Content of Consultation Obligation*

While a low threshold applies to trigger Crown consultation obligations, the degree of consultation and, in some cases, accommodation required will depend on the degree to which the taking up of land will affect treaty rights. The Court noted that the same sliding scale of consultation obligations applied in a treaty context as in a non-treaty context, stating that "adverse impact is a matter of degree, as is the extent of the Crown's duty" to consult.⁷ In this case, the Court held that, while the winter road would affect Mikisew Cree treaty hunting and trapping rights, this was a fairly minor road that was built on lands surrendered by the Mikisew Cree when they signed Treaty 8. As a result, the lower end of the consultation spectrum was engaged. This meant Parks Canada should have provided notice to the Mikisew Cree, and should have engaged them directly to solicit their views and to

⁷ At ¶ 55.

attempt to minimize adverse impacts on their rights. As Parks Canada had unilaterally determined important matters like road alignment before meeting with the Mikisew Cree, the Court held that the Crown's duty to consult had not been adequately discharged.

Consistent with its *Haida Nation* and *Taku River Tlingit* decisions, the Supreme Court held that there is a reciprocal onus on the Mikisew Cree to carry their end of the consultation process by making their concerns known, responding to governments' attempts to address concerns and suggestions, and trying to reach a mutually satisfactory solution. The Court emphasized that the Mikisew Cree did not have a veto over the alignment of the road, and noted that consultation efforts would not always lead to agreement on appropriate accommodation measures to address their concerns.

(v) *Crown Obligation to Consult Tied to Traditional Lands*

The decision also helped to clarify an important area of uncertainty about the geographic scope of the Crown's duty to consult in a treaty context. Treaty hunting rights can be exercised by members of signatory First Nations throughout the area covered by the treaty. In the prairie provinces, the geographic scope of hunting rights was extended to apply throughout each province by the Natural Resources Transfer Agreement. Theoretically speaking, therefore, land use decisions in southern Alberta could affect the exercise of treaty rights by the Mikisew Cree.

However, in *Mikisew Cree*, the Supreme Court held that the duty to consult under Treaty 8 does not mean that "whenever a government proposes to do anything in the Treaty 8 surrendered area it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact".⁸ The Court indicated that treaty rights to hunt are not determined on a treaty-wide basis, but rather on the basis of the lands over which the First Nation traditionally hunted, fished and trapped and continues to do so today. This suggests that the Crown's duty to consult First Nations is tied to activities only within lands traditionally and

⁸ At ¶ 55.

currently used by First Nations for treaty harvesting rights, and, more importantly, that the Crown is not required to consult with a First Nation about activities located outside those lands.

(vi) *Risks of Inadequate Consultation Underscored*

Finally, the *Mikisew Cree* decision underscores the potential consequences for a project proponent where the Crown fails to discharge its duty to consult. In this case, even though the road at issue would have only minor impacts on treaty rights — the decision characterizes it as a “fairly minor winter road located on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the “taking up” limitation”⁹ of Treaty 8 — and even though the Court held that the Crown’s duty to consult lay at the lower end of the consultation spectrum, the Court nevertheless set aside the Minister’s decision to approve the winter road and sent the matter back to the Minister for reconsideration in accordance with the decision.

VI. What’s Happened Since in the Context of Consultation Requirements in the Post-Treaty Context?

While the Mikisew Cree were the successful party in the appeal, thus far the decision has not had significant practical implications. The federal and provincial governments had already been gearing up for consultation activities with treaty First Nations in anticipation of this decision. The decision’s balancing of governments’ power to manage lands and resources with protection of treaty hunting, fishing and trapping rights is consistent with the theme of prior Supreme Court decisions emphasizing the need for reconciliation of Aboriginal interests with the broader public interest. The decision will provide further impetus for the federal and provincial governments to develop and implement appropriate processes for Crown consultations with Aboriginal groups affected by governmental land and resource use.

⁹ At ¶ 64.

decision-making. As the Court noted, "consultation is key to achievement of the overall objective of the modern law of treaty and Aboriginal rights, namely reconciliation."¹⁰

As will be seen below, modern land claim agreements and treaties, particularly those in northern Canada, provide mechanisms for the balancing of these interests that is in line with the reconciliation approach articulated by the Courts.

VII. Consultation under Modern Land Claims Agreements

Since 1973, 14 comprehensive land claims have been reached in the northern territories (Yukon, the Northwest Territories, and Nunavut) and three other comprehensive land claims have been concluded in the rest of Canada, including the Nisga'a Final Agreement ratified in 2000.

A common approach in these agreements, which each contain their own structural and procedural arrangements, is as follows:

- I. a specific tract of land is identified and confirmed as land held by the Aboriginal group in fee simple;
- II. a larger tract of land is identified as a management area, within which the Aboriginal group, federal government and either territorial or provincial government participate in land use planning and land use permitting and approvals; and
- III. a larger area within which Aboriginal land use rights, such as hunting, fishing, trapping and gathering, continue to apply. This larger area often overlaps with management areas or other areas within which neighbouring Aboriginal groups have and exercise rights.

Clearly, decisions regarding land and resource projects on the fee simple lands under these agreements are within the control of the Aboriginal group, subject to the laws and regulations of the Aboriginal group, as well as to any generally applicable environmental

¹⁰ At ¶ 63.

assessment or environmental protection laws and regulations. The more difficult and nuanced issue is to identify the degree of control exercised by the Aboriginal group on the second and third categories of land identified above.

(a) The Nisga'a Final Agreement

The Nisga'a Final Agreement follows the above model in identifying different categories of land and attempts to identify and clarify the consultation obligations that attach to each category. For example, Chapter 10 of the Nisga'a Final Agreement, which deals with environmental assessment and protection, provides that:

- I. if a proposed project (physical works or activities) is located on Nisga'a lands, it is potentially subject to Nisga'a laws in respect of environmental assessment, and may be subject to concurrent or coordinated assessments under federal (eg. CEAA) and provincial (eg. BCEAA) laws; and
- II. if a proposed projects that will be located off Nisga'a lands (that is, on Crown lands) may reasonably be expected to have adverse environmental effects on residents of Nisga'a lands, Nisga'a lands, or Nisga'a interests set out in this Agreement (eg. hunting and fishing rights), Canada or British Columbia, or both must ensure that the Nisga'a Nation:
 - a. receives timely notice of, and relevant available information on, the project and the potential adverse environmental effects;
 - b. is consulted regarding the environmental effects of the project; and
 - c. receives an opportunity to participate in any environmental assessment under federal or provincial laws related to those effects, in accordance with those laws, if there may be significant adverse environmental effects (see Chapter 10, paragraph 6).

