4th Spec. Session

Presented: 7-13-2008
Sunday Juneau

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Keith Bergner is a partner with Lawson Lundell LLP. He represents clients in the areas of Aboriginal law, constitutional law and regulatory/energy law. Keith has appeared before numerous regulatory tribunals and all levels of Superior, Federal and Appellate Courts in Canada, including the Supreme Court of Canada.

Keith's practice focuses on advising governments and private sector clients on regulatory and Aboriginal law matters, with a particular emphasis on the North. After beginning his legal practice in Vancouver, Keith moved north to anchor Lawson Lundell's office in Yellowknife, Northwest Territories from 1999 to 2002. He has continued to devote a significant portion of his practice to northern issues since returning to Vancouver in 2003. A recent project involves advising the NWT territorial government in relation to the Mackenzie Gas Project application currently pending before the National Energy Board.

Within the area of Aboriginal law, Keith has been involved in numerous matters regarding Aboriginal rights and title claims. Keith advises governments, Crown Corporations and private sector clients regarding the extent of the duty of consultation and compensation for infringement of Aboriginal rights or title by major industrial projects. Keith regularly advises BC Hydro in respect of Aboriginal consultation requirements for generation or transmission projects. Keith also represents project proponents and governments in appeals and judicial reviews challenging project approvals or permitting decisions.

In the area of regulatory/energy law, Keith has been involved in a number of significant regulatory hearings and alternative dispute resolution processes for oil and gas, electricity (both generation and transmission) and mining projects. Keith appears regularly before numerous administrative tribunals including the National Energy Board, the British Columbia Utilities Commission, the Alberta Utilities Commission (formerly the Alberta Energy and Utilities Board) and the NWT Public Utilities Board. Keith also acts as counsel on appeals or applications seeking judicial review of decisions by administrative boards and tribunals.

Keith is a regular speaker at conferences on Aboriginal and regulatory/energy law, including, recently, the Rocky Mountain Mineral Law Institute, the BC Law Society's Continuing Legal Education program and Yellowknife's Geoscience Forum..

Bar Admissions
British Columbia (1997)
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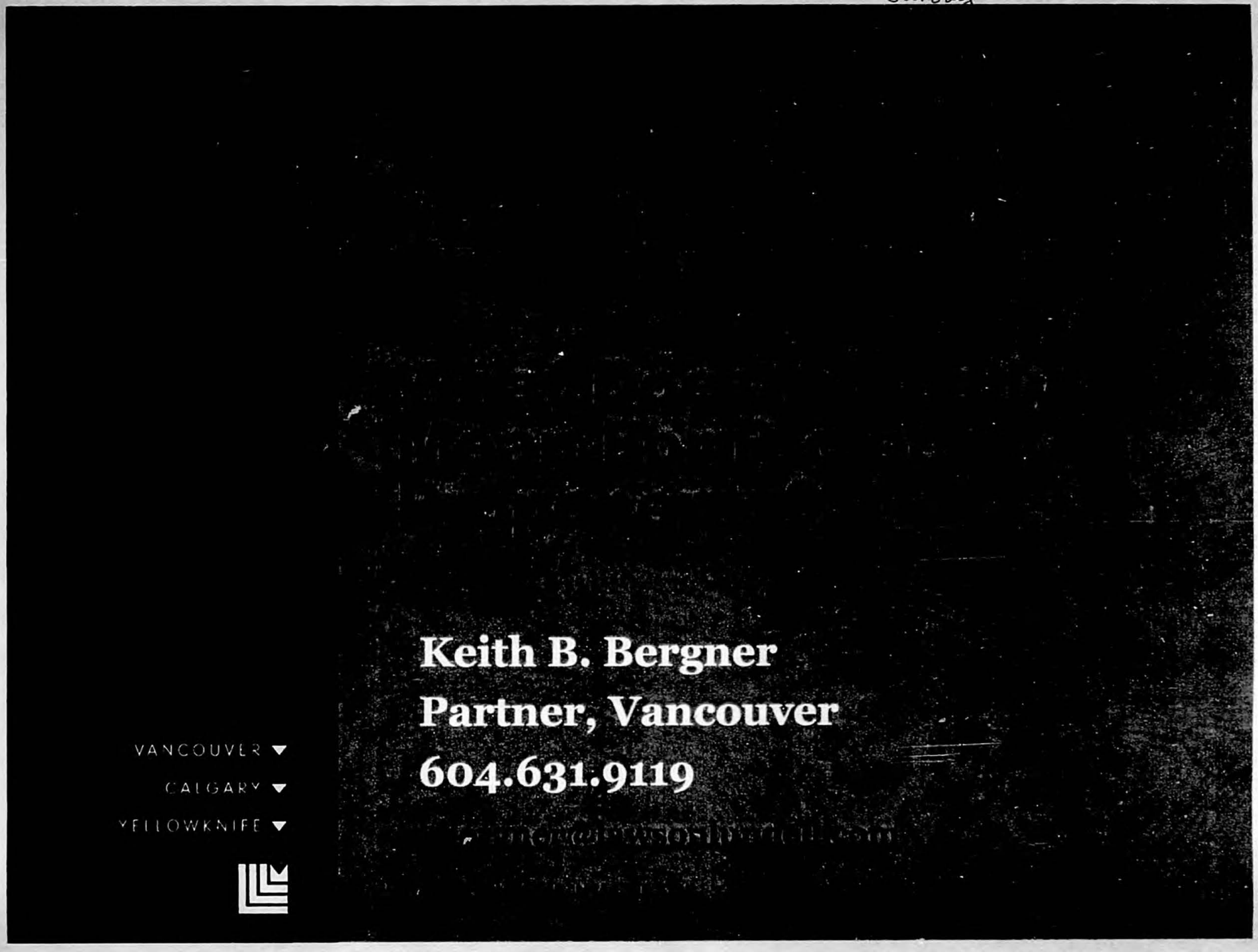
Nunavut (2000)

Education
McGill University (B.A. Honours, 1990)
McGill University (LL.B., 1996)

4th Spec. Session

Presented 7-13-2005 Juneau
Sundays



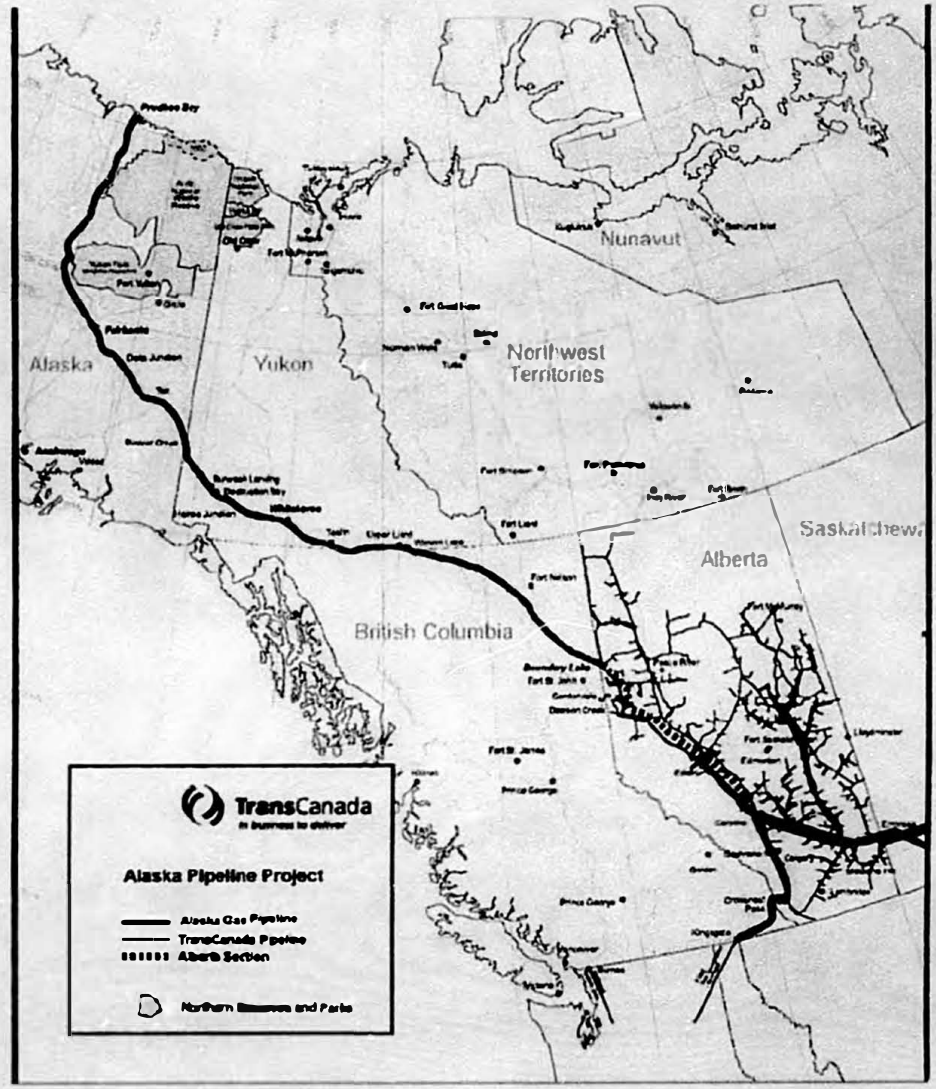
(1) Consultation and Accommodation

I. Asserted Claims

II. Historical Treaty Areas

III. Modern Treaty Areas

(2) Agreements with First Nations


Nunavut
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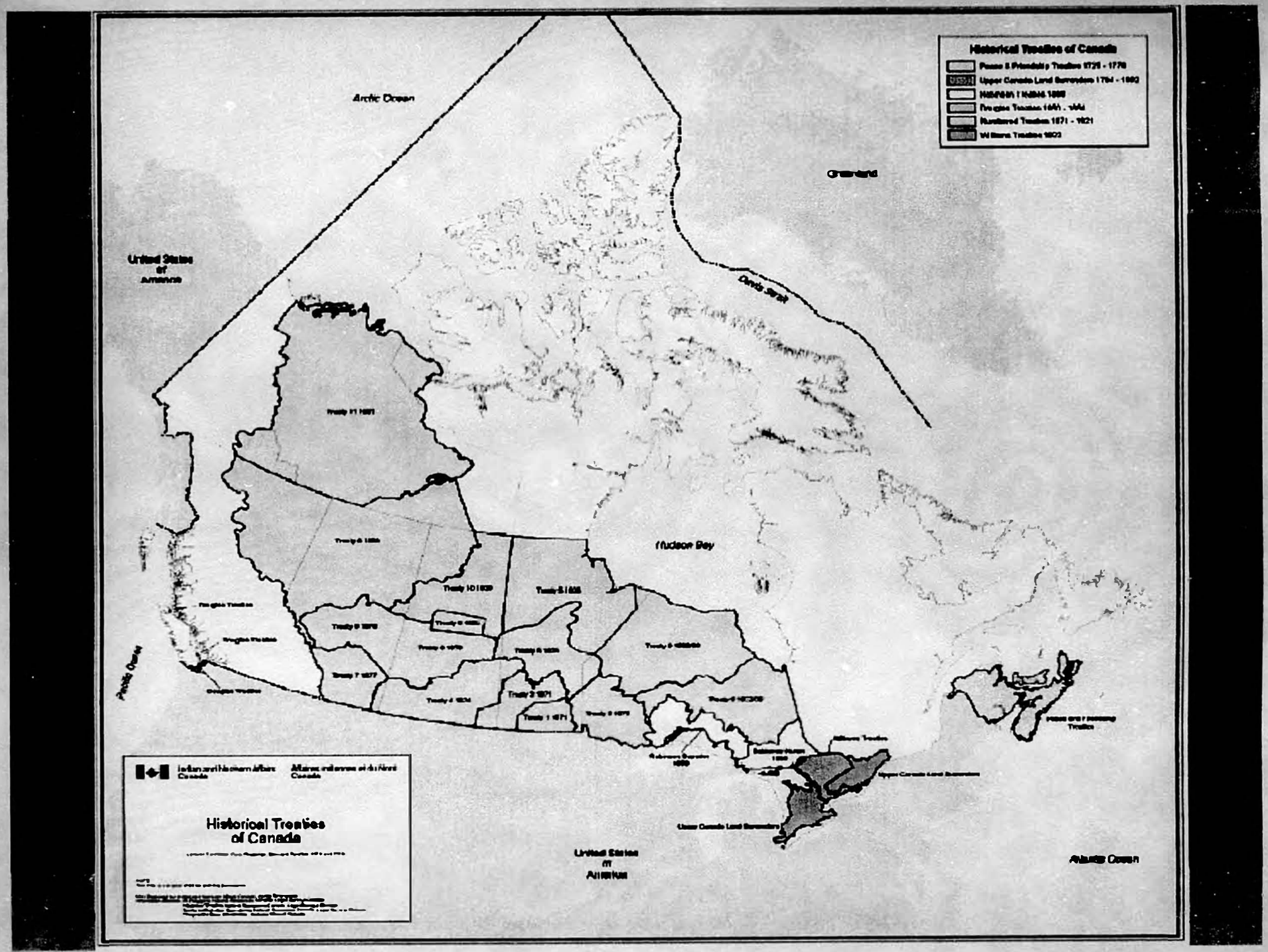
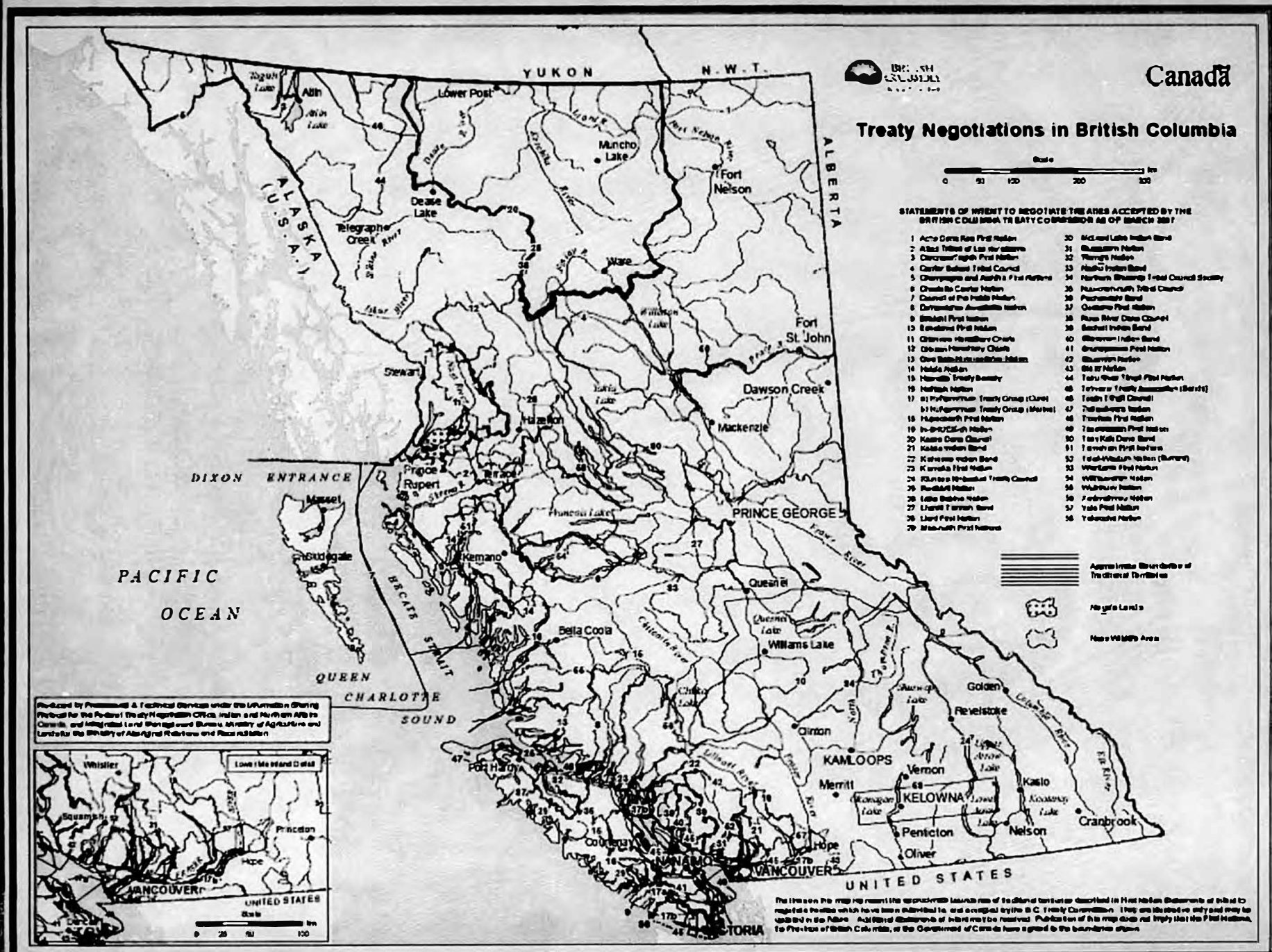
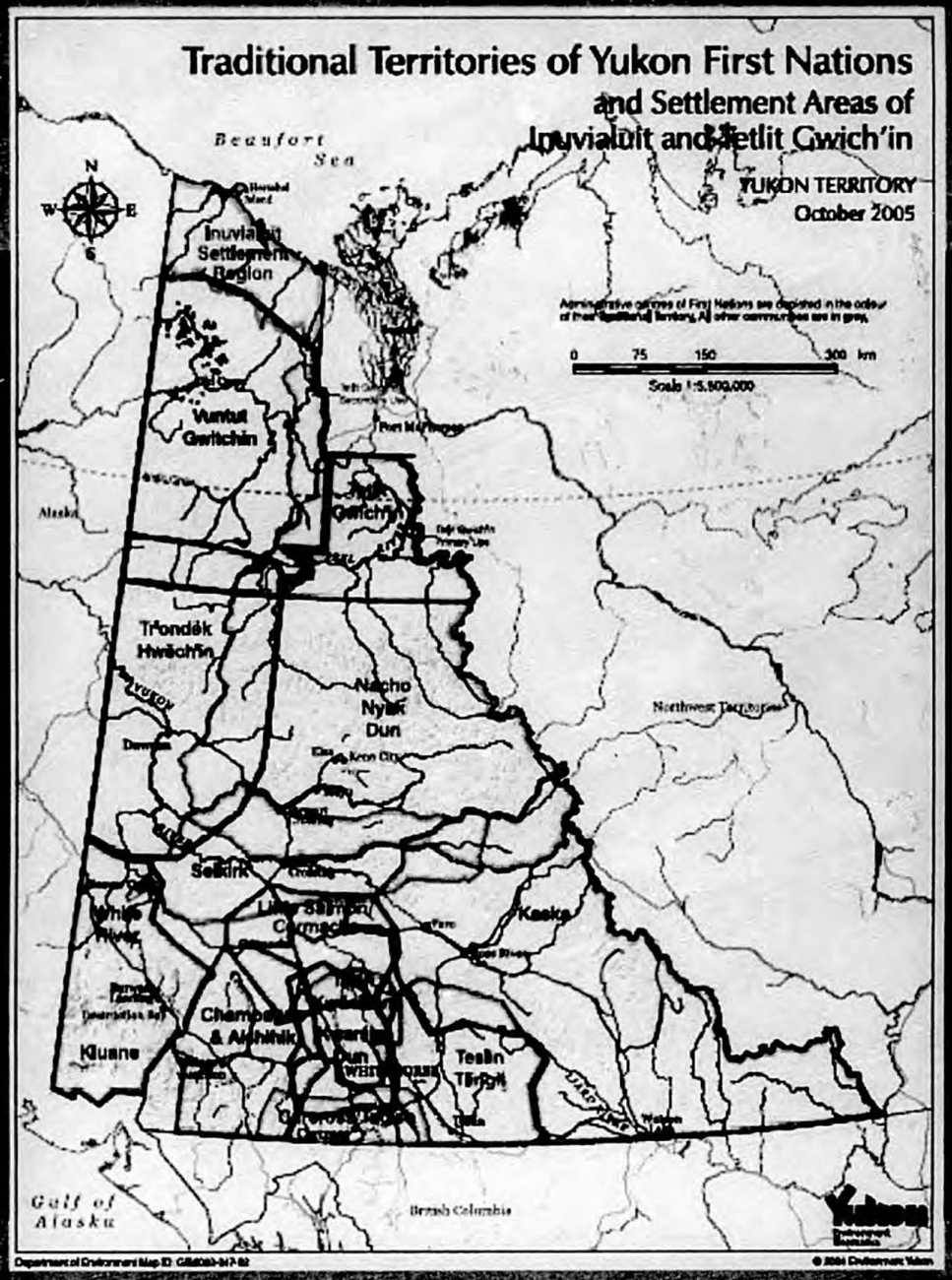
Yukon
Northwest Territories
Alberta
British Columbia
TransCanada
Alaska Pipeline Project
Alaska Gas Pipeline
TransCanada Pipeline
Alberta Section