The Nisga'a Final Agreement defines consultation (such as that referenced in paragraph b, above) as follows:

"consult" and "consultation" mean provision to a party of:

- i. notice of a matter to be decided, in sufficient detail to permit the party to prepare its views on the matter,

- iii. in consultations between the Parties to this Agreement, if requested by a Party, sufficient information in respect of the matter to permit the Party to prepare its views on the matter,
- iii. a reasonable period of time to permit the party to prepare its views on the matter,
- iv. an opportunity for the party to present its views on the matter, and
- v. a full and fair consideration of any views on the matter so presented by the party.

With respect to the obligation to ensure that the Nisga'a Nation receives an opportunity to participate in any environmental assessment, Chapter 10, paragraph 7 provides as follows:

If Canada or British Columbia establishes a board, panel, or tribunal to provide advice or make recommendations with respect to the environmental effects of a project on Nisga'a Lands or a project off Nisga'a Lands that may reasonably be expected to have adverse environmental effects on residents of Nisga'a Lands, Nisga'a Lands, or Nisga'a interests set out in this Agreement, the Nisga'a Nation will:

- (a) *have standing before the board, panel, or tribunal; and*
- (b) *be entitled to nominate a member of the assessment board, panel or tribunal, unless the board, panel, or tribunal is a decision-making body, such as the National Energy Board.*

The general provisions of the Nisga'a Final Agreement contain the following provision on consultation:

CONSULTATION

- 28. When Canada and British Columbia have consulted with or provided information to the Nisga'a Nation in respect of any activity, including a resource development or extraction activity, in accordance with their obligations under this Agreement and federal and provincial legislation, Canada and British Columbia will not have any additional obligations under this Agreement to consult with or provide information to the Nisga'a Nation in respect of that activity.

Accordingly, the Nisga'a Final Agreement specifically addresses the extent and nature, as well as the limits, of consultation obligations in relation to land and resource projects on Crown land, in circumstances where those projects may have an impact on Nisga'a residents, Nisga'a lands or Nisga'a interests.

(b) The Tlicho Agreement

As indicated above, 14 land claim agreements have been reached between the federal government and Aboriginal groups in the three northern territories. The most recent of these is the Tlicho Agreement. The federal legislation ratifying this agreement received royal assent on February 15, 2005.

The Tlicho Agreement follows the general structure of identifying and confirming Tlicho lands which are held in fee simple, a larger tract of land known as Wek'èezhii, within which the Tlicho people participate directly in land use planning and the issuance of land and water permits and licences, and a broader area of land known as Mowhì Gogha Dè Niitlèè within which the Tlicho people have rights such as hunting, fishing, and trapping.

Proposed projects on Tlicho lands are within the general control of the Tlicho government.

Proposed projects outside of the Tlicho lands, but within Wek'èezhii or Mowhì Gogha Dè Niitlèè are, with some similarities to the Nisga'a Final Agreement, subject to consultation with the Tlicho government and subject to environmental assessment and review by the Mackenzie Valley Environmental Impact Review Board, on which the Tlicho people will have direct representation, and the Mackenzie Valley Land and Water Board (of which the Wek'èezhii Land and Water Board is a local panel), again with direct participation of the Tlicho people.

Specific consultation requirements are provided for in the Tlicho Agreement under Chapter 23, which addresses subsurface resources.

Section 23.2 provides as follows:

23.2 CONSULTATION

23.2.1 Any person who, in relation to Crown land wholly or partly in Mowhi Gogha Dè Nütdèè (NWT) or Tlicho lands subject to a mining right administered by government under 18.6.1, proposes to

(a) explore for or produce or conduct an activity related to the development of minerals, other than specified substances and oil and gas, if an authorization for the use of land or water or deposit of waste is required from government or a board established by government to conduct these activities; or

(b) explore for or produce or conduct an activity related to the development of oil or gas,

shall consult the Tlicho Government.

23.2.2 The consultations conducted under 23.2.1 shall include

(a) environmental impact of the activity and mitigative measures;

(b) impact on wildlife harvesting and mitigative measures;

(c) location of camps and facilities and other related site specific planning concerns;

(d) maintenance of public order including liquor and drug control;

(e) employment of Tlicho Citizens, business opportunities and contracts, training orientation and counselling for employees who are Tlicho Citizens, working conditions and terms of employment;

(f) expansion or termination of activities;

(g) a process for future consultations; and

(h) any other matter agreed to by the Tlicho Government and the person consulting that government.

23.2.3 The consultations conducted under 23.2.1 are not intended to result in any obligations in addition to those required by legislation.

23.2.4 No consultation is required under 23.2.1 where negotiations have been conducted in accordance with 23.4.1.

23.3 OIL AND GAS EXPLORATION RIGHTS

23.3.1 Prior to opening any lands wholly or partly in Mowhi Gogha Dè Nütlèè (NWT) for oil and gas exploration, government shall consult the Tlicho Government on matters related to that exploration, including benefits plans and other terms and conditions to be attached to rights issuance.

23.4 MAJOR MINING PROJECTS

23.4.1 Government shall ensure that the proponent of a major mining project that requires any authorization from government and that will impact on Tlicho Citizens is required to enter into negotiations with the Tlicho Government for the purpose of concluding an agreement relating to the project. This obligation comes into effect one year after the effective date. In consultation with the Dogrib Treaty 11 Council or the Tlicho Government, government shall, no later than one year after the effective date, develop the measures it will take to fulfil this obligation, including the details as to the timing of such negotiations in relation to any governmental authorization for the project.

23.4.2 The Tlicho Government and the proponent may agree that negotiation of an agreement under 23.4.1 is not required.

The term "consultation" is defined in Chapter 1 of the Tlicho Agreement as follows:

"consultation" means

- i. the provision, to the person or group to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that person or group to prepare its views on the matter;
- ii. the provision of a reasonable period of time in which the person or group to be consulted may prepare its views on the

matter, and provision of an opportunity to present such views to the person or group obliged to consult; and

- iii. full and fair consideration by the person or group obliged to consult of any views presented.

Accordingly, the Tlicho Agreement contains specific obligations on, and limitations to, consultation in relation to land and resource projects on Crown land, which may have impacts upon the Tlicho people, Tlicho lands, or Tlicho interests.

VIII. Consultation under Agreements-in-Principle in British Columbia

While no treaties have been finalized under the British Columbia Treaty Commission process, agreements-in-principle provide some indication of the potential requirements for consultation in relation to land and resource projects on Crown land.

For example, the Lheidli T'enneh Agreement-in-Principle (LTAIP) dated July 26, 2003 provides some guidance on these issues. The Wildlife chapter under the LTAIP confirms that the Lheidli T'enneh will have the right to harvest wildlife for food, social and ceremonial purposes in the Lheidli T'enneh Area in accordance with the final agreement.

Paragraph 9 of the Wildlife chapter addresses the issue of Crown land disposal as follows:

9. The Crown may authorize use of or Dispose of Crown Land, and any authorized use or disposition may affect the methods, times and locations of harvest in Wildlife under the Final Agreement, provided that the Crown ensures that those authorized uses or dispositions do not deny Lheidli T'enneh Citizens the reasonable opportunity to harvest Wildlife under the Final Agreement.
10. The Lheidli T'enneh right to harvest Wildlife will be exercised in a manner that does not interfere with other authorized uses or dispositions of Crown Land existing as of the Effective Date or authorized in accordance with paragraph 9.
11. Prior to the Final Agreement, the Parties will negotiate and attempt to reach agreement on the factors to be

considered in determining whether the reasonable opportunity to harvest Wildlife would be denied under paragraph 9.

These provisions in the LTAIP provide only a broad outline of the potential structure of Crown land use decisions, environmental impact reviews and consultation requirements which would be applicable under a final agreement reached within the British Columbia Treaty Commission process. Generally similar provisions appear in other agreements-in-principle.

(a) The Definition of Consultation

All of the existing AIPs include a definition of consultation. The AIPs of the Lheidli T'enneh, Maa-nulth First Nation and Sliammon essentially duplicate the definition found in the Nisga'a Final Agreement (reproduced above). The Tsawwassen First Nation Agreement-in-Principle contains a definition that is only slightly revised from that found in earlier agreements:

"consult" and "consultation" mean provision to a Party of:

- i. notice of a matter to be decided;
- ii. sufficient information in respect of the matter to permit the party to prepare its views on the matter,
- iii. a reasonable period of time to permit the party to prepare its views on the matter,
- iv. an opportunity for the party to present its views on the matter, and
- v. a full and fair consideration of any views on the matter so presented by the Party.

In addition, the four AIP's all contain a limiting provision similar to that in the Nisga'a Final Agreement. The Tsawwassen AIP states:

CONSULTATION

50. Where Canada and British Columbia have Consulted or provided information to Tsawwassen First Nation as required by the Final Agreement, Canada and British Columbia will have no additional Consultation obligations under the Final Agreement.

While there are still no final agreements under the BC Treaty Commission process, the above definitions of consultation and attendant limiting language appear to be becoming standard features of AIP's.

IX. The Parallels Between Consultation under Modern Land Claims Agreements and the Numbered Treaties

The numbered treaties differ dramatically in form from modern land claims agreements. This is not surprising given the lengthy period of time separating their creation and the widely differing social and legal context.

However, there seems to be the beginnings of a convergence in the requirements for consultation under these very different agreements. The modern land claims agreements identified above expressly define consultation to generally require:

- i. Notice
- ii. Adequate information
- iii. Time and an opportunity to express concerns
- iv. Serious consideration of concerns

This definition of consultation incorporated into modern land claim agreements (and contemplated by the Agreements in Principle under the BC Treaty Commission process) appears, at first blush, to stand in sharp contrast to the silence of the numbered treaties. However, the Supreme Court has now clarified that the numbered treaties contain a similar

requirement. In *Mikisew*, the Supreme Court agreed with the following statement of Finch J.A. (now C.J.B.C.) in *Halfway River* at paras. 159-160:

"The fact that adequate notice of an intended decision may have been given does not mean that the requirement for adequate consultation has also been met.

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, whenever, possible, demonstrably integrated into the proposed plan of action."

The ultimate resulting consultation may not appear as different as the treaties that require it.

X. Summary and Conclusion

Earlier case law (*Haida* and *Taku*) confirmed that the Crown has a duty to consult, if necessary, accommodate Aboriginal interests when it has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it.

The numbered treaties, concluded between 1871 and 1923, did not expressly incorporate the concepts of consultation, accommodation and justification in relation to land that is "required or taken up." The recent decision from the Supreme Court of Canada in *Mikisew Cree* clarifies that the duty of consultation is triggered when Crown decisions or land use authorizations permit a potential interference with treaty rights.

Modern land claims agreements (and agreements currently under negotiation) opt to expressly identify the circumstances in which consultation is required and to define the requirements of consultation. These agreements generally include limiting language to clarify that, once the consultation requirements of the agreements have been met, the federal, provincial or territorial government will have no additional consultation obligations under the agreements.

Thus, the concept of consultation will continue to apply with respect to land and resource decisions on Crown land in the post-treaty context—whether historic numbered treaties or modern land claim agreements. While the numbered treaties differ dramatically in form from modern land claim agreements, there appears to be convergence on the requirements of the Crown's duty to consult.

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STATE OF ALASKA

ALASKA GASLINE INDUCEMENT ACT

**TRANSCANADA ALASKA COMPANY, LLC
and FOOTHILLS PIPE LINES LTD.**

ALASKA PIPELINE PROJECT

REPORT BY

Bennett Jones, LLP

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STATE OF ALASKA
ALASKA GASLINE INDUCEMENT ACT
TRANSCANADA ALASKA COMPANY, LLC
and FOOTHILLS PIPE LINES LTD.
ALASKA PIPELINE PROJECT

A. EXECUTIVE SUMMARY

We have been requested to address aspects of the proposed Alaska Pipeline Project (or "Project") application filed by TransCanada Alaska Company, LCC and Foothills Pipe Lines Ltd. (collectively "TransCanada") pursuant to the *Alaska Gasline Inducement Act* ("AGIA") on November 30, 2007. We have been specifically asked to consider matters that could impact the timeline of the Project. As specified in the request for applications, TransCanada's proposal addresses the specific requirements of the AGIA and also included a timetable for the completion of various activities associated with bringing the Project to fruition.