Historical Treaties of Canada
Arctic Ocean
United States of America
Davis Strait
Hudson Bay
Pacific Ocean
United States of America
Atlantic Ocean
Historical Treaties of Canada


Canada
Treaty Negotiations in British Columbia
YUKON
N.W.T.
ALBERTA
ALASKA (U.S.A.)
PACIFIC OCEAN
DIXON ENTRANCE
QUEEN CHARLOTTE SOUND
HECATE STRAIT
PRINCE GEORGE
UNITED STATES
Lower Post
Muncho Lake
Fort Nelson
Dease Lake
Telegraph Creek
Stewart
Fort St. John
Dawson Creek
Mackenzie
Hazelton
Prince Rupert
Masset
Kemano
Bella Coola
Williams Lake
Quesnel
Clinton
KAMLOOPS
Merritt
Vernon
Kelowna
Penticton
Oliver
Revelstoke
Golden
Kaslo
Nelson
Cranbrook
Hope
Port Hardy
Courtenay
NANAIMO
VANCOUVER
VICTORIA
Whistler
Squamish
Princeton
Statements of Intent to Negotiate Treaties Accepted by the British Columbia Treaty Commission as of March 2001
Approximate Boundaries of Traditional Territories
Negotiations Area
Nass Wildlife Area


Traditional Territories of Yukon First Nations
and Settlement Areas of
Inuvialuit and Metlit Gwich'in
YUKON TERRITORY
October 2005
Beaufort Sea
Inuvialuit Settlement Region
Vuntut Gwitchin
Teetl Gwitchin
Tr'ondëk Hwëch'in
Nacho Nyak Dun
Selkirk
Kaska
Champagne & Aishihik
Kluane
Teslin Tlingit
Alaska
Yukon
Northwest Territories
British Columbia
Gulf of Alaska
0 75 150 300 km
Scale 1:5,500,000

What triggers the Duty to Consult?

- When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

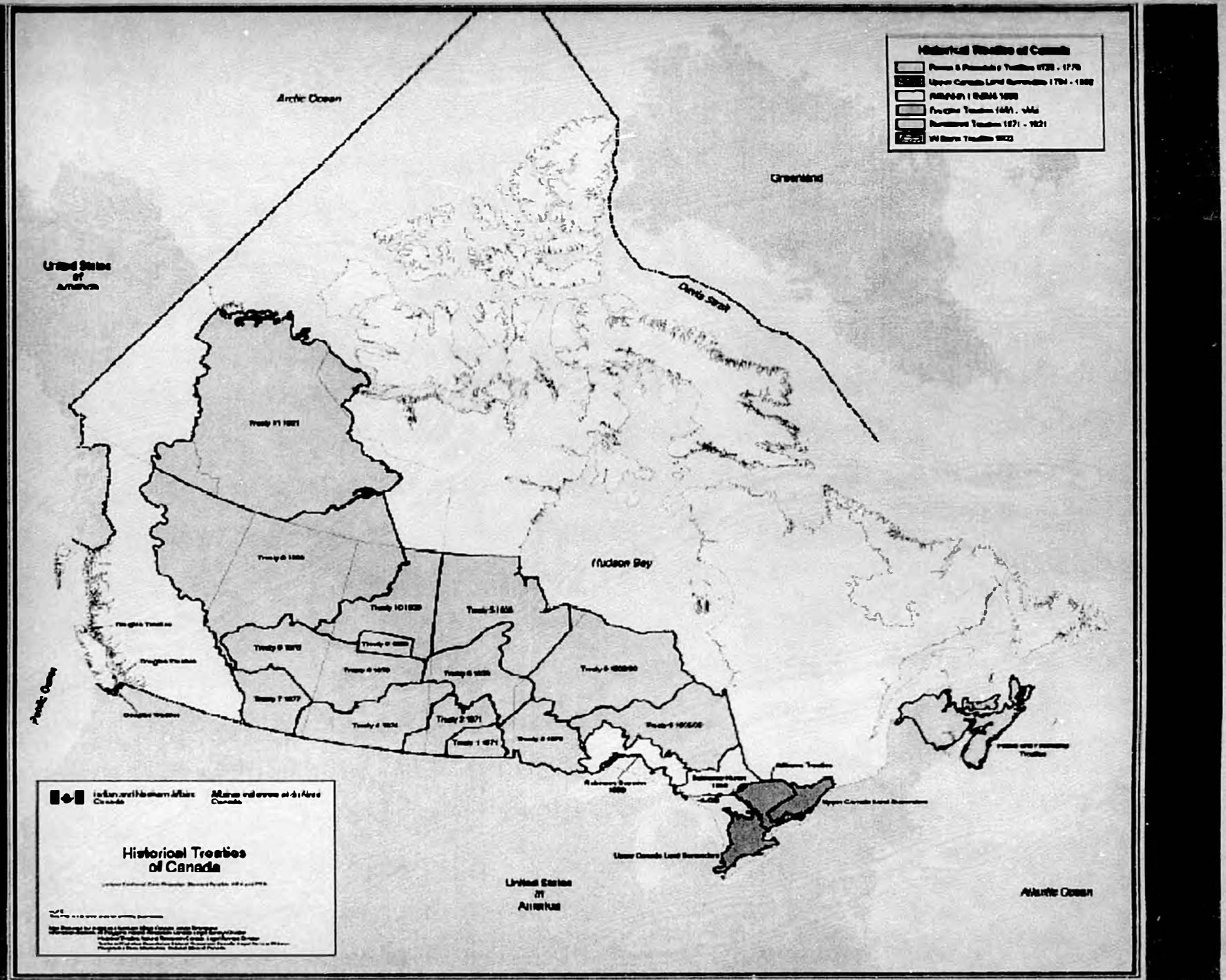
1. The Crown (both Federal and Provincial) has a legal duty to consult and, if necessary, accommodate in respect of asserted Aboriginal claims
2. The source of the duty to consult is the "Honour of the Crown"
3. Third parties do not have a duty to consult

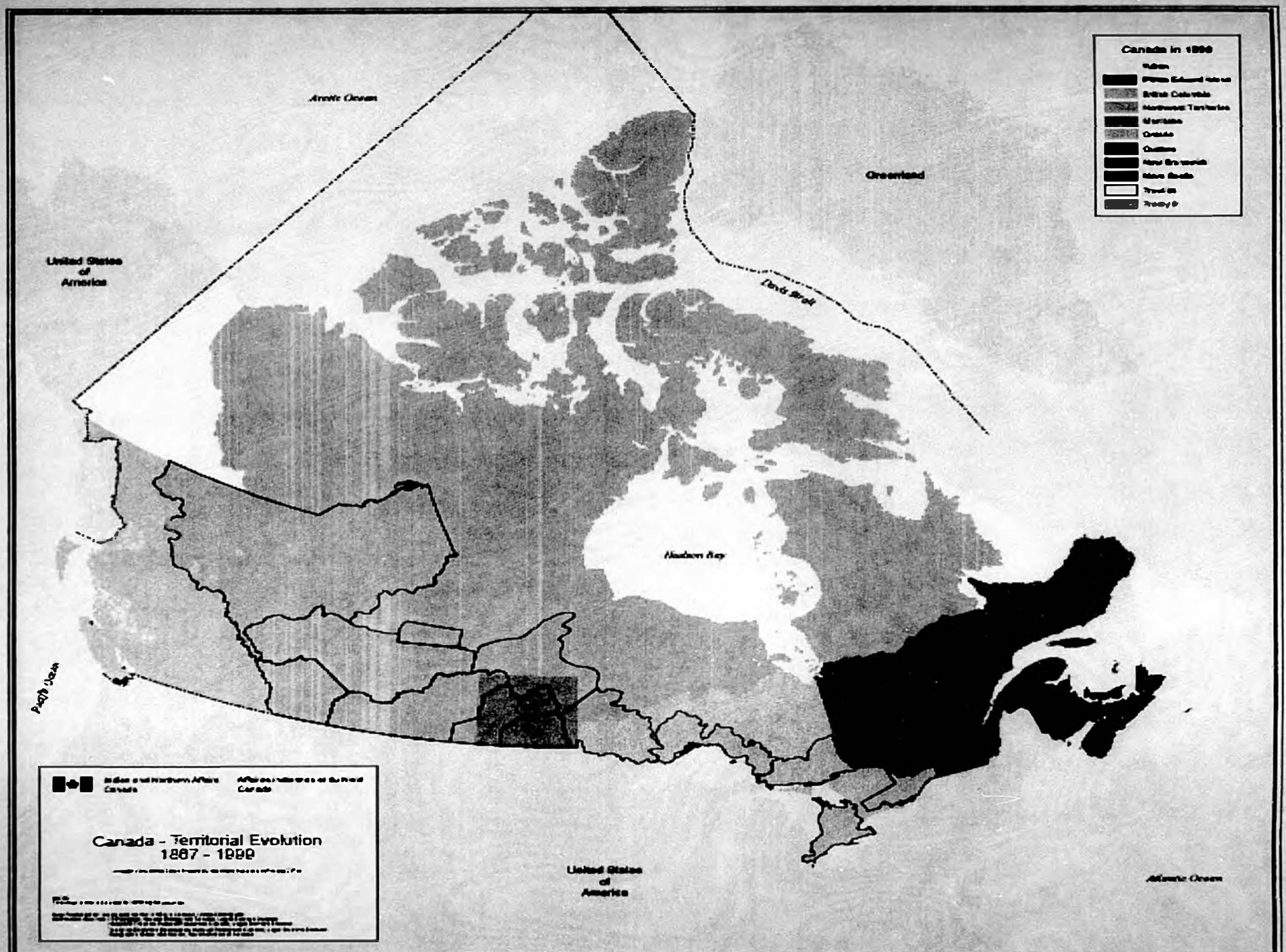
The Crown can dėlegate "procedural aspects of consultation"

Scope and content of duty on a "spectrum"

1. Strength of Claim
2. Seriousness of the Impact

- 1871 and 1923
- 11 numbered treaties – Ontario, Manitoba, Saskatchewan, Alberta, Northwest Territories


Historical Treaties of Canada
Arctic Ocean
Greenland
United States of America
Davis Strait
Hudson Bay
Pacific Ocean
United States of America
Atlantic Ocean
Historical Treaties of Canada
Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada


Canada in 1999
Arctic Ocean
Greenland
United States of America
Davis Strait
Hudson Bay
Pacific Ocean
United States of America
Atlantic Ocean
Canada - Territorial Evolution
1867 - 1999

"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…saving and excepting such tracts as may be required or *taken up* from time to time for settlement, mining, lumbering, trading or other purposes."