The expected timing of the development phase of the Project is of critical importance in the assessment and quantification of the potential benefits that could result from the proposed Project. As such, it is necessary to understand the rationale underpinning TransCanada's forecasted schedule and the risks TransCanada has taken into account in its evaluation. In addition, we have attempted to identify other potential concerns and issues that could impact overall timing. This Report is restricted to an examination of the Canadian segment of the Project.

TransCanada has adopted a five and one-half year schedule for securing major Canadian pre-construction approvals, following the issuance of the AGIA License. TransCanada has expressed the view that it expects to rely on the *Northern Pipeline Act* ("NPA" or "Act") as the primary legislative vehicle through which necessary regulatory approvals have and will be coordinated in Canada. This is viewed by TransCanada as minimizing the time required to complete the above process. TransCanada has also identified a number of project risks that could result in delay.

While we agree that there are advantages associated with the prior NPA approvals received by TransCanada and the "single window" process provided by the NPA, based on the detailed assessment contained herein, it is our view that the schedule proposed by TransCanada represents a "best case" scenario that may be difficult to achieve.

Given the nature and magnitude of the Project, it is our view that one could reasonably expect that at least certain of the issues identified herein, or by TransCanada in its risk assessment, will be raised during the preparation and regulatory approval phases of the Project, with a resultant impact on timing. In our view, a timeframe of seven to eight years is more realistic, with the lower end of the range (seven years) having a higher probability of being achieved. A seven to eight year timeline, to complete the required pre-construction processes, may be the minimum for a Third Party pipeline project that does not have the advantage of the existing approvals obtained under the NPA.

As will be discussed herein, the strategy and approach ultimately adopted by TransCanada for the execution of its proposal will likely have a significant impact on its ability to achieve the proposed "best case" scenario. By this we mean that TransCanada will face a number of choices with regard to the strategy it will employ on various key project items. If TransCanada adopts a course of action that seeks to address concerns that have previously been expressed it may be able to mitigate the risk of delay identified herein.

By way of illustration, TransCanada maintains that it will pursue the completion of the Project under the NPA, to the exclusion of other legislation that arguably could be applicable to the Project, such as the *Canadian Environmental Assessment Act* ("CEAA") and the *Yukon Environmental and Socio-Economic Assessment Act* ("YESAA"). If TransCanada maintains this approach, it will likely face challenges from a variety of parties that could result in delay.

However, if TransCanada proposes or encourages a process that encompasses the requirements of all applicable legislation (even if under the umbrella of the NPA), it

may be able to materially mitigate the risk of a challenge in this regard. In our view, this could involve TransCanada proposing that the Designated Officer under the NPA adopt the standards and open, public processes embedded in legislation such as CEAA and YESAA, in order to achieve substantially similar levels of review and analysis as would be expected under such legislation; albeit still under the "single window" approach contemplated by the NPA. In addition, TransCanada could minimize inefficiencies and delays by seeking a single, coordinated process that addresses all regulatory and environmental requirements at the outset.

Another example is TransCanada's proposal to make use of only NGTL facilities in Alberta (in addition to the Pre-Build) to transport Alaskan gas. If TransCanada chooses to maintain the exclusive link to the NGTL system, it is likely to face challenges, with resultant delays. However, if TransCanada adopts a more flexible and expansive approach of assessing the most economic and efficient use of all available infrastructure to transport Alaskan gas, as well as accommodating the positions of shippers, it will likely be able to materially mitigate the risk of such challenges and hence the potential for delay.

The above attempts to illustrate that, to some extent, TransCanada will be the master of its own destiny. While the positions advanced in its AGIA filing may be characterized as TransCanada's "opening position," the degree to which TransCanada exercises flexibility in its business approach will have a direct impact on its ability to achieve the desired schedule. In this regard, we would expect that TransCanada would have an incentive to complete the Project in a timely manner, which should drive it towards minimizing such debates and challenges. TransCanada is a large and successful pipeline company that likely appreciates the dynamics that will be at play. As will be discussed herein, TransCanada has acknowledged that current requirements and standards should be used to assess an Alaska Pipeline Project filing. To the extent this is, in fact, achieved by a TransCanada filing, the above concerns could be mitigated. We have no reason to believe that TransCanada will not ultimately adopt a strategy that will seek to minimize opposition and, hence, maximize its chances of expediting the Project.

It is also important to note that the extended timeline suggested herein would not necessarily disadvantage TransCanada vis-à-vis any Third Party pipeline proponent that may seek to construct a pipeline from Alaska and into Canada. Many of the specific concerns identified herein would apply equally to any such Third Party, such as a detailed assessment of environmental and socio-economic considerations, the duty to consult First Nations, as well as, routing, land rights, and potential litigation. In fact, TransCanada would likely have an advantage due to such things as its existing Certificates, the "single window" approach adopted by the NPA and its easement in the Yukon. We also note that TransCanada has previously asserted that it has the exclusive right to build a pipeline from Alaska into Canada. While not commenting on the validity of this claim, we would expect that TransCanada would seek to enforce this right and oppose any Third Party project. This could result in a significant delay in any such project.

In the end result, based on the information available to this point, it is reasonable to expect that certain delays will be encountered by TransCanada. Consequently, it would appear prudent for the State of Alaska to also examine the somewhat more extended timeline of approximately seven years discussed herein, for the completion of the required pre-construction approval processes; in addition to the five and one-half year period reflected in the AGIA Application, as part of its assessment.

A summary of the significant issues that could impact timing of the proposed TransCanada project is outlined below. Greater detail on these, and other, matters is provided in the body of this Report.

1. Continued Applicability of the NPA Approval

As reflected in the past submissions of Alliance Pipeline Ltd. ("Alliance") and Enbridge Inc. ("Enbridge"), it is likely that certain parties will challenge the general applicability of the NPA to the circumstances confronting the Alaska Pipeline Project today. This argument also appears to be supported by statements made by producers, including ConocoPhillips and Exxon-Mobil. It is arguable whether certain of the objectives of the NPA are relevant today, given that one of the main purposes was to

facilitate the "efficient and expeditious planning and construction of the [then proposed] pipeline". Nonetheless, it is our view that the NPA and the Certificates awarded thereunder remain valid. Of note is the fact that the NPA was relied upon as recently as 1998 for authority to expand the Pre-Build facilities. As detailed below, the NPA does not provide direct guidance on the process or procedure that would be used to consider an Alaska Pipeline Project filing. Therefore, the challenge for TransCanada will be to encourage and facilitate a process under the NPA umbrella that accommodates current requirements and minimizes the risks of additional delays.