Background:

- winter road proposed to connect three aboriginal and one non-aboriginal communities to Alberta highway system
- did not talk to Mikisew Cree

Power to Take Up Land Confirmed

- not limited to express purposes stated in treaty

Requires Consultation Where Taking Up Infringes Treaty Rights

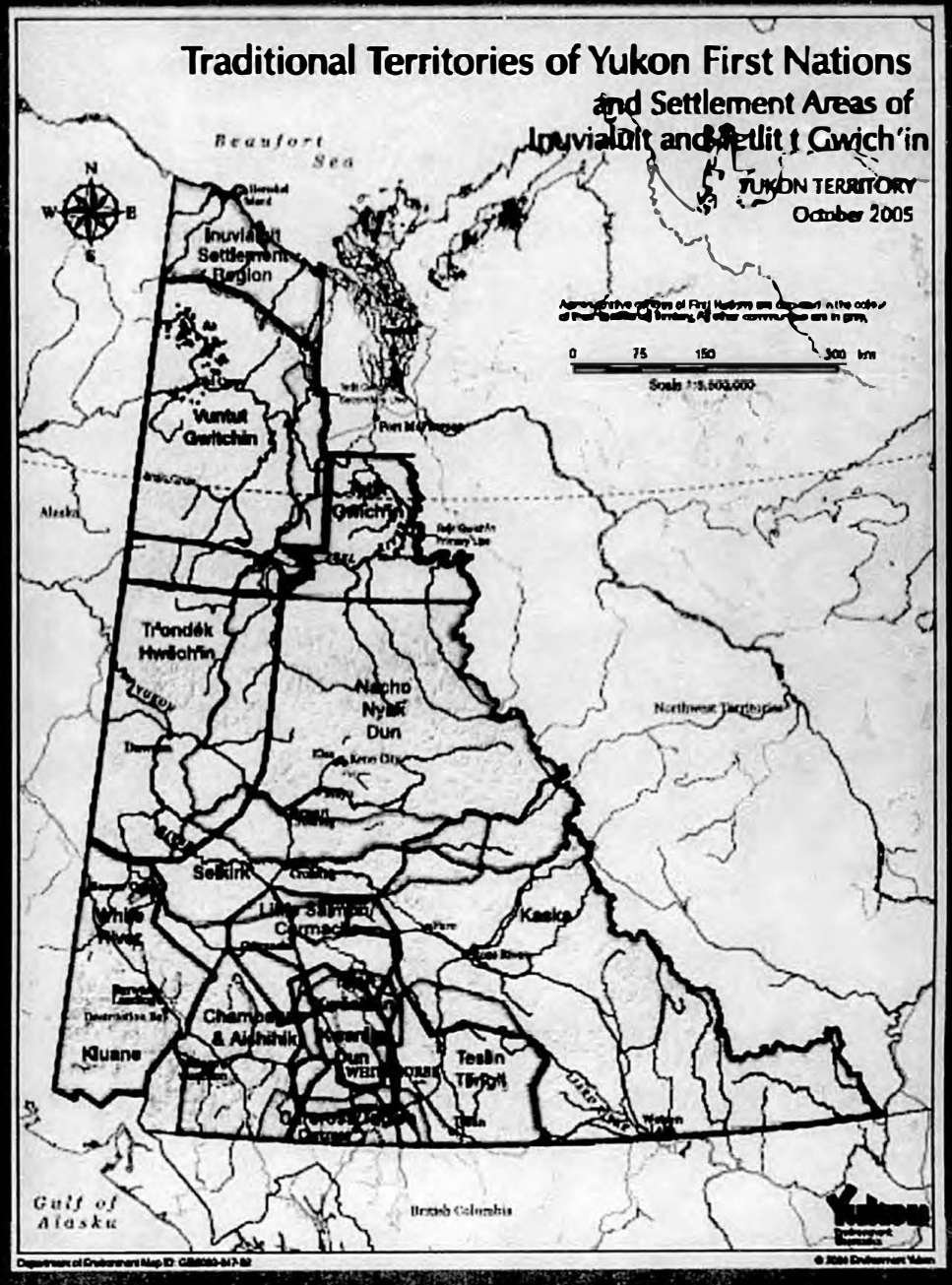
Spectrum

1. Specificity of the Treaty Promise
2. Seriousness of Potential Impact

Since 1973

Sixteen (16) comprehensive land claims in Yukon, NWT and Nunavut

Four (4) other comprehensive land claim in the rest of Canada


Traditional Territories of Yukon First Nations
and Settlement Areas of
Inuvialuit and Gwich'in
YUKON TERRITORY
October 2005
Beaufort Sea
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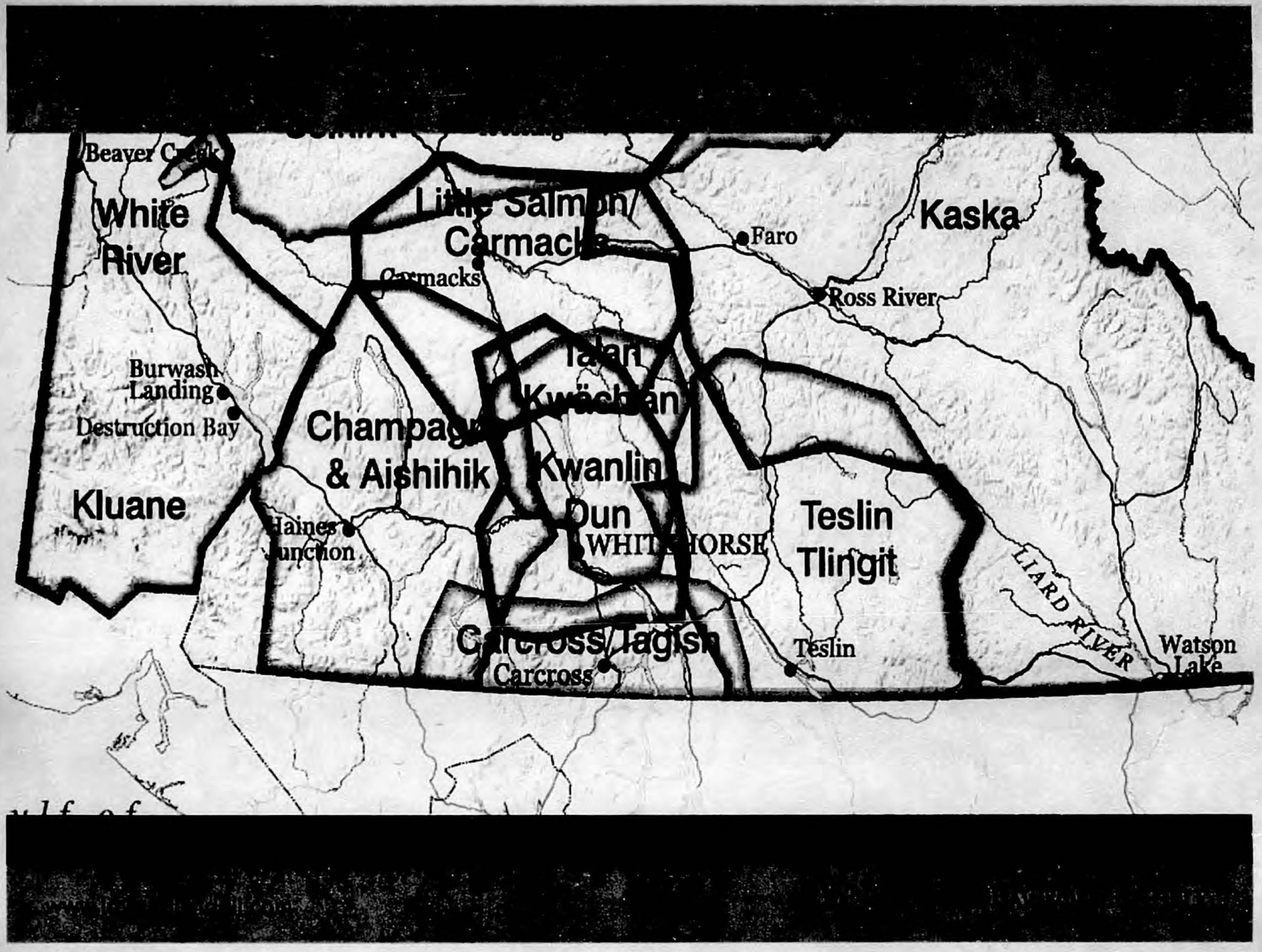
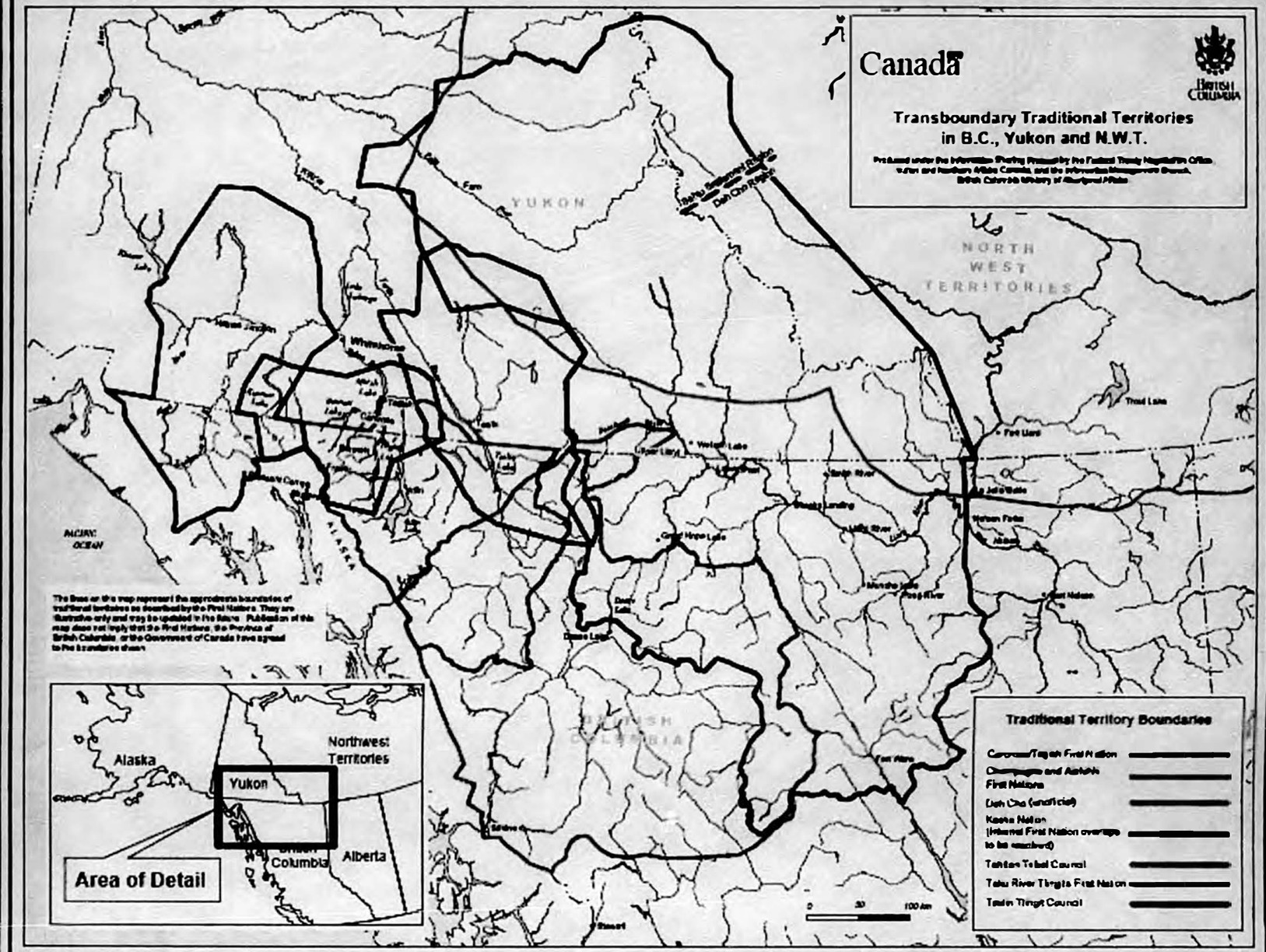
Vuntut Gwitchin
Gwich'in
Tr'ondëk Hwëch'in
Nacho Nyäk Dun
Selkirk
White River
Kaska
Champagne & Aishihik
Kluane
Tesläin Tlingit
Alaska
Northwest Territories
British Columbia
Gulf of Alaska
0 75 150 300 km


Beaver Creek
White River
Little Salmon/ Carmacks
Carmacks
Faro
Kaska
Ross River
Burwash Landing
Destruction Bay
Champagne & Aishihik
Kwanlin Dun
WHITEHORSE
Kluane
Haines Junction
Teslin Tlingit
Teslin
LIARD RIVER
Watson Lake
Carcross/Tagish
Carcross


Canada
Transboundary Traditional Territories
in B.C., Yukon and N.W.T.
YUKON
NORTH
WEST
TERRITORIES
Whitehorse
Watson Lake
Fort Liard
Trout Lake
Teslin Lake
Upper Liard
Nelson Forks
Alaska
Northwest
Territories
Yukon
Alberta
Area of Detail
Traditional Territory Boundaries
Kaska Nation
(Internal First Nation overlaps
to be resolved)
Tahltan Tribal Council
Teslin Tlingit Council

Lands in fee simple

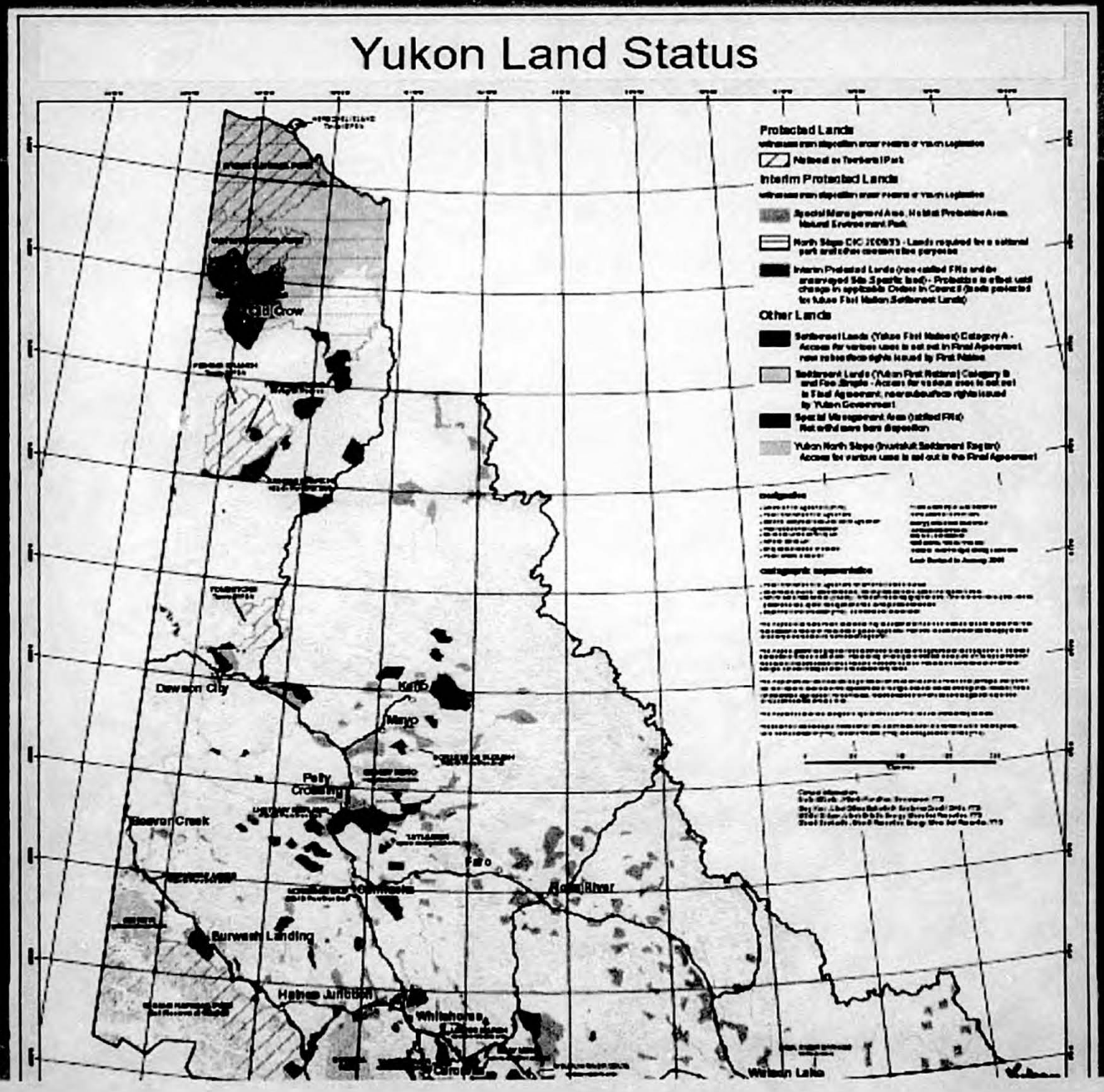
Management Area *participate in*:

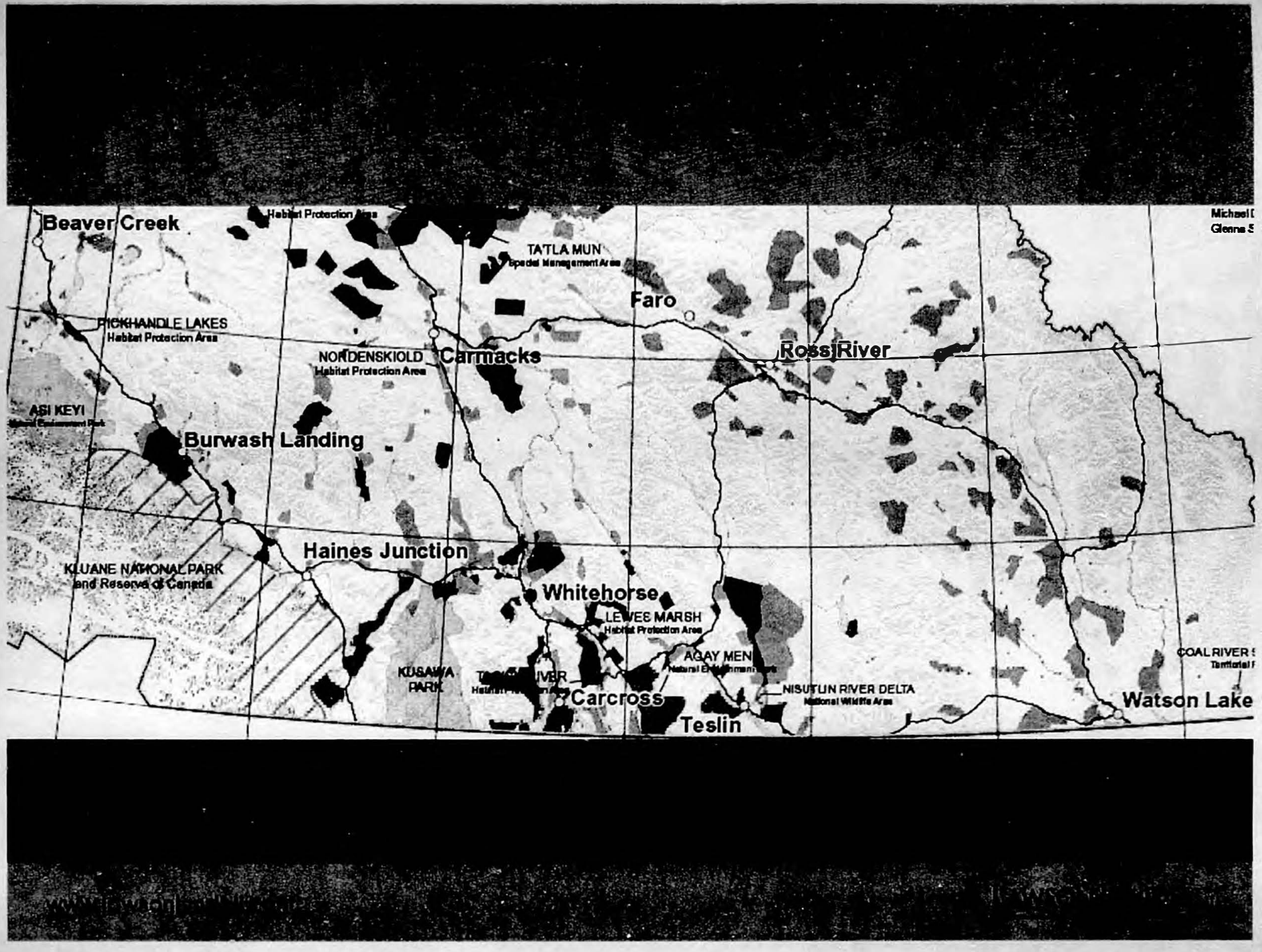
- *land use planning*
- *land and water use*

Still larger tract of land

- *Hunting fishing and trapping*
- *May be overlapping with other groups*

Yukon Land Status




Beaver Creek
Habitat Protection Area
TA'TLA MUN
Special Management Area
Faro
PICKHANDLE LAKES
Habitat Protection Area
NORDENSKIOLD
Habitat Protection Area
Carmacks
Ross River
ASI KEYI
Burwash Landing
Haines Junction
KLUANE NATIONAL PARK
and Reserve of Canada
Whitehorse
LEWES MARSH
Habitat Protection Area
AGAY MEN
KUSAWA
PARK
Carcross
NISUTLIN RIVER DELTA
National Wildlife Area
Teslin
Watson Lake

Does a modern land claim agreement displace the common law duty to consult?

Little Salmon/Carmacks First Nation v. The Gov't of Yukon (Min. of Energy, Mines and Resources), 2007 YKSC 28

(Under Appeal – heard in June 2008)

Asserted Claims - *Haida* and *Taku*

- Duty to consult applies to asserted (not yet proven) claims

Historic Treaties - *Mikisew Cree*

- Duty to consult applies in the context of the historic numbered treaties

Modern Land Claim Agreements – *Little Salmon*

- Expressly define consultation obligations

When is Accommodation Required?

"When the consultation process suggests amendment of Crown policy, we arrive at the stage of Accommodation" (*Haida*, at para 47).

Accommodation is Not Required in Every Situation

Accommodation May Include:

(1) *Avoidance of Specific Areas*

(2) Minimizing Impacts

(3) Compensation

Binding Agreements

- Access/Benefit Agreements
- Impact/Benefit Agreements
- Impact Management and Benefit Agreements
- Participation Agreements
- Cooperation Agreements

Who?

- Project Proponent
  - Parent company/subsidiaries
  - Contractors/subcontractors
  - Successors and assignees

Who?

- First Nation
  - Band (*Indian Act*)
  - Tribal Council
  - Nation
  - Corporations or societies
  - Land claim/self-government agreement entities (governments)
  - Metis

Who?

- Government
  - Canada
  - Provincial government
  - Territorial government

Why Not The Crown?

- Duty to consult and accommodate is a legal duty of the Crown (Haida)
- Crown can delegate "procedural aspects of consultation" to Project Proponents
- Industry seeking "sign-off" on Crown's duty

How?

- Employment opportunities
- Contracting opportunities
- Financial consideration
- Communications Committee
- Legal certainty

Why?

- Industry: Proceed with the Project and Legal Certainty
- First Nation: Share in the benefits and provide input on the Project
- Both parties: Build relationships

The Alternatives

- Judicial review
- Appeal
- Injunction
- Litigation (nuisance, etc.)
- Delay in permit authorization
- Lack of access

- Timely
- Cost-effective
- Competitive Advantage

Past Grievances/Infringements

- *Gitxsan v. British Columbia (Minister of Forests)*
- *Gwasslam v. British Columbia (Minister of Forests)*

"If a...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." (Gitxsan, p. 81)

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LAWSON LUNDELL LLP

BARRISTERS & SOLICITORS

4th Spec. Session Presented Sunday 7-13-2008 Juneau

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The Crown's Duty to Consult and Accommodate

By
Keith B. Bergner

This paper was presented at The Canadian Institute's 2nd Annual Conference on Aboriginal Consultation: Best Practices and Leading Edge Strategies for Managing Aboriginal Consultations
June 2006
Vancouver, British Columbia

THE CROWN'S DUTY TO CONSULT AND ACCOMMODATE

Keith B. Bergner
Lawson Lundell LLP

Canadian Institute's 2nd Annual Conference on
Aboriginal Consultation: Best Practices and Leading Edge Strategies
for Managing Aboriginal Consultations

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Vancouver, British Columbia

TABLE OF CONTENT

On November 18, 2004, the Supreme Court of Canada released its decisions in *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*, 2004 S.C.C. 73 ("*Haida*") and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 S.C.C. 74 ("*Taku*"). These landmark decisions provide a preliminary outline of the parameters of the Crown's duty to consult and, where appropriate, accommodate Aboriginal peoples in circumstances where Aboriginal interests have been asserted, but not proven. The decisions also provide a framework for Aboriginal consultation activity related to potential infringements of Aboriginal rights caused by land and resource development activities. As a result, the two decisions are perhaps the most significant Supreme Court of Canada Aboriginal law decisions since the 1997 decision in *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010.

On November 24, 2005, the Supreme Court of Canada delivered it decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 S.C.C. 69 (*"Mikisew"*) which affirmed the existence of a duty to consult in a post-treaty context. The Court ruled that whereas governments have the power to exercise their treaty rights, those rights are subject to a duty to consult in situations where the exercise of those treaty rights would have an adverse effect on Aboriginal treaty rights.

The purpose of this paper is to summarize the above cases, examine the subsequent jurisprudence that has considered the decisions, and to comment on some of their implications.

I. *Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser*

(a) Background and Lower Court Decisions

The *Haida* case involved a judicial review, pursuant to the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, of the Minister's decision to replace and approve the transfer of a tree farm licence. In 1961, the Province of British Columbia issued the tree farm licence to a large forestry company, MacMillan Bloedel, permitting it to harvest trees in an area of Haida Gwaii (the Queen Charlotte Islands). The Minister replaced the licence in 1981, 1995 and 2000. In 1999, the Minister also approved a transfer of the tree farm licence to Weyerhaeuser. The Haida commenced judicial review proceedings in 2000 to challenge these replacements and the transfer, which were made without their consent and, since approximately 1994, over their express objections.

The Chambers Judge, Halfyard J. of the British Columbia Supreme Court, dismissed the Haida's petition (2000 B.C.S.C. 1280). He reasoned that the law could not presume the existence of Aboriginal rights merely from proof of their assertion and proof that there had been no formal surrender or extinguishment of such rights. He found that until the nature and extent of Aboriginal title and right of the Haida had been conclusively determined by legal proceedings, questions of infringement could not be decided with certainty and questions about justification could not be accurately framed or decided in respect of speculative infringement of unproven rights. He concluded that the Crown had only a "moral duty" to consult with the Haida regarding their claims.

The Court of Appeal allowed the appeal—ultimately issuing two judgements on the matter. In the first decision, reported at 99 B.C.L.R. (3d) 209 ("*Haida #1*"), the Court of Appeal held that the Provincial Crown had fiduciary obligations of good faith to the Haida with respect to Haida claims to Aboriginal title and right. Further, it found that the Provincial Crown and Weyerhaeuser were aware of the Haida's claims to all or significant parts of the area covered by the licence and the claims were supported by a good *prima facie* case. In the result, the Court granted a declaration that the Crown *and* Weyerhaeuser had a legally enforceable duty to the Haida to consult in good faith and endeavour to seek workable

accommodation between Aboriginal interests of the Haida and objectives to manage the area in accordance with the public interest.

The Court of Appeal's decision in *Haida #1* raised considerable controversy whether private parties could owe a duty to consult to Aboriginal people similar to that owed by the Crown. (The issue had not been argued either at first instance or on appeal.) Counsel for the Crown and Weyerhaeuser sought clarification and the Court permitted supplementary argument on this point (reported at 2002 BC.C.A. 223). The subsequent Court of Appeal decision, reported at 5 B.C.L.R. (4th) 33, ("*Haida #2*") resulted in a 2-1 decision on August 19, 2002. The majority of the Court of Appeal confirmed that Weyerhaeuser had a legal duty to consult and seek accommodation with the Haida and seek workable accommodations between the Haida and the objectives of the Crown and Weyerhaeuser.

(b) *Haida* -- Supreme Court of Canada Decision

The Supreme Court of Canada, in a unanimous 7-0 decision, dismissed the Crown's appeal, but allowed the appeal of Weyerhaeuser.

(i) Consultation Obligation Applies Where Rights Are Asserted

The Court found that the source of the duty to consult and accommodate is grounded in the "honour of the Crown" (paragraph 16). In circumstances where the Aboriginal rights and title have been asserted, but not defined or proven, the Aboriginal interest is insufficiently specific to impose a fiduciary duty on the Crown (paragraph 18). The Court stated that the duty to consult and accommodate arises where the Crown has knowledge of the potential existence of an Aboriginal right or title, whether or not that right or title has been legally established, and contemplates conduct that may adversely affect it (paragraph 35).

The nature and scope of the duty to consult and accommodate will vary with the circumstances. In general terms, the scope of the duty is proportionate to a preliminary assessment of the strength of the asserted right or title, and the seriousness of the potential impact on it (paragraph 39). This produces a spectrum of consultation. In some cases, mere notice and an opportunity to discuss the proposed decision may be required. In other cases,

"deep consultation" may be required where there is a strong claim to the Aboriginal right or title, or where the risk of non-compensable damage to the right or title is high (paragraphs 43-44).

(ii) Accommodation

Good faith consultation efforts by the Crown and affected Aboriginal groups may, in turn, lead to an obligation to accommodate Aboriginal concerns. Where a strong *prima facie* case exists and the consequences of a proposed decision would affect it in a significant way, addressing Aboriginal concerns may require "taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim" (paragraph 47). The accommodation required is a process of "seeking compromise in an attempt to harmonize conflicting interests" (paragraph 49).

(iii) No Obligation to Obtain Aboriginal Consent

The Supreme Court confirmed that the final decision regarding balancing of Aboriginal and societal interests rests with the Crown. While the Crown is obligated to consult in good faith with the affected Aboriginal group, Aboriginal consent is not required. The court emphasized that Aboriginal groups do not have a veto over government decisions made pending final proof of their asserted rights or title. The Crown is not required to act in the best interests of the Aboriginal group, as a fiduciary, in exercising discretion.

The Court found that the duty to consult rested solely with the Crown and did not extend to Weyerhaeuser.