As well, we anticipate that there will be significant political pressure brought to bear for the Governments and regulatory agencies to "do the right thing" and assess such a massive undertaking under current regulations and standards; and not accept an authorization that was granted under circumstances that were very different. There may indeed be some legitimacy to the argument that the information from the distant past is stale and outdated; and that the basis upon which the previous evaluations were conducted no longer remain valid.

In our view, while TransCanada will have certain advantages because of existing approvals and the NPA process, there will likely be political pressure asserted to expose the Project to an extensive regulatory and environmental review process, similar to that employed regarding the examination of the Mackenzie Gas Project. In this regard, it is noteworthy that the Mackenzie Gas Project has taken some eight plus years from initial regulatory process design to anticipated receipt of major regulatory approvals. While these are material differences, the Mackenzie Gas Project process may be viewed as broadly analogous in terms of regulatory complexity to the Alaska Pipeline Project. In our view, there will clearly be an expectation that the Project will be exposed to a rigorous process and not provided any short-cuts because of past approvals.

2. Technical Concerns with the Application of the NPA

In our view, while the deemed Certificates of Public Convenience and Necessity granted to the Foothills affiliates under the NPA contain a measure of flexibility, it is certainly arguable that the new proposal, which reflects a substantially different flow

rate, economic cost and possibly even route changes, is outside the scope of the Project which was certificated pursuant to the NPA. The TransCanada proposal contains information on a number of these parameters which arguably are a "material" change from those previously approved. In our view, these changes in scope, etc. could expose TransCanada to a challenge respecting its reliance on the prior NPA authorizations. To the extent that TransCanada has to seek amendments to either the existing approvals or the governing legislation, to accommodate proposed changes, this could precipitate a protracted debate that could delay the process from moving forward.

3. Required Environmental Assessment

In its AGIA filing, TransCanada characterizes its proposed actions as an "update" to the information previously filed in support of the existing NPA approvals and the Terms and Conditions it must fulfill thereunder. At this time, TransCanada has indicated that it intends to rely on the NPA and is not required to conduct an assessment in accordance with the CEAA or YESAA. If TransCanada attempts to fulfill outstanding requirements via an expedited process that does not include a comprehensive environmental assessment, with full public input as contemplated by these statutes, or meet other applicable requirements, it could face challenges that the above-referenced environmental legislation should apply to the Project.

It is also clear that, absent the NPA, such legislation would indeed apply, and TransCanada would be required to conduct a comprehensive environmental assessment thereunder. As mentioned above, TransCanada has confirmed that it intends to adopt a transparent and public process and, as well, has confirmed that it will be updating the numerous technical environmental reports associated with the construction of the subject pipeline. These actions may in some measure mitigate opposition (and potentially litigation) over the Project. To the extent an open and comprehensive process is employed, the risk of a challenge could be reduced. Conversely, the opposite is also true. Given that the Yukon Government has indicated that it believes YESAA will apply to the Project, TransCanada would appear to have an incentive to accommodate a review process that addresses this concern.

4. Duty to Consult First Nations

Since the time of the approvals granted under the NPA, the obligations imposed upon both Project Proponents and Governments (Provincial, Territorial and Federal) with respect to the duty to consult First Nations has evolved considerably. As with any project proponent, TransCanada's failure to ensure that the currently recognized obligation to consult is completely fulfilled, would inevitably lead to challenges on behalf of potentially affected First Nations. A failure by the Crown to fulfill this duty has been one of the main stumbling blocks for project proponents when their undertakings could potentially have a significant impact on First Nations. To the extent TransCanada and the relevant Governments fulfill this obligation pursuant to the current requirements the Project risks will be reduced. Nonetheless, history would suggest that this is a likely basis for challenge. We note that this concern is not unique to a TransCanada proposal and would apply to any proposed pipeline project from Alaska that traverses First Nations lands or lands where the First Nations assert traditional uses. In fact, the work conducted by TransCanada to date should provide it with an advantage in this regard. We are not able to comment on the extent to which the relevant governments have engaged in consultation.

5. North American Free Trade Agreement ("NAFTA")

NAFTA did not exist at the time the NPA approvals were granted to TransCanada and the NPA was not grandfathered under NAFTA. As will be detailed below, certain NAFTA issues could arise which would potentially cause significant delays to the advancement of the pipeline proposal. It is worthwhile noting that the above referenced Joint Alliance/Enbridge submission expressly raises NAFTA issues as an area of concern. As such, it is apparent that these parties, and likely others, are attuned to this basis for challenging a TransCanada Application under the NPA.

6. Alberta Component of the Overall Project

TransCanada's Application did not describe the precise facilities that will be utilized to transport the Alaskan based gas once it reaches the B.C./Alberta border. While TransCanada identifies certain benefits associated with the use of Transportation

by Others, it appears that these comments are made solely in the context of using TransCanada's "Alberta System". In our view, it is likely that certain other pipeline carriers, including Alliance and Spectra, will argue that excess capacity or economic expandability on existing pipelines should be used for the transportation of Alaskan based natural gas. The information filed in the ongoing Alberta Inquiry into NGL matters, as well as a recent Press Release regarding a report by the Canadian Energy Research Institute on the capacity of the Western Canada Natural Gas Pipeline System, forecast that existing pipelines will have significant excess capacity by the time the Alaska Pipeline Project is proposed to be in-service. To the extent that TransCanada demonstrates a willingness to work jointly with third party carriers, it should be able to minimize debates that could cause material delays in the implementation of the Project. If such a debate arises, to the extent that TransCanada would be relying upon National Energy Board ("NEB") or Alberta Utilities Commission approval for additional facilities in Alberta (versus pursuant to the NPA) there will be a forum for such a debate. Otherwise, recourse to the Courts is likely.

7. Acquisition of Land Rights

It appears that TransCanada has obtained an "easement" across the Yukon, which should give it a timing advantage over any Third Party pipeline proponent. It also appears that, at this time, TransCanada does not have any secure rights to the necessary rights-of-way across British Columbia and Alberta. The acquisition of such rights in these two Provinces could take TransCanada, or any other project proponent, a considerable amount of time; and provide leverage to affected stakeholders. As such, while the NPA approvals would clearly give TransCanada an advantage over any third party pipeline proposal (particularly in the Yukon), the completion of the outstanding land acquisition process could create material delays. TransCanada's Application does not describe the precise manner in which it proposes to handle these outstanding land acquisition matters.