II. *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*

(a) Background and Lower Court Decisions

The *Taku* case, like *Haida*, involved a judicial review pursuant to the British Columbia *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Redfern Resources applied in 1994 for approval from the British Columbia government to reopen, and to build a road to, the old Tulsequah Chief mine, which had previously been operated in the 1950's. In 1998, a project approval

certificate was granted for the road over the objections of the Taku River Tlingit, following an extensive three-and-a-half year environmental review process.

Unlike the governmental decision at issue in *Haida,* the decision-making process reviewed in *Taku* followed a recommendation resulting from an established regulatory scheme. When the application was first made, the governing legislation was the *Mine Development Assessment Act*, S.B.C. 1990, c. 55, which, in 1995, was replaced by the *Environmental Assessment Act*, R.S.B.C. 1996, c. 119. (The *Environmental Assessment Act* was subsequently amended again, S.B.C. 2002, c. 43.) One of the purposes of the *Environmental Assessment Act* (as it read at the time), set out in former section 2(e), was "to provide for participation, in an assessment under this Act, by... first nations ...". Under the Act, a "project committee" had to be established and a number of groups had to be invited to nominate members to the committee, including "any first nation whose traditional territory includes the site of the project or is in the vicinity of the project" (former section 9(2)(d)).

The Taku River Tlingit were invited and agreed to participate in the project committee, as well as sub-committees formed to deal with Aboriginal concerns and issues around transportation options. The primary concern of the Taku River Tlingit concerned the 160-kilometre access road from the mine, which traversed a portion of their traditional territory. They took the position that the road ought not to be approved in the absence of a land use planning strategy and that the matter should be dealt with at the treaty negotiation table. The Taku River Tlingit were advised that these issues were outside the scope of the environmental assessment process, but were referred to other provincial agencies and decision-makers. A consultant was engaged to undertake traditional land use studies and addressed issues raised by the First Nation. The consultant's report was included in the Project Report prepared by the proponent. The consultant was also engaged to prepare an addendum report addressing additional concerns raised by the First Nation following their review of the initial consultant's report.

The majority of the project committee members agreed to refer the application for a project approval certificate to the Ministers for decision. The committee prepared a written

recommendations report. The Taku River Tlingit disagreed with the recommendations contained in the report and prepared a minority report stating their concerns with the process and the proposal. In March 1998, the Ministers issued the Project Approval Certificate, approving the proposal, subject to detailed terms and conditions.

In February 1999, the Taku River Tlingit challenged the Minister's decision to issue the Project Approval Certificate by way of judicial review proceedings on both administrative law grounds and on grounds based on the Taku River Tlingit's Aboriginal rights and title. The issue of determining its rights and title was severed from the judicial review proceeding and referred to the trial list (1999 CanLII 5674 (B.C.S.C.)), leave to appeal denied, June 25, 1999 (1999 B.C.C.A. 442); application to review refusal of leave dismissed, September 22, 1999 (1999 B.C.C.A. 550).

In the judicial review proceedings, the Chambers Judge, Kirkpatrick J., concluded that the Ministers should have been mindful that their decision might infringe on Aboriginal rights, and they had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the Taku River Tlingit's concerns. She also found for the Taku River Tlingit on administrative law grounds (2000 B.C.S.C. 1001).

The British Columbia Court of Appeal dismissed the Province's appeal in a 2-1 decision. Both the majority and the dissent appeared to conclude that the decision complied with administrative law principles (see paragraph 18 of the reasons of Madam Justice Southin, which, on the administrative law grounds, appears to be accepted by the majority (2002 B.C.C.A. 59)). The majority held that the Province had failed to meet its duty to consult and accommodate the Taku River Tlingit. The dissenting judge, Southin J.A., found that the consultation undertaken was adequate on the facts.

(b) *Taku* – Supreme Court of Canada Decision

The Supreme Court of Canada allowed the appeal. It found that the Province was under a duty to consult with the Taku River Tlingit in making the decision to reopen the mine. The

Province was aware of the Taku River Tlingit's claims by virtue of its involvement in the treaty negotiation process, and also knew that the decision to reopen the mine had the potential to adversely affect the substance of the Taku River Tlingit's claims, which, on the basis of the principles established in *Haida*, meant that the Province was under a duty to consult with the Taku River Tlingit (paragraphs 23-28).

In considering the scope and extent of the Province's duty to consult and accommodate (which 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 of the right or title claimed), the Court found that acceptance of the Taku River Tlingit's title claim for negotiation under the B.C. Treaty Commission Process established a *prima facie* case in support of its Aboriginal rights and title. The Court clarified that an Aboriginal group need not be accepted into the treaty process for the Crown's duty to consult to apply to them. However, the Court suggested that acceptance of a title claim for negotiation establishes a *prima facie* case in support of Aboriginal rights and title (paragraph 30). Regarding the seriousness of the potential impact, the Supreme Court also found that, while the proposed road would occupy only a small portion of the territory over which the Taku River Tlingit asserts title, the potential for negative derivative impacts on the Taku River Tlingit's claims was high. The Court concluded that the Taku River Tlingit were "entitled to something significantly deeper than minimal consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation" (at paragraph 32). The Court concluded that the consultation provided by the Province was adequate (paragraph 39).

III. *Haida* and *Taku* and Administrative Law

The following section attempts to distill from the *Haida* and *Taku* decisions the essential points that would be of interest to practitioners of administrative law.

(a) Duty to Consult and the Standard of Review

The Supreme Court of Canada decision in *Haida* discussed the applicable standards of review, despite the fact that it was not reviewing the result of a process established to

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".

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[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 judiciary 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 (*Gitxsan 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." (*Gitxsan*, paragraph 81)

The *Gitxsan* 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 corportation, 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 privates 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.

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[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 abonginal 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 phase "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.

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[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 Bank 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 where 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 <u>any interference</u> 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 decision[5] 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.

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[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

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[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

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[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,

ii. 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 Mowhi 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 Mowhì Gogha Dè Niitlèè (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 Niitlèè (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

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.

In addition, we note that there has already been litigation with respect to the NEB's Northern Pipelines Decision and the application and scope of the NPA related to activities undertaken by Foothills as part of its Pre-Build. While this litigation confirmed the validity of the present authorizations, it may be indicative of the fact that various stakeholders, including Aboriginal and Environmental groups, will not hesitate to become actively involved in the overall governmental and regulatory/environmental process to consider such a Project. In our view, there is likely to be a strong correlation between the number of potential procedural or process challenges and a delay in the proposed schedule.

It is also of note that TransCanada's AGIA Application identifies some forty First Nations groups that it views as legitimate stakeholders in the Yukon and British Columbia, in addition to six regional Environmental groups that would be included in stakeholder consultation. We observe that this list does not address any Alberta based First Nations or Environmental groups; and does not take into account a number of national environmental entities that could easily become involved in a Project of this magnitude. From the above, it appears fairly clear that a large number of potential stakeholders will be very interested in any pipeline proposal ultimately brought forward by TransCanada. Such parties could seek to use any forum available to them to advance their positions, including recourse to the Courts.

In terms of the potential involvement of these parties, other intangible factors must also be considered. The fact that projects of this scope and magnitude do not take place very often, and hence will attract considerable attention, will inevitably act as an impetus for parties to use this venue as an opportunity to pursue public policy issues. This is also true of First Nations and Environmental groups who seldom get such a high profile forum to pursue issues of concern to them.

With respect to First Nations, it has been observed that the initial response of a number of Aboriginal entities located in the State of Alaska has been positive and they appear to be supportive of the Project. In our view, it is possible that a different 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 Decision[1] 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

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[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

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[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

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[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 I – 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]

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[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 NEBAct.

[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.

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[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.

Recently, more favourable market conditions have rekindled interest in exploring options for bringing Alaskan gas to markets. In response, the NP Agency has reportedly been taking measures to address the commitments of the Government of Canada that are embodied in the NPA.[20] According to a recent Treasury Board of Canada Report, during 2007-2008, it is anticipated that the NP Agency will continue to work with other federal agencies, provincial and territorial governments, First Nations and the public to meet the objectives of the NPA. Furthermore, "in anticipation of receiving detailed project plans from Foothills, the NP Agency has begun reviewing key issues, including environmental concerns and First Nations interests. During 2007-2008, the NP Agency will be occupied with the development of plans to regulate and facilitate the construction of the pipeline."[21] This indicates that the NP Agency is aware that TransCanada may soon be in a position to proceed under the NPA and is in the process of preparing for such an eventuality. While these preparatory actions may serve to facilitate and expedite consideration of the detailed project plans, the status of current initiatives is far from clear given the limited public information available. At present, the approval process that may be followed by the NP Agency and the nature and extent of coordination are not known.

It seems clear, however, that in the event a detailed project plan is received and commercial arrangements to support construction of the project are finalized, the NP Agency would be called upon to significantly increase its activity levels. According to the referenced Treasury Board of Canada Report, the earliest this is expected to occur is 2008-2009. At present, the Agency's budget provides for only two FTE's, although it is recognized that the resource levels for future years may need to be adjusted depending on the actual level of activity in the Foothills project. Interestingly, the costs of the NP Agency are fully recovered from Foothills pursuant to section 29 of the NPA and determined in accordance with section 24.1 of the NEB Act and the NEB Cost Recovery Regulations.

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[20] RPP 2007-2008 - Northern Pipeline Agency Canada, Treasury Board of Canada Report, available at: http:www.tbs-sct.gc.ca/rpp/0708/npa-apn/npa-apn01_e.asp.

[21] RPP 2007-2008, *supra*

Likewise, the Treasury Board Report confirms that the NP Agency's jurisdiction extends only to the Foothills project, as authorized under the NPA. While it appears that Foothills intends to file detailed project plans to complete the project, and has asked that the NP Agency "prepare to expeditiously consider these plans and to facilitate construction", the natural gas producers "who hold the rights to extract gas in Alaska, have indicated their interest in applying for new certificates under the NEB Act to build a pipeline to bring the gas to markets south of the 60th parallel".[22] Should such a competing Third Party proposal be filed, it would be subject to the NEB and CEAA approval process, typically applied to "Greenfield" pipeline projects, and not the NPA process. While the potential impact of the recently announced Major Projects Management Office can not be assessed with any degree of certainty at this point, it is our view that a third party project could take at least 7 – 8 years to complete. In this regard, we observe that Conoco's November 30, 2007 filing with the State of Alaska contained a timeline, which it characterized as "streamlined", that covered approximately 10 years from the establishment of the necessary framework to pipeline operations. Of this time, it appears that Conoco was allowing approximately 5 ½ years from the present time to the commencement of construction. Conoco described the "streamline" process as one that is completed "without delay". Given the numerous issues that Conoco or any other third party pipeline proponent (such as the recently announced BP/Conoco proposal) is likely to fail, we do not attach a high probability to actually being able to achieve this schedule.

b. Organizational Structure

The organizational structure of the NP Agency is defined by the Act, with specific responsibilities shared between the Minister, Commissioner, Administrator, Designated Officer and NEB. As TransCanada appears to be relying heavily upon the NPA for the requisite approvals, a brief examination of this organizational structure is warranted.

Minister of Natural Resources

[22] *Ibid.*

The NP Agency reports to Parliament through the designated Minister who is responsible for the management and direction of the Agency. At present, the designated Minister is the Minister of Natural Resources ("Minister").[23]

Under Section 10 of the NPA, the Minister is authorized to:

- Exercise the powers, duties and functions of other Minister's or agencies as may be transferred by the Governor in Council;
- Consult with provincial and territorial governments to coordinate and review the activities of the Agency and those governments;
- Enter into agreements with provincial and territorial governments as necessary to obtain the objectives of the Act and to coordinate and review the activities of the Agency and those governments;
- Oversee and survey all aspects of the planning, construction and procurement of the pipeline; and
- Consult with appropriate authorities of the United States for matters arising under the Agreement.

Consistent with the intent that the Agency act as a "single window", the Governor in Council ("GIC") may by order, transfer duties and functions of any federal minister, department or agency to the minister responsible for the NP Agency and that minister may carry out those duties and functions in relation only to the Canadian section.[24] Certain powers, duties and functions of the Ministers of Indian Affairs and Northern Development,[25] Environment[26] and Fisheries and Oceans[27] have been transferred to

[23] NPA at ss. 5(1) and (2). Although originally the Minister responsible for the NPA was the Minister of State for Economic Development, this was changed to the Minister for International Trade, and the Minister of Energy. P.C. 1979-2656, C. Gaz. 1979.II.3683 and SI/95-17. The Agency was transferred to the NRCan portfolio in February 2004.

[24] TransCanada AGIA Application, page 2.2-75. See also: NPA, s. 15.

[25] The transferred powers are those under the *Northern Inland Waters Act* and the *Territorial Lands Act*, P.C. 1980-2316, C. Gaz. 1980.II.3162. See Review and Regulatory Processes, *supra*.

[26] The transferred powers are those under the *Migratory Birds Act*, the *Clean Air Act*, the *Environmental Contaminants Act* and the *Canada Wildlife Act*, P.C. 1980-2316, C. Gaz. 1980.II.3162. See: Review and Regulatory Processes, *supra*.

[27] The transferred powers are those under the *Fisheries Act*, P.C. 1980-2316, C. Gaz. 1980.II.3162. See: Review and Regulatory Processes, *supra*.

the Minister "in relation to the pipeline only". Transfer of such authority is reported to have occurred in 1980. Furthermore, in 1983, the following additional powers, duties and functions were reportedly transferred to the Minister:[28]

- The NEB under Parts I, II and III of the *Gas Pipeline Regulations*;[29]
- The Minister of Indian Affairs and Northern Development to control, manage and administer certain territorial lands required for the pipeline;[30] and
- The Minister of Environment to administer, manage and control those lands in Kluane National Park Reserve required for the pipeline.[31]

This suggests that the Minister will be responsible for issuing a number of different approvals in respect of the pipeline other than those required under the NPA, including for example, approvals under the *Fisheries Act* in relation to the pipeline. As will be discussed below, this could have important implications, as normally such approvals could trigger the involvement of agencies such as the Canadian Environmental Assessment Agency ("CEA Agency"). Moreover, the ability of the NP Agency to undertake these activities will require additional senior staff, likely from other federal departments. In this regard, the GIC on the request of the Minister is authorized under Section 12(5) of the NPA to direct any department or agency of the Government of Canada to second to the NP Agency, for specified periods, officers and employees necessary for the proper conduct of the work of the NP Agency. As well, the Agency may obtain the advice and assistance of any department or agency of the Government of Canada.

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[28] Review and Regulatory Processes, *supra*.

[29] P.C. 1981-2412, C. Gaz. 1981.II.2762 and P.C. 1983-1078, C. Gaz. 1983.II.1643. As the author notes in Review and Regulatory Processes, *supra*, these regulations were later repealed when they were consolidated with the *Oil Pipeline Regulations* to create the *Onshore Pipeline Regulations* (P.C. 1988-1719, C. Gaz. 1988.II.3790 and P.C. 1989-1091, C. Gaz. 1989.II.2991; *Onshore Pipeline Regulations*, SOR/99-294). An analysis of whether the Agency Minister has retained powers under the *Onshore Pipeline Regulations* that are akin to those previously transferred is beyond the scope of this research.

[30] *Transfer of Powers, Duties and Functions (Territorial Lands) Order*, P.C. 1983-3690, C. Gaz. 1983.II.4378.

[31] *Transfer of Powers, Duties and Functions (Kluane National Park Reserve Lands) Order*, P.C. 1983-3692, C. Gaz. 1983.II.4380.

The Minister also has a number of specific responsibilities and duties under Schedule III of the NPA that must be satisfied prior to construction. For example, as described by R. Cowling:

> "Foothills is required to submit to the Minister a detailed manpower plan and to design a program for Canadian participation and content in procurement of goods and services for the pipeline.[32] The Minister also has responsibilities in relation to approving the financing of the pipeline, overseeing the costs incurred and projected for the pipeline and the progress of the planning and construction of the pipeline, as provided by Foothills in quarterly reports.[33]"

The NPA also requires Foothills to provide proof to the Minister and the Board that the necessary regulatory approvals have been obtained before construction can commence[34]

As noted by TransCanada, the responsible Minister is also authorized to undertake consultations and enter into agreements with the governments of the Provinces and Territories in Canada, as required, to co-ordinate all aspects of the project as they affect different jurisdictions.[35] As mentioned above, while there appears to have been some preliminary discussion regarding coordination of the required process, there is no evidence to support a position that this has been advanced to any meaningful degree. The overall process to coordinate the various bodies that could potentially be involved in the Alaskan Pipeline Project could take a considerable period of time (18-24 months). We would note that this was the recent experience with the Mackenzie Gas Pipeline.

The Commissioner

The NP Agency has one senior officer, a Commissioner appointed by the Governor in Council.[36] Acting under authority delegated by the Minister, the Commissioner serves as deputy head of the NP Agency in Ottawa and has prime

[32] NPA, Schedule III condition 9-10.
[33] NPA, Schedule III condition 12-15.
[34] NPA, Schedule III condition 17.
[35] TransCanada AGIA Application, page 2.2-75.
[36] NPA, s. 6(1).

responsibility for advising the Minister on matters of policy. The Deputy Minister of NRCan has been Commissioner of the NP Agency since February 2004 (currently Cassie J. Doyle).[37] At present, the only office in the NP Agency that is staffed is the Office of the Commissioner, which maintains a small support staff. The Commissioner has reportedly appointed the Comptroller as Assistant Commissioner of the Agency.

Given the low level of activity, arrangements are reportedly in place whereby the NP Agency relies largely on NRCan for administrative and technical assistance. The NPA also receives policy advice from NRCan and other federal departments.[38]

The Administrator and/or the Designated Officer

Provision is made under the NPA for appointment by the GIC of an Administrator to assume responsibility for day-to-day operations of the NP Agency.[39] The GIC can appoint an officer to be called the Administrator or can appoint a member of the NEB to be the Administrator[40], in which case the person is referred to as the Designated Officer.[41] At the present time, based on the information available, it appears that the Administrator and Designated Officer positions are vacant.[42]

Although the office is currently vacant, it is important to note that the Designated Officer is granted broad powers under the NPA including the power to, in respect of the pipeline, exercise and perform any of the powers, duties and functions of the NEB, as delegated by order of the NEB, except those as exempted under subsection 7(1) of the NPA.[43] The materials examined indicate that a number of NEB Orders were made in 1978 and 1983 to delegate responsibilities to the Designated Officer. However, these

[37] RPP 2007-2008, Northern Pipeline Agency Canada.
[38] RPP 2007-2008, Northern Pipeline Agency Canada.
[39] NPA, s. 6(2).
[40] *Ibid.*
[41] "Designated Officer" is defined in ss. 2(1) and 6(4). See Review and Regulatory Processes, *supra*.
[42] RPP 2007-2008, Northern Pipeline Agency Canada.
[43] NPA, ss. 6(2) and 7(1).

were later revoked in 1985.[44] The result being that these responsibilities again reside with the NEB.

The Act also grants the Designated Officer direct powers. For example, it authorizes the Designated Officer to:

- Certify copies of the approved plan, profile and book of reference, and to certify certain permits under the NEB Act,[45]
- With the concurrence of the Minister, to issue such orders and directions to Foothills and grant such approvals as may be necessary to carry out the terms and conditions of the Certificates;[46] and
- The Board or the Designated Officer may rescind, amend or add to the terms and conditions set out in Schedule III or deemed to be set out therein (with the approval of the Governor in Council).[47]

Furthermore, the NPA authorizes the Minister to transfer Ministerial powers, duties and functions to the Administrator.[48]

The NEB

As noted, 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 Certificates are declared in the NPA to be issued pursuant to section 52 of the NEB Act.[49]

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[44] See NEB Orders No. NPO-1-78, AO-1-NPO-1-78, AO-2-NPO-1-78 and RO-NPO-1-78. As referenced in: Review and Regulatory Processes, *supra*.

[45] NPA, s. 7(2)(a).

[46] NPA, s. 22(1).

[47] NPA, s. 21(4). See for example, the five Zone Specific Socio-Economic and Environmental Terms and Conditions discussed in more detail below.

[48] NPA, s. 6(3). It is reported that in 1980, certain of the Ministerial powers, duties and functions were granted to the Administrator for the Pre-Build sections only. See: Review and Regulatory Processes, *supra* at 80: "The Minister of State and Economic Development delegated the authority to the Administrator to exercise and perform the Ministerial concurrence required by section 22(1) [then section 21(1)] in regard to some of the orders, directions and approvals issued or granted by the Designated Officer to the Pre-Build sections of the pipeline, see Lucas, Appendix 3."

[49] NPA, s. 21(2). TransCanada AGIA Application, page 2.2-74.

Like the responsible Minister and Designated Officer, the NEB has specific responsibilities under the NPA with respect to the pipeline. These include the power to:

- Rescind, amend or add to the terms and conditions as found or deemed to be in Schedule III of the Certificate, with the approval of the Governor in Council;[50]
- Make orders with respect to traffic, tolls and tariffs;[51]
- Approve, in conjunction with the Minister, Foothills' financing plans;[52]
- Foothills must provide proof to the Board that it has obtained all necessary regulatory approvals prior to construction;[53]
- Grant leave to open the pipeline pursuant to Section 47 of the NEB Act; and,
- Ensure compliance with NEB Act regulations.

The NEB Act also provides the ability of the NEB to recover from Foothills all costs incurred by the regulatory authority in scrutinizing and monitoring the planning and the construction of any pipeline from the time of certification until one year after leave to open the system is granted. As a result, TransCanada will be obligated to cover the related costs of both the NP Agency and the NEB.

Both the NEB and Designated Officer are subject to direction in the exercise of their responsibility by the GIC.[54]

Consultative and Advisory Councils

To further assist the Minister in carrying out the NPA's mandate, there is provision for federally-appointed advisory councils. As recognized by TransCanada, the function of these councils is to facilitate communication and consultation.[55]

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[50] NPA, s. 21(4).

[51] NPA, Part II modifies Part IV of the NEBA to establish rates, tariffs and tolls.

[52] NPA Schedule III, Condition 12(1). The NEB also has responsibilities in relation to overseeing the costs incurred and projected for the pipeline, the financing of the pipeline, and the progress of the planning and construction of the pipeline, as provided by Foothills in quarterly reports: NPA, Schedule III, Conditions 14-16. As referenced in Review and Regulatory Processes, *supra*.

[53] NPA Schedule III, Condition 17.

[54] NPA, s. 20.

According to the referenced Treasury Board of Canada Report, two such councils were established:

- A council consisting of Aboriginal, business and other parties representing communities in the Yukon; and
- A council for northern British Columbia.

Membership in these councils has however lapsed in view of the limited activities of the Agency in recent years.

c. Terms and Conditions

Under the NPA, the Certificates are subject to extensive terms and conditions detailed in the legislation. An integral part of the Agency's role is related to addressing these broad terms and conditions. These conditions must be satisfied before construction can commence. As the NPA is silent regarding process, it is unclear how a request for confirmation of compliance would be considered. If however a public process would be involved, which appears likely, this could have timing implications.

The initial legislative bill set out certain general terms and conditions relating to such matters as the input of Canadian manpower, goods and services, the design, specification and routing of the system, and the avoidance or minimization of adverse socio-economic and environmental impacts.[56]

As referenced above, the Foothills companies are also required to submit extensive information and, in many cases, to obtain federal approval with regard to such factors as costs, financing plans, shipper and producer contracts, operating and safety manuals, and collective agreements. The general terms and conditions require Foothills to comply with all undertakings it made before the NEB to achieve the greatest possible economic and social benefits from the project and to minimize adverse social and environmental effects. While we have not had the opportunity to examine in detail

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[55] TransCanada AGIA Application, page 2.2-75.

[56] Commons Debates, February 13, 1978 at 2790.

all of the undertakings made by Foothills during the NEB Northern Pipelines hearing, it could take considerable time and effort to comply with this requirement.

In some cases, these general terms and conditions are supplemented and reinforced by more detailed guidelines and orders under the NPA. These detailed terms and conditions are contained in Schedule III, which sets out conditions relating to matters such as the design and construction of the pipeline, social, economic and environmental matters, remote communities, manpower and procurement, financing, general matters, and the Dempster Line.[57]

Additionally, comprehensive Socio-Economic and Environmental Terms and Conditions ("Zone Specific") were drafted and appended to the five Certificates in 1980 (excluding the Yukon Certificate).[58] These five Zone Specific Conditions are:

- *Northern Pipeline Socio-Economic and Environmental Terms and Conditions for the Province of Alberta* (Order NP-MO-1-80 dated 12 June, 1980);
- *Northern Pipeline Socio-Economic and Environmental Terms and Conditions for Southern British Columbia* (Order NP-MO-2-80 dated 12 June, 1980);
- *Northern Pipeline Socio-Economic and Environmental Terms and Conditions for the Swift River Portion of the Pipeline in the Province of British Columbia* (Order NP-MO-11-80 dated 29 August, 1980);
- *Northern Pipeline Socio-Economic and Environmental Terms and Conditions for Northern British Columbia* (Order NP-MO-12-80 dated 29 August, 1980); and,
- *Northern Pipeline Socio-Economic and Environmental Terms and Conditions for the Province of Saskatchewan* (Order NP-MO-13-80 dated 29 August, 1980).

The Zone Specific Conditions were made by order of the Designated Officer, and approved by Order in Council. The effect of the Orders is to rescind Condition 7 of

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[57] Review and Regulatory Processes, *supra*.

[58] NPA ss. 21(3) and 22(2).

Schedule III[59] as well as those undertakings deemed to be included in Schedule III pursuant to subsection 22(2) of the NPA,[60] and replace these conditions with the five new, and more detailed, Zone Specific Conditions.[61] Again, no set of Zone Specific Conditions was adopted for the Yukon. Therefore, it appears that Condition 7 of Schedule III and Subsection 22(2) of the NPA still apply in respect of this zone.[62]

As explained by TransCanada, "these specific terms establish what conditions must be satisfied and what plans or programs must be developed (and approved) before construction can begin. These plans and programs are intended to ensure protection and enhancement of the environment; provide social and economic benefits and opportunities and, in every case, avoid or mitigate the potential for adverse effects".[63] In essence, they detail the socio-economic and environmental standards that Foothills is expected to achieve in respect of those particular zones. As further explained by R. Cawling:[64]

> The Regional Conditions differ for each of the three provinces, with the three British Columbia terms and conditions also containing Environmental Guidelines. Examples of environmental terms and conditions that were common to all five plans are: terrain, landscape and waterbodies; reclamation and revegetation; air quality; noise; agricultural land; wildlife; fisheries; and, special interest areas. Pursuant to the Regional Conditions, Foothills is required to submit a series of plans to the Designated Officer

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[59] This condition requires Foothills to comply with the undertaking given to the NEB during the Northern Pipeline hearing, as amended during the hearing or as may be made by orders or directions given by the Designated Officer.

[60] This section states:

Every undertaking given by Foothills Pipe Lines (Yukon) Ltd., the Alberta Gas Trunk Line (Canada) Limited, Westcoast Transmission Company Limited and Alberta Natural Gas Company Ltd. And in the submission of the Alberta Gas Trunk Company Limited to the Board, as amended during the Hearing is deemed to be:

(a) an undertaking of every company in so far as the undertaking relates to the company and to the portion of the route indicated in the Agreement in respect of that company; and

(b) a term or condition set out in Schedule III.

[61] An exception to the removal of the requirement to meet the undertakings was the continuing requirement for Foothills to compensate for hunting and trapping losses due to the pipeline activities. See Introduction, page (i) in each of the Regional Conditions.

[62] See: Review and Regulatory Processes, *supra*.

[63] TransCanada AGIA Application, page 2.2-75.

[64] See: Review and Regulatory Processes, *supra*.

indicating how it intends to proceed.[65] These plans are to be made available to the public at the Agency's offices.[66]

For the Yukon, Condition 7 requires that Foothills comply with the undertakings for social, economic and environmental matters given to the NEB, as amended during the hearing or by orders or directions of the Designated Officer. Condition 8 further stipulates that:

8. Prior to the approval of the final detailed design of each section or part of the pipeline, the company shall submit to the Designated Officer:

(a) the results of such further studies in respect of social and economic matters and environmental, fisheries and agricultural concerns as may be ordered or directed by the Designated Officer; and

(b) the recommendations of its environmental consultants for the protection of fisheries, farm lands and the environment.[67]

If the conditions under the NPA are not satisfied, there is an issue regarding whether Foothills has the right to exercise any rights pursuant to the NPA Certificates. As stated above, while the process for the fulfillment of these extensive terms and conditions is not clear, it appears that even if TransCanada can rely solely on the NPA, it has acknowledged that a transparent and public process will be required to examine these matters. In our view, such a process could well be extensive and will have a direct impact on the timing of the Project.

D. POTENTIAL ISSUES AND CONCERNS

Based on our review of the numerous issues that could potentially arise, including matters previously identified by TransCanada and other parties, there appear to be a number of matters that TransCanada should reasonably expect to encounter. These matters could result in an extension of the five and one-half timeframe identified by TransCanada in the AGIA Application for the completion of the pre-construction approval phase of the Project. TransCanada has clearly indicated that it will rely heavily upon the NPA and the NP Agency for a consideration of its proposal. This approach is

[65] See Introduction, page (ii) In each of the Regional Conditions.
[66] See Introduction, page (ii) In each of the Regional Conditions.
[67] NPA, Schedule III, at s. 8.

consistent with the "single window" concept reflected in the NPA. However, to the extent that TransCanada places undue reliance upon the NPA, it could actually delay TransCanada's timeline, as it is likely to lead to challenges that will take time to resolve. However, if TransCanada adopts a broad-based approach, of including all potentially impacted agencies, tribunals, and interested parties in the process to examine the Project proposal (while still maintaining that the NPA approvals provide it with a "single window" process for addressing issues) it may diffuse many of the process and procedural arguments that would otherwise be available to parties.

We note that the subject AGIA Application contains certain comments that leads one to believe that TransCanada will adopt a more "all encompassing" approach to seeking required approvals for the Project. In this regard, we observe that in its Application TransCanada has indicated that the Project will meet all "current" standards (see Executive Summary, p. 2) and that it anticipates a transparent and public process to examine its Application (p. 2.2 – 75). TransCanada does not specifically identify the type of process it is contemplating or whether such process would provide a venue to obtain public input from all impacted stakeholders. These will be important considerations for TransCanada to address as it moves forward.

With regard to the potential for delay, TransCanada's AGIA Application, Section 2.7 – Risk Factors enumerates a number of items that would be seen as "risks" for the Project. It is noteworthy that one of the major consequences resulting from any of these identified risk factors coming to pass is a scheduling delay for the Project. This portion of the Application appears to acknowledge the extreme sensitivity of timing to the identified risk factors. TransCanada does not quantify the duration of any delay it would expect to occur if the identified risk(s) came to pass. As will be detailed below, in our view there are a number of additional factors which likewise could impact upon the timeframe outlined by TransCanada in its AGIA Application. As discussed at the outset, the approach adopted by TransCanada in bringing the Project forward will likely have a significant impact on its ability to achieve the desired timeline.

A summary of the major issues that could impact upon TransCanada's proposal is provided below.