8. Fulfillment of Existing NPA Terms and Conditions

Even if TransCanada were successful in confining the process for examining the Alaska Pipeline Project to the "single window" approach advanced by the NPA, there is the matter of the extensive Terms and Conditions attached to the existing approvals. For example, the Designated Officer under the NPA can require that additional environmental information be filed in support of the Application. As such, it is possible that even if TransCanada were to succeed in technical arguments (likely following lengthy debate) that CEAA or YESAA do not apply, the Designated Officer could impose similar information requirements to ensure that a complete assessment of all applicable requirements is conducted for the length of the pipeline in Canada. In fact, there may be significant pressure to ensure that such an approach is followed.

Additionally, TransCanada will be required to meet other extensive conditions under the existing approvals prior to commencing construction. The exact process for a consideration of the information filed regarding these matters is uncertain, but could be the source of debate if a full public vetting is not accommodated.

9. Litigation

As will be detailed below, there are likely to be a significant number of "trigger points" which will provide the basis for a Court challenge. As noted below, there has already been litigation regarding the NEB's Northern Pipeline Decision involving First Nations and Environmental groups. Past experience suggests that such parties are well versed in their legal rights and have little hesitation in seeking recourse to the Court system when they are aggrieved. Likewise, commercial parties will often commence litigation if they are not satisfied with the outcome of commercial discussions. We also note that there has already been litigation involving a past Foothills Pre-Build application. While the past litigation was not successful, if such a challenge were to occur, it could result in a significant delay. This litigation concern would apply equally to any party seeking to build a pipeline from Alaska into Canada, as the facilities would likely have similar potential impacts on the environment and First Nations, regardless of the project proponent.

In our view, any single item identified above could result in a material delay to the schedule detailed by TransCanada in its Application. Based on the situation one could reasonably expect to evolve following TransCanada's filing, it is conceivable that several of these potential concerns could become a reality, with resultant delays to the schedule. As stated above, the extent to which the matters identified herein, or by TransCanada itself, actually lead to delays in TransCanada's proposed schedule will be impacted to a significant degree by the strategy TransCanada ultimately employs in pursuing the Project.

B. INTRODUCTION

The State of Alaska has requested that we provide our views on a number of issues associated with the November 30, 2007 Application filed by TransCanada pursuant to the AGIA. While a number of issues will be discussed regarding the TransCanada proposal, one of the primary mandates we have undertaken is to identify issues that could arise which would materially impact the proposed timeline for the completion of the pre-construction approvals phase of the Project put forward by TransCanada. After reviewing TransCanada's proposed timeline, we believe that it likely represents a "best case" scenario and is aggressive, in the sense that it will be difficult to complete all the identified tasks in the time allotted. However, we would logically expect a project proponent to adopt such an approach when bringing forth a proposal of this unique nature and magnitude. In essence, TransCanada has put forth a plan which assumes that it will not encounter any significant difficulties or delays in securing the major pre-construction approvals for the Project. In this regard, while we note that the TransCanada Application provides a "Key Risk Assessment and Mitigation" matrix, it does not provide a sensitivity analysis of, or a contingency for, the impacts (including on Project timing) that would be associated with certain events, that are arguably foreseeable, actually occurring. As such, should the matters identified by TransCanada or discussed below become a reality, it is likely that timing delays beyond the period forecast by TransCanada would occur.

In this Report we have attempted to incorporate consideration of a number of issues that could arise in the context of any Application (including a submission in the

form of a supplementary information filing) brought forward by TransCanada pursuant to the NPA to construct the remaining Canadian portion of the Alaska Pipeline Project. In our view, any such application would obviously be impacted by the filing of a "competitive" proposal by a Third Party(ies). In this regard, we note that ConocoPhillips prepared an application outside the AGIA process; and, more recently, BP-Conoco announced plans for a new Alaska pipeline project. These actions seem to confirm that other parties have a direct interest in developing an alternate pipeline proposal, and would likely be actively involved in any application brought forward by TransCanada. In fact, they may seek concurrent consideration of both proposals. It appears to be generally accepted that any pipeline proposal, including TransCanada's, would have to be supported by Alaskan natural gas producers for it to succeed. The complexities arising from "competing" proposals would almost certainly result in material delays. In this regard, we note that TransCanada has historically taken the stance that it has an "exclusive" right to build a pipeline from Alaska. While not commenting on the validity of such a claim, it seems likely that TransCanada would oppose any Third Party pipeline on this (and possibly other) basis. Such a development could result in a Third Party proposal encountering major delays from the outset.

In the past entities such as Alliance and Enbridge have made direct submissions to the Canadian Government with respect to the applicability of the NPA and the appropriate process that should be used to consider any pipeline application for the delivery of Alaskan gas (see: Joint Submission dated April, 2005). Press reports and submissions in the AGIA process continue to indicate that these parties are very interested in the potential development of an Alaskan Pipeline. A common theme identified by parties such as ConocoPhillips, Enbridge and Alliance is that they view a complete process under the *National Energy Board Act* ("NEB Act") and CEAA as being the appropriate approach to consider such an application. Other entities, such as the Government of the Northwest Territories, have also made submissions to the U.S. Senate Committee on Energy and Natural Resources (see: submission dated October, 2001) regarding proposals for the transportation of Alaskan natural gas.

advance their positions, including recourse to the Courts.

profile forum to pursue issues of concern to them.

response will be experienced in Canada. Canadian First Nations groups that could

potentially be impacted by the Project may not see this as a development that will have long term, material benefits for them. Rather, they will see this as a transient opportunity to obtain maximum benefits when their leverage is the greatest, which in our view is during the period when the project proponent is seeking to have the project approved and constructed. We expect that these parties may attempt to obtain commitments regarding such benefits during the approval process, which could lead to material delays. In fact, we would not be surprised to see certain First Nations use this Project as leverage in Land Claims Settlement discussions. History suggests that a common approach is to take actions which serve to impede the development of a project or cast doubts on its viability in furtherance of these objections. This does not mean that these parties are "opposed" to the Project *per se*, as absent the development, they would not get any of the benefits they seek to obtain. Rather, it is a case of attempting to use leverage when it is most advantageous. In our view, these concerns would be equally applicable to any third party pipeline project.

The same can be said of many Environmental groups, who will take a great interest in the potential impacts of the project and use any public forum available to attract attention to the environmental issues they will argue are not being adequately addressed by this development. The fact that a material portion of the Project is proposed to be constructed in proximity to the Alaska Highway is unlikely to deter such parties from vigorously pursuing their positions. While in many circumstances the concept of using a "Utility Corridor" is accepted as an approach that could assist in minimizing environmental impacts (versus another distinct right-of-way), this will not likely reduce the scrutiny of the proposal or allow TransCanada to avoid the full assessment of potential environmental impacts. The end result may well be that locating the Project in proximity to the existing highway will reduce impacts below those that would be experienced in a distinct corridor, but this is not likely to be the focus of concern. Rather, parties will likely focus on the potential impacts the proposed Project may have, as it is proposed. Thus, while locating the pipeline in proximity to an existing disturbance (the Alaska Highway) may be an advantage, it is not likely to diminish the opposition voiced by Environmental groups to any material degree. In this regard, any

proposal which attempts to utilize a route that is materially different from that previously contemplated could face additional challenges, with resultant delays.

C. BACKGROUND AND OVERVIEW OF THE NORTHERN PIPELINE ACT

In order to provide context for the views expressed herein, it is important to understand the background to the development of the *Northern Pipeline Act* and the Northern Pipeline Agency ("NP Agency"), that has been created to administer this legislation in conjunction with the National Energy Board. This will also provide insight into the current "approvals" and the outstanding requirements regarding same.

The NPA was enacted following a number of regulatory and government actions, including execution of the Canada-U.S. Treaty Concerning Transit Pipelines, extensive NEB hearings, and execution of the Canada-United States Agreement on Principles.

1. Canada-U.S. Treaty Concerning Transit Pipelines

In January 1977, an Agreement between the Government of Canada and the Government of the United States of America Concerning Transit Pipelines was executed (the "Treaty"). The Treaty affects all transit movements of hydrocarbons from and to one of the signatories, across the territory of the other. Under the Treaty, the parties agreed not to, amongst other things, interfere with oil/gas throughputs or discriminate with taxes, fees or charges. Under Article II, for example, "no public authority in the territory of either Party shall institute any measures, other than those provided for in Article V, which are intended to, or which would have the effect of, impeding, diverting, redirecting, or interfering with in any way the transmission of hydrocarbon in transit". The Treaty applies to various pieces of legislation, including the NPA.

2. National Energy Board Hearings

As noted by TransCanada in its AGIA Application, the NEB issued its 1977 Northern Pipelines Decision¹ in June 1977 following a lengthy (214 days) hearing in which the merits of two competing pipeline proposals for the transmission of Alaskan

¹ National Energy Board, Reasons for Decision, Northern Pipelines, 1977 (GH-1-76, AO-1-GH-2-75). [hereinafter, "Northern Pipelines Decision"].

gas through Canada were adjudicated.² These proposals were submitted by the Canadian Arctic Gas Pipeline Limited ("CAGPL") and Foothills Pipelines (Yukon) Ltd. ("Foothills"). The CAGPL proposal sought certificates of public convenience and necessity ("CPCN" or "Certificates") for delivery of Arctic Slope and Mackenzie Delta gas through a pipeline constructed along the coastal plain from Prudhoe Bay, Alaska, to the Mackenzie Delta and then south across Canada to Canadian markets and markets in the United States.³ In contrast, the Foothills proposal sought certificates to construct pipelines and related works that would transport gas from Alaska through the Yukon along the Alaska Highway then south through Alberta to the United States. That process ultimately resulted in the selection of the proposal put forward by Foothills, now a wholly owned subsidiary of TransCanada Corporation.

The NEB in granting Certificates to Foothills, made them conditional upon Governor in Council approval, stating:

In respect of the Foothills (Yukon) project, although further engineering design, environmental and socio-economic information is to be filed prior to approval of final design, on the evidence the Board finds that it offers the generally preferred route for moving Alaska gas.⁴

In its Decision, the NEB discussed conditions that were to be placed on the Certificates and required Foothills to, amongst other things, alter its proposed route so that it would include the Dawson diversion or realignment (i.e. go near Dawson City) to facilitate construction of the Dempster lateral pipeline for the transmission of Mackenzie Delta gas; and to apply for a Certificate for the Dempster lateral.

In *Yukon Conservation Society and Council for Yukon Indians v. National Energy Board and Foothills Pipe Lines (Yukon) Ltd.* [1979] 2 F.C. 14, an appeal was lodged against the Board's 1977 Northern Pipelines Decision, on the grounds that the Board exceeded its jurisdiction by approving a route that was substantially different than that in

² TransCanada AGIA Application, page 2.2-73.

³ Robin L. Cowling, Canadian Institute of Resources Law, Calgary, Alberta, "Review and Regulatory Processes for Northern Pipeline Projects: Opportunities for Public Involvement", prepared for the Canadian Arctic Resources Committee, Yellowknife, NWT, November 2, 2001 [hereinafter "Review and Regulatory Processes"]

⁴ See: Northern Pipelines Decision, page 1-165.

the application. However, Foothills made a successful application for summary dismissal of the appeal on the grounds that the appeal was rendered academic by the *Northern Pipeline Act of 1977*.⁵

3. Canada-U.S. Agreement on Principles

Following selection of a project proponent and a route in both Canada and the U.S., the two countries entered into the *Agreement between Canada and the United States of America on Principles Applicable to a Northern Natural Gas Pipeline* (the "Agreement") on September 20, 1977.⁶ The Agreement provided for the construction of a gas pipeline to transport gas from northern Alaska and northern Canada to the United States.

Under section 2(a) of the Agreement the parties agreed as follows:

2(a) Both Governments will take measures to ensure the prompt issuance of all necessary permits, licenses, certificates, rights-of-way, leases and other authorizations required for the expeditious construction and commencement of operation of the Pipeline.

In this regard, the Agreement sets principles to coordinate and expedite the construction and operation of the pipeline system, and describes the route in general terms, divided into eleven zones (see: Annex I to the Agreement).⁷ The pipeline route is generally defined as following the Alaska Highway, with the Dempster lateral extending from a point near Whitehorse to the Mackenzie Delta.⁸

The Agreement also calls for, amongst other things, Foothills to demonstrate proof of financing before construction will be allowed to proceed.⁹

The Agreement specifically refers to the Transit Pipeline Treaty, which as noted, governs all existing and future transit pipelines in the U.S. and Canada and which

⁵ A. Black, "Legal Principles Surrounding the New Canadian and American Arctic Energy Debate", *Energy Law Journal*, Vol. 23:81.