1. Continued Applicability of the NPA Approval

As aptly demonstrated in the past submissions of Alliance and Enbridge, there is a risk that parties will challenge the general applicability of the NPA to the circumstances confronting the Project today. Based on information we have reviewed, this argument also appears to be supported by certain producers, including ConocoPhillips and Exxon-Mobil. In this regard, we note that one of the main purposes of the NPA is to facilitate the "efficient and expeditious planning and construction of the pipeline". One could argue that this objective is of questionable relevance today, given the approximate thirty year delay in advancing the Project. We also 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.

Over the intervening period, since TransCanada's original filing, not only has the overall policy and regulatory context shifted, but the Canadian environmental assessment policies and processes have matured. Additionally, requirements under other legislation that may be applicable to any Alaska Pipeline Project filing have changed since the time of the original examination. Statutes such as CEAA now mandate a process that includes a full and comprehensive assessment of pipeline projects. The current process is certainly different than at the time the original approvals were granted, which occurred under the then existing Federal Environmental Assessment and Review Process ("EARP"). Additionally, today Aboriginal rights have constitutional protection that guarantees consultation and participation by affected First Nations.

In our view, 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 more than eight years from initial regulatory process design to anticipated receipt of major regulatory approvals. Although there are some significant differences between the two projects, the Mackenzie Gas Project process may be viewed as broadly analogous in terms of regulatory complexity to the Project. In our view, there will clearly be an expectation that the Alaska Pipeline Project will be exposed to a rigorous process and not provided any short-cuts because of past approvals. Should TransCanada adopt a proactive approach that seeks to address identified concerns, it may be able to mitigate the risk of delay and enhance the prospect of achieving its "best case" scenario.

One of the main advantages offered by the NPA is the "single window", expedited regulatory approval process. However, at this point in time, it is unclear how much actual coordination is in place and exactly which governments, agencies and tribunals will seek to be involved. Even under the NPA itself there is considerable regulatory uncertainty regarding the approach that would be utilized to examine any TransCanada filing and an extended period may be needed to finalize the structure of the review process. To the extent that TransCanada is able to maintain the "single window" approach, contemplated by the NPA, it should be able to reduce delay and duplication of effort.

2. Technical Concerns with the Application of the NPA

The deemed Certificates of Public Convenience and Necessity granted to the Foothills affiliates under the NPA appear to contain a measure of flexibility. However, reliance on same may be met with opposition on the basis that any residual certificate rights held by Foothills under the NPA are antiquated or that the new proposal is outside the scope of the Project which was previously certificated.

Notwithstanding the potential for debate, the better view appears to be that the NPA and residual Certificate rights remain valid. The legislation by its terms continues to apply. There is no section in the Certificates that limits their validity by way of an expiration date. Although the underlying *Canada-U.S. Agreement on Principles* can be terminated, this can only occur after its initial term of 35 years, with twelve months

written notice by either party.[68] Therefore, the Agreement itself will remain effective until at least 2012.

The continued validity of the legislation and residual Certificate rights in the face of changed circumstances and delay is also supported by the fact that the NPA process has been relied upon as recently as 1998 in respect of the Pre-Build. The failure of Foothills to advance the northern portion of the pipeline for over thirty years, therefore, should not in itself foreclose reliance on the NPA. As explained in Driedger, "A statute is not repealed, nor does it expire, through the passage of time or by reason of non-use or obsolescence. Unless the legislature has fixed a limit for the duration of legislation, it continues in force until it is repealed".[69] Nonetheless, a protracted debate on this issue could well occur.

Assuming the NPA and Certificates remain valid, TransCanada's ability to rely on them will clearly depend on whether the TransCanada proposal is different from the project that was authorized by the NPA. The reasoning being that TransCanada should not have free rein to build a project that is substantially different from that which was considered and certificated[70]. Accordingly, there may be a risk to the extent that the new proposal deviates from the ANGTS template and details of the Canada-U.S. Agreement on Principles.

Based on the information available, it is difficult to determine with certainty the existence and materiality of any inconsistencies between the current Project and that approved under the NPA. However, issues could potentially arise in relation to matters such as the proposed route, flow rate, and system configuration. This concern may also be impacted by the proposed use of TransCanada's Alberta System, to the exclusion of other existing infrastructure.

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[68] Agreement at article 12.

[69] R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham: Butterworths, 2002) at 527. As further explained: "Under Anglo-American common law, all English statutes retain their potential for enforcement even though they may be disobeyed or left unenforced. As Shakespeare said "The law hath not been dead, though it hath slept"... Accordingly, the 1977 Northern Pipeline Act remains valid legislation even if the underlying energy policy has shifted in the past twenty-five years": Alexander J. Black, *Legal Principles Surrounding the New Canadian and American Arctic Energy Debate*, 23 ENERGY L.J. 81, 119 (2002).

[70] Alliance letter, *supra*.

With respect to the proposed route, it may be arguable, for example, that the TransCanada proposal seeks to revise the general route of the ANGTS pipeline described under the NPA. Annex I sets out the general route of the ANGTS pipeline. The route specified may be more appropriately termed a "general corridor" as the Terms and Conditions contemplate separate approval of the detailed route; presumably within or along this corridor.

The TransCanada Application defines the Project route with reference to the NPA and underlying Canada-U.S. Agreement on Principles. For example, the Executive Summary provides, at page 4:

> The pipeline route will follow the route set out in the Agreement Between Canada and the United States of America on Principles Applicable to a Northern Gas Pipeline ("Agreement on Principles") and the Northern Pipeline Act ("NPA") (1977-78, c. 20 R.S. 1985, c. N-26).

The more detailed sections of the Application pertaining to the route, however, suggest that there may be inconsistencies between the TransCanada proposal and the route set out in Annex I. While TransCanada maintains that the existing authorizations provide it with the necessary flexibility to accommodate its current proposal, it is not possible to confirm that this is the case based on the information available to date. As well, the materials provided by TransCanada make a broad assertion in this regard, but do not provide a detailed explanation of why this is the case.

Similar concerns may surface with respect to what is proposed in relation to the Alberta section of the Project. In this regard, TransCanada proposes the following:

> When Alaska's natural gas reaches the British Columbia/Alberta border, Foothills will construct the necessary additional facilities in Alberta to permit Alaskan gas to reach the Alberta Hub by integrating with TransCanada's existing pipeline system in Alberta and connecting to the Pre-Build.[71]

[71] TransCanada Proposal, Executive Summary.

According to more detailed information contained in Section 2.1 of the Application, the intent is for a portion of the initial Alaska gas to be transported using existing gas pipeline infrastructure downstream of Boundary Lake:

> This available capacity in the existing gas infrastructure would be supplemented by new incremental facilities to handle the remainder of the 4.5 bcf/d from Alaska. These new facilities will be built and owned by Foothills under the NPA connecting to the existing Pre-Build and would consist of pipe looping and new compressor stations" (Page 2.1-10).

It is unclear what the use of "available capacity in the existing gas infrastructure" means and whether it is intended to be broader than solely the use of the Pre-Build. This indeed appears to be the case given that TransCanada makes reference to the "Alberta System" in describing its plans:

> Currently the Alberta System has a Transportation by Others ("TBO") arrangement for Foothills Pre-Build facilities located within Alberta to transport WCSB gas. Such TBO arrangement between the Alberta System and Foothills would allow the Alberta System to utilize the new and existing Foothills facilities in Alberta to offer transportation to the Alaska Shippers. *When Alaska's natural gas reaches the BC/Alberta border, Shippers could contract with the Alberta System and enter the Alberta Hub.* (Page 2.1-11)
>
> [Emphasis added.]

The "Alberta System" for the purposes of the Application refers to "TransCanada Corporation's wholly-owned, 15,000 mile natural gas transmission system in Alberta which gathers natural gas for delivery to end users and to liquids extraction facilities within the province and for delivery through provincial export locates to major natural gas areas across North America".[72] Therefore, the Alberta System clearly includes more than the Pre-Build, but is limited to facilities which are wholly-owned by TransCanada affiliates.

If capacity exists on existing, alternate pipeline systems, an argument could potentially be made that expansion of the Pre-Build or construction of new facilities is

[72] TransCanada Application, Glossary.

unnecessary and would result in proliferation of facilities and unnecessary duplication. The forum for such a challenge is not clear, making it difficult to assess the process that would ensue. In any event, should such a challenge be brought, it could arguably result in protracted debate and delay. As mentioned above, should TransCanada demonstrate a willingness to work with other pipelines and gas producers on the optimal use of available infrastructure, this concern would likely be mitigated.

It may be open to interpretation whether the proposed configuration of the Project, including the Alberta Pre-Build, is even contemplated under the NPA.[73] In this regard, TransCanada is proposing that the annual average daily capacity of the Canada Section of the pipeline (northern section and Pre-Build) would be 4.5 bcf/d, with expansion capability (Page 2.1-9 and 2.1-10). This is significantly higher than the "initial" Alaska gas flow capacity of only 2.4 bcf/d contemplated under the Canada-U.S. Agreement on Principles.[74] While the expansion of pipeline capacity is arguably contemplated under Article 3 of the Agreement, this is subject to "regulatory requirements" being met. It is not entirely clear which "regulatory requirements" are to apply to such expansions. However, it is cautioned that there is an "expansion" provision under the NPA that has been referenced as applying to capacity expansions of the Canadian portion and thus potentially requiring a new certificate application to the NEB for any larger-scale project.[75] As discussed herein, the need to seek NEB approval would in tum, likely trigger the public hearing process, as well as a major review under CEAA. Clearly, such additional process, which is not contemplated in the TransCanada Application, could have timing implications.[76]

Similarly, in the event that it is not possible to accommodate the new proposal (and any material changes contemplated thereby to the proposed route, system configuration, etc.) under the NPA or an amendment thereto, then it would be necessary to bring applications pursuant to the NEB Act for approval to construct and operate the

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[73] This proposal calls for the expansion of the Pre-Build through looping and additional compressor stations to handle Alaska volumes not accommodated by the existing gas infrastructure.

[74] NPA, Schedule I, Section 3.

[75] Alliance Letter, *supra*.

[76] It appears that the Pre-Build Expansions did not trigger this provision since they did not exceed the "initial" capacity contemplated, although this has yet to be confirmed.

proposed project. In this regard, the need to seek NEB approval for facilities falling outside the ANGTS template is confirmed by the process applied in respect of certain aspects of the Pre-Builds. The decompression/recompression facilities, for example, applied for by Foothills in respect of the 1998 Pre-Build were considered to fall outside the scope of the ANGTS project and hence outside the scope of the NPA, since Alaskan gas was not planned to be stripped of liquids at Empress. Accordingly, the application for the de/re expansion facilities was made pursuant to the NEB Act and a screening performed pursuant to the CEAA.[77] The determination that the de/re facilities fell outside the scope of the ANGTS project was reportedly made following a referral by the Government of Canada to the Department of Justice.[78]

It is noted that the design of the balance of the 1998 Pre-Build expansion project consisting of the installation of 113 km of 42-inch diameter pipeline and various compression and metering facilities, all downstream of Empress on existing right-of-way and station sites was approved by the Northern Pipeline Agency. These facilities had previously been certificated under the NPA as part of the proposed ANGTS.[79]

Likewise, the other Pre-Build expansions appear to have fit within the parameters of the system configuration that was contemplated in the 1970s and therefore were subject to authorization under the NPA.

3. Required Environmental Assessment

As stated above, 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. There is no indication that TransCanada intends to conduct an assessment pursuant to CEAA or YESAA. Depending on the approach ultimately adopted by TransCanada, the process it seeks to employ could be challenged by a number of parties.

It is clear that, absent the NPA, certificates of public convenience and necessity would need to be obtained and the above referenced legislation would indeed apply.

[77] NEB News Release, January 20, 1997, "Foothills secures key regulatory approvals for 1998 Eastern Leg Expansion Project".
[78] Alliance Pipeline letter to the Right Ho. Paul Martin, P.C., M.P., Prime Minister et. al. dated February 22, 2006.
[79] NEB News Release, January 20, 1997, "Foothills secures key regulatory approvals for 1998 Eastern Leg Expansion Project".

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 (Application p. 2.2 – 75). However, the process for the examination of these reports and the determination of whether or not there are potentially significant environmental impacts has not been detailed. To the extent an open and comprehensive process is employed, the risk of a challenge is significantly reduced. Conversely, the opposite is also true.

Moreover, TransCanada does not discuss the potential applicability of environmental legislation in British Columbia ("B.C.") and Alberta to the Project. While we consider that the better view is that these processes are not applicable to a Federal pipeline, this issue could be debated, particularly if the Project is not exposed to a comprehensive environmental assessment under the referenced Federal legislation. Such debates have occurred in the context of other Federally regulated pipelines.

In this regard, TransCanada acknowledges that there "remains a significant compliance process" for the Project under the NPA "to ensure the Project meets all current standards" (Application Executive Summary, p. 2). TransCanada asserts that the "NPA is the primary legislative vehicle through which necessary regulatory approvals have been and will be delivered or coordinated in Canada for the Project", and that "the NPA provides a single window, expedited regulatory approval process for the continued development of the Project" (Application Executive Summary, p. 11). TransCanada outlines the following as the principal remaining approvals required for construction *and* operation of the Project through Canada (Application Executive Summary, p. 12; Application, p. 2.2-82 to 84):

- Leave to Proceed Order under the NPA [approval of detailed pipeline design and health, safety, employment, logistics, environmental and related plans for the Project].

- Approval of Plans, Profile, and Books of Reference [i.e. detailed route information] under the NPA.
- National Energy Board ("NEB") approval of tolling methodology and tariffs.
- Leave to Open the Project from the NEB [once post-construction safety tests are complete].
- Other Federal approvals, including authorizations under the *Fisheries Act*, R.S.C. 1985, c. F-14, the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22, and the *Species at Risk Act*, S.C. 2002, c. 29."
- Provincial and Territorial approvals, which TransCanada lists in detail under Appendix P2 of the Application, including approvals for water crossings and land use.

TransCanada further lists a series of Environmental Field Studies that it anticipates will be required in connection with the Canadian portion of the Project. These studies will be in relation to: air quality and noise modeling; soils and geology; fisheries, hydrogeology and hydrology; vegetation and wetlands; wildlife, including species at risk; and archeology and heritage resources (Application, p. 2.2-45 & 46). It appears that TransCanada will rely on the NP Agency to examine and assess these Environmental Field Studies. However, the manner in which public input will occur is not clear.

TransCanada does note that the NPA and construction of the Foothills Pre-Build predated the 1995 enactment of the CEAA, and the specific federal legislation for environmental assessments in Yukon, namely the YESAA, enacted in 2005. TransCanada also points out that a review of the environmental, social and economic impacts of the original Foothills Alaska Pipeline proposal was completed in 1982 under the Federal Environmental Assessment Review process in effect at the time (Application, p. 2.2-75).

TransCanada states (Application, *ibid.*) that:

> New and additional information will be required to meet mandatory conditions and prepare required plans and programs. The Foothills Subsidiaries will provide updated project, geophysical, environmental, social and economic information as part of its re-engagement of the NPA process (Intent to Proceed) and *fully expects* that such information and the sufficiency of plans and programs *will be evaluated through a transparent and public process under the NPA and any other applicable federal legislation* before receiving approval...
>
> [Emphasis added].

TransCanada does not, however, provide details on the public process it expects will be held to review a renewed Alaska pipeline proposal. However, it appears that TransCanada is of the view that CEAA and YESAA will not apply.