⁶ TransCanada AGIA Application, page 2.2-74. As amended by exchanges of notes dated June 6, 1978 between the Governments of Canada and the United States of America: See NPA, Schedule I.

⁷ Agreement, article 1.

⁸ Agreement, Annex II, Zones 10 and 11. See: Review and Regulatory Processes, *supra*.

⁹ Agreement, article 4(a).

mandates non-discriminatory treatment. The Agreement has a term of thirty-five years and is renewed *automatically* unless a party chooses to terminate it with 12 months written notice.

As noted by TransCanada, in recognition of the magnitude and importance of the Project, the Canadian government took the unusual step of committing to enact specific legislation to statutorily enshrine the regulatory decision of the NEB and the terms of the Agreement:¹⁰

14. The two Governments recognize that legislation will be required to implement the provisions of this Agreement. In this regard, they will **expeditiously seek all required legislative authority** so as to facilitate the timely and efficient construction of the Pipeline and to remove any delays or impediments thereto.

The enactment of the NPA fulfilled Canada's obligation in this regard. In Canada there has been no legislation enacted providing for expedited certification of any project other than the Foothills project.¹¹

4. Northern Pipeline Act

Shortly after the NEB's Northern Pipeline Decision, the NPA came into force on April 13, 1978.¹² In essence, the NPA created an administrative and regulatory scheme to carry out and give effect to the *Agreement on Principles*. Presumably therefore, the legislation was originally intended to, amongst other things, ensure the "prompt issuance of all necessary permits, licenses, certificates, rights-of-way, leases and other authorizations required for the expeditious construction and commencement of operation of the Pipeline" as agreed by the Governments. As reflected in the objects of the Act, which are set out in Section 4 of the NPA, this was to be accomplished through measures aimed at facilitating efficient and expeditious planning, construction, consultation and coordination. As discussed below, given the significant lapse of time since the NPA came into force, debate may ensue regarding whether the legislation can

¹⁰ TransCanada AGIA Application, page 2.2-74.

¹¹ *Ibid.*

¹² Proclamation, SI/78-90, 13 April 1978, C. Gaz. 1978.II.2665.

and should be used to further this original purpose, particularly if current regulatory or environmental standards are not met.

The NPA consists of four Parts: Part 1 – Northern Pipeline Agency, Part II – Traffic, Tolls and Tariffs, Part III – Real Property and Part IV – General. It is appended by three Schedules. Schedule I is the Canada-US Agreement, Schedule II is a list of the Foothills companies who have received Certificates under section 21 of the Act, and Schedule III lists the terms and conditions of the Certificates.

Some of the key aspects of the NPA are described below.

a. Northern Pipeline Agency

The NP Agency was created with the proclamation of the NPA in April 1978. Its stated purpose is to oversee planning and construction of the Canadian portion of the Alaska Highway Gas Pipeline Project by the Foothills Group of Companies, which is the project conditionally approved under the NPA. Indeed, the Foothills Subsidiaries hold Certificates granted pursuant to section 21(1) of the NPA for each of the zones of the Project in Canada. These CPCN are declared in the NPA to be issued pursuant to section 52 of the NEB Act and are the only existing certificates for the Project in Canada.¹³ The pipeline, as certificated, is intended to transport Alaskan and possibly northern Canadian natural gas to southern markets in Canada and the United States.

The mandate of the NP Agency is twofold. It is required to carry out federal responsibilities in relation to the pipeline and facilitate the efficient and expeditious planning and construction of the pipeline taking into account local and regional interests, in particular those of native people. It is also responsible for maximizing the social and economic benefits from the construction and operation of the pipeline for Canadians while minimizing any adverse effect on the social and environmental conditions of the areas most directly affected by the pipeline.¹⁴

¹³ TransCanada AGIA Application, page 2.2-74. See also: NPA, s. 21(2). The Act states that these Certificates are "deemed to be a certificate issued pursuant to section 52" of the NEB Act.

¹⁴ Northern Pipeline Agency Canada website. Available at: <http://www.infosource.gc.ca>

The NP Agency, working in close conjunction with the NEB, was and arguably still is intended to provide a central regulatory authority or window for the exercise of all federal responsibilities related to planning, monitoring and controlling the system throughout Canada.¹⁵ Indeed, according to *Hansard*, the NP Agency is intended to serve as the only regulatory agency in charge of all federal responsibilities with regard to the Canadian part of the pipeline.¹⁶ According to TransCanada this approach offers advantages. Indeed, in its Application TransCanada states, "by creating a single window through which federal approvals and decision making can be delivered and provincial or territorial approvals can be coordinated, the NPA has proved to be an effective and efficient approach to timely and complete regulatory authorizations".¹⁷

In reality, the Agency has been essentially dormant for many years and has only "bare bones" staff in place at this time. Yet, as detailed below, in keeping with the Act, many regulatory powers of other federal departments and agencies related to the pipeline project have been delegated to the NP Agency. This is not the case however for those powers reserved exclusively to the National Energy Board or shared between the NEB and the NP Agency.¹⁸

The relative inactivity of the NP Agency in recent years follows from the fact that its activities are dictated by the timing and pace of construction of the ANGTS in Canada. As noted by TransCanada, while a portion of the ANGTS pipeline has been built in Alberta (the "Pre-Builds") under the authority of the NPA, the majority of this construction occurred in the early 1980's when the price of natural gas fell to levels that made the construction of the entire APP, from Alaska to market uneconomic.¹⁹ These unfavourable economic conditions led to indefinite delays in the completion of the northern portion of the pipeline ("Phase II"). Consequently, the NP Agency's activities have been limited. The most recent expansion under the NPA occurred in 1998 involving the installation of 113 km of 1067mm (42") diameter pipeline and compression and metering facilities downstream of Empress.

¹⁵ See: NPA Preamble; Section 4(b); and Commons Debates, February 13, 1978 at 2789.

¹⁶ Commons Debates, February 15, 1978, page 2892.

¹⁷ TransCanada AGIA Application, page 2.2-75.

¹⁸ Northern Pipeline Agency website available at: http://www.infosource.gc.ca/inst/npa/fed02_e.asp

¹⁹ TransCanada AGIA Application, page 2.2-74.