With respect to the time required to complete the environmental studies and regulatory review process for the proposed Project in Canada, TransCanada does not provide a firm indication of the time it will take to complete such processes and secure necessary approvals for the Canadian portion of the Project. TransCanada states: "With regard to the timing of seeking regulatory authorizations of the Canada Section of the Project, TransCanada will *target* to finalize relevant Canadian approvals by the same date as the FERC Certificate" (Application Executive Summary, p. 12). Assuming that the AGIA License is issued by April 1, 2008, TransCanada *commits* to apply by December 30, 2011 for a FERC Certificate of Public Convenience and Necessity for the Project (Application, p. 2.2-85). The Project Schedule then *estimates* that the FERC Certificate will be issued on August 30, 2013, five years and five months after the issuance of the AGIA License (Application, p. 2.6-2). By extension, TransCanada is targeting completion of "relevant Canadian approvals" for the Project within a five and a half-year period, commencing April 1, 2008. TransCanada describes this period as the "Project Development Phase" which it further divides into: (a) the "Proposal Sub-Phase"—from the issuance of the AGIA License to completion of the planned binding Open Season eighteen months later; and (b) the "Definition Sub-Phase" from the end of the Open Season to the "receipt of all major approvals" anticipated, as noted, by August, 2013 (Application, p. 2.6-1).

The objectives of the NPA discussed above suggest that considerable scrutiny will be given to the Project by regulators under the NPA, specifically the NP Agency (and the NEB), to ensure that these major policy/political objectives are in fact met. The NP Agency, working in close conjunction with the NEB, 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. In addition, as discussed in detail above, the federal Minister of Natural Resources has considerable responsibilities under the NPA that must be satisfied prior to construction. In addition, these bodies will be charged with ensuring that all applicable terms and conditions are properly fulfilled. As discussed, this could be an extensive undertaking.

As discussed above, to further assist the Minister in carrying out the NPA's mandate, there is provision for federally-appointed advisory councils. The function of these councils is to facilitate communication and consultation. These councils do not appear to be active at this point.

In sum, under the terms and conditions of the NPA, TransCanada will be required to submit extensive information and obtain a series of approvals from the Agency, the NEB, and the Minister of Natural Resources prior to commencing construction. These approvals relate to design and various other technical, environmental, socio-economic and commercial matters, including costs, financing plans, and operating plans. The exact process for determining the extent of information required for submission and the issuance of approvals is not pre-determined by the NPA. Process design will be up to the NP Agency, the NEB, and the Minister of Natural Resources and will require a significant degree of coordination between these bodies to ensure efficiency in requesting information from TransCanada, reviewing such information, allowing for public review/input and ultimately issuing approvals. In our view, coordination between these entities will be the minimum that is required. It is likely that additional bodies may wish to be involved and the process to successfully organize multiple authorities can take an extended period of time. This was recently experienced in the Mackenzie Gas Project.

4. Applicability of the Yukon Environmental and Socio-Economic Assessment Act

At the heart of the regulatory process for projects in the Yukon is the *Yukon Environmental and Socio-Economic Assessment Act,* R.S.C. 2003, c. 7 ("YESAA"). YESAA is a federal law establishing a unique assessment process for projects in Yukon, functionally replacing the application of CEAA to most Yukon projects (section 6), subject to certain exceptions discussed below in relation to the Project. The YESAA process applies to federal, territorial and aboriginal approvals required to enable a project in the Yukon.

The origins of YESAA lie within the land claims settlements between the Federal Government and Yukon First Nations. Chapter 12 of the *Umbrella Final Agreement* with *Yukon First Nations* called for the establishment by federal legislation of an assessment process that would apply on all lands of the Yukon: federal, territorial, First Nation and private. The Council of Yukon First Nations ("CYFN") and the Yukon Territorial Government agreed to work with the Government of Canada to jointly establish a unique development assessment process for the Yukon. YESAA is administered by the Yukon Environmental and Socio-Economic Assessment Board ("YESAB"), an independent arms-length entity, made up of seven Board members appointed by the Federal Minister of Indian and Northern Affairs, in consultation with the Yukon Government and Yukon First Nations. YESAA and YESAB have been in full effect since November 2005.

There are three criteria that must be met for a project proposal to require an evaluation under YESAA. The project must: occur in Yukon; be captured by the *Assessable Activities, Exceptions and Executive Committee Projects Regulations*, SOR/2005-380 (the *"Activities Regulations"*) and not exempted; and, meet one or more of the triggering circumstances listed in section 47 of the Act.

The Project would be caught by the *Activities Regulations* which includes under Schedule 3, s. 18, "Construction, operation, modification, decommissioning or

abandonment of an oil or natural gas pipeline 75 km or more in length if the pipeline is on a right of way developed for a power line, pipeline, railway line or road".

If a project is developed in the Yukon and subject to the *Activities Regulations*, then the final step to determining the application of YESAA is to determine if any of the triggering circumstances under s. 47 of the Act are met. These circumstances include the need for an authorization or the grant of an interest in land by a (federal or territorial) government agency, the NEB, municipal government or First Nation. The decision making bodies just listed are prevented from taking any decision to enable a proposed activity to proceed, until after the environmental assessment process under YESAA is complete (sections 82-84). The Project will require various regulatory authorizations from federal and territorial agencies (e.g. from the NEB as well as, Fisheries Act approvals federally, and water licenses and land use permits, discussed below, at the Territorial level). Therefore, it is clearly arguable that YESAA should apply to the Project unless TransCanada can successfully argue that the application of the NPA alleviates the requirement to subject the Project to the YESAA. It is also debatable whether a conflict would arise if both pieces of legislation were applied to the Project.

Note that YESAA does not include any transitional provisions equivalent to s. 74(4) of CEAA that would exclude the Project on the basis of its past genesis.[80] Moreover, YESAA expressly includes (section 94 to 101) provisions for the review of "existing projects", defined as a project that had already been undertaken or completed, but would have been subject to assessment under YESAA if proposed today. Consequently, even if it could be argued that the Project was not a new project for the purposes of YESAA, it would still be caught by the Act. It is also instructive that the Government of the Yukon takes the public position that the Project will be subject to YESAA (see: hhtp://www.emr.gov.yk.ca/pipeline/key_pipeline_interests.html), suggesting that an attempt to avoid the YESAA could bog TransCanada down in a dispute with the Territorial Government and likely others.

[80] YESAA does include certain transitional provisions, but in our view these would not be effective in excluding the APP from the operation of the Act.

If the YESAA is found to apply, the Project would likely be subjected to the most onerous form of assessment under YESAA, namely a public review panel. Ordinarily, as a major activity listed under Schedule 3 of the *Activities Regulations*, the Project proposal would first be submitted directly to the Executive Committee of the YESAB (skipping an evaluation by regional offices, utilized to review lower impact projects). The Executive Committee of YESAB would conduct a "screening" of the proposal. The Executive Committee consists of three designated YESAB members. During the conduct of a screening, the Executive Committee must consult with First Nations, government agencies, and regulatory bodies with an interest in the proposed project. The Executive Committee will also receive public comments during a specified comment period. At the conclusion of the screening process, the Executive Committee must refer a project to hearings—a review panel—if, *inter alia*, the committee concludes that a project is likely to cause significant public concern in the Yukon or involves technology that is controversial or for which the effects are unknown (section 58). In our view, after applying these criteria, the Project is most likely to be referred to a review panel by the Executive Committee. Public concern around the Project is expected to be significant. In this regard, it should be noted that the purpose of a YESAA assessment extends beyond a review of the environmental impacts of a proposed project to include an analysis of socio-economic impacts (section 5). Consequently, even if environmental issues are limited in relation to the Project, which is not expected to be the case, socio-economic issues will likely persist and justify a review panel to address public concern. Moreover, TransCanada states in its Application (p 2.2.-15) that "use of new technologies will be a key factor in efficiently implementing the Project". This use of new technologies in the Yukon would also justify a reference to a review panel to scrutinize the Project.

There are also several mechanisms for direct referral of a proposed project to a review panel under YESAA, thus skipping a screening of the proposal by the Executive Committee of the YESAB. First, the Federal Minister of Indian and Northern Affairs or the Federal Minister of Environment may request the YESAB Executive Committee to establish a panel review for a project where a federal decision maker has a role in enabling the project. Second, the Yukon Government may request a review for a project

requiring its approval. A request for review must be made jointly by the Yukon Government and the Federal Government, if both federal and territorial bodies have jurisdiction in relation to the proposed project (section 60(2)). This is the situation that would apply to the Project. Finally, a Yukon First Nation, with the consent of the Federal Minister of Indian and Northern Affairs and the Yukon Government (for projects requiring territorial approval), may request a panel review of a project. It is quite feasible, therefore, for the Federal and Yukon Governments to expedite the assessment of the Project under YESAA by requesting the YESAB Executive Committee to make a direct referral to a review panel (or permitting a First Nation to make such a request).

A review panel, involving public hearings, can be conducted by YESAB itself. However, when a review panel is required under YESAA, the Canadian Environmental Assessment Act may exceptionally apply in the Yukon. For a Yukon project requiring a YESAA review panel, the federal Environment Minister can require (sections 61 & 62) that YESAB choose between: (a) convening a federal review panel under the Canadian Environmental Assessment Act to replace the YESAB review panel; (b) creating a YESAB-CEAA joint review panel; or (c) establishing a joint review panel between YESAB and another environmental assessment agency with an interest in effects from the proposed project. The Federal Environment Minister can refuse to allow a stand-alone YESAB review panel, and effectively force YESAB to either allow itself to be replaced by a CEAA-convened panel or to compromise with a joint panel (sections 62 & 63). The purpose of these provisions appears to be to ensure a federal role in the review of major projects in the Yukon and to address trans-boundary impacts through a CEAA or joint-panel process to cover impacts beyond Yukon. In our view, these provisions provide an additional opportunity for a CEAA type process to be applied to the Project.

A further exception under which CEAA applies in the Yukon is found at section 6(2) of YESAA:

National Energy Board

> Sections 5 to 60 of the *Canadian Environmental Assessment Act* apply in relation to a project, *as defined in that Act,* that requires *an authorization* from the National Energy Board in order to be undertaken, but where the project is referred to a review panel under subsection 29(1) of that Act, the Minister of the Environment shall notify the executive committee of the referral, and section 63 of this Act applies as if that Minister had agreed to a request under paragraph 61(1)(*b*) [emphasis added].

The impact of this provision is that for projects that require an authorization from the National Energy Board —i.e. international or inter-territorial/provincial pipelines or power lines —CEAA applies in the Yukon, with one modification: if the NEB-regulated proposed project is referred to a panel review under CEAA, then the YESAB Executive Committee can request that the review be conducted by a joint CEAA-YESAB panel.

Arguably, the foregoing CEAA-related provisions are not entirely relevant to the Project because there are strong grounds for concluding that CEAA is not independently applicable to the Project, and thus would not be given effect by references within YESAA that give CEAA exceptional operation in Yukon. Assuming CEAA is not applicable, then one of two results seem plausible. Either YESAB would be left alone to conduct a review panel of the Project in the Yukon on a stand alone basis, or pursuant to section 61(1)(c), the Federal Environment Minister could require that YESAB conduct a joint panel review involving the NP Agency, in lieu of a joint YESAA-CEAA process. YESAA does not expressly provide for a joint YESAB-Northern Pipeline Agency process, but s. 67(2)(b) contemplates the creation of a joint panel between YESAB and any "authority having power to examine the environmental or socio-economic effects of the project, or of an activity that is to be taken partly outside Yukon and of which the project forms part." This definition appears sufficiently broad to encompass the creation of a joint YESAA-NPA process.

To date, no YESAA review panel (whether stand-alone or in conjunction with another process) has been held. A review of the *Rules for Reviews Conducted by Panels of the Yukon Environmental and Socio-economic Assessment Board* (the "Rules"), however, gives a limited sense of the time required for a review panel to be

completed. Upon the triggering of a review panel, the Rules give the YESAB Executive Committee up to five and one-half months to issue final guidelines for the preparation of an Environmental and Socio-economic Effects Statement ("ESE Statement") by the proponent for the project. The proponent must then take the time it requires to submit the ESE Statement. The Rules then give the YESAB Executive Committee up to four months to determine whether the information in the ESE Statement is sufficient. From this point, the Executive Committee has up to two months under the rules to convene the Panel (including the appointment of Panel members from amongst the YESAB membership) and to set terms of reference for the Panel. Within 90 days of its appointment, the Panel must commence a technical review of the ESE Statement and also an Information Request Process allowing parties (the proponent and interveners) to question their respective filings; ordinarily the technical review and Information Request process is to be completed within 90 days, but may be extended by the Panel. At the end of this stage, the Panel may seek supplementary information from the proponent, or proceed to the hearing. The duration of the hearing is at the discretion of the Panel. At the conclusion of the public hearing, a YESAB review panel can recommend that a project be allowed to proceed, be allowed to proceed with conditions, or not be allowed to proceed (section 72). The Rules give a panel up to five months to issue its recommendations. The Rules, in short, provide some control over the time required for a YESAB panel, but even so, the Rules contemplate a process of at least two years and potentially longer depending on the time required for the completion of all ESE Statement filings and hearings.

The Rules do not contemplate timing for a joint process between YESAB and another agency, but this would likely be longer than the time line set out in the Rules, to allow for coordination between the conjoined processes.

Once a YESAB review panel (or a joint YESAB panel) issues its recommendations, these must be considered by the relevant "decision bodies", as that term is defined under YESAA (at section 2). Decision bodies relevant to the Project would be the "territorial minister", i.e. the Yukon Government (the Executive Council

Office), and any federal departments that have the power to issue an authorization that is required for the Project to be undertaken.

A decision body in relation to a project must issue its Decision Document, responding to the panel recommendations, within the period prescribed by the *Decision Body Time Periods and Consultation Regulations*, SOR/2005-380: ordinarily, recommendations of a YESAB panel review must be responded to within 90 days (section 4(b)).

If a decision body disagrees with the recommendations of a panel of the YESAB, the decision body must refer the recommendations back to the Panel for its reconsideration (YESAA, section 76). The Panel then issues the recommendations anew (the same recommendation can be made as before), and the relevant decision bodies have a further 60 days to accept, reject or vary the new recommendations (*Decision Body Time Periods and Consultation Regulations*, section 5). Federal agencies are bound by YESAA to implement Decision Documents they issue in relation to a project (section 82). Where the Yukon Government is a decision body in relation to a project, all territorial departments, agencies and municipal governments are bound to implement the Decision Document issued by the Yukon Government (section 83).

In summary, TransCanada appears to be adopting a position that YESAA would not apply to the Project, based on the existing approvals and Project specific requirements of the NPA. As detailed above, there may be arguments why this view should not prevail. To the extent that TransCanada ultimately has to engage in a YESAA process it will likely extend the timeline for the Project. TransCanada should be able to minimize the impacts of any applicable YESAA process if it can take advantage of the opportunity to coordinate with other review processes at the outset.

5. 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. Failure to completely fulfill the obligation to consult that would be triggered by an Alaska Pipeline Project filing 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 would note that the matters raised herein would apply equally to a Third Party pipeline proponent. In fact, the consultations conducted by TransCanada, as well as the existence of its Yukon easement, should provide it with an advantage.

TransCanada's Application identifies approximately 40 First Nations Groups in the Yukon and British Columbia who are expected to be active stakeholders in any Alaska Pipeline Project application. In addition, there are several First Nations groups in Alberta who would likely become involved in this matter. First Nations play a unique role in the Canadian Regulatory process as they have an acknowledged constitutional right to be consulted on matters that could potentially impact them. This right has been reinforced repeatedly by recent case law and imposes a direct "duty to consult" on the Federal, Territorial and Provincial Governments involved. It is also arguable the project proponent itself has a duty to consult First Nations as part of its overall stakeholder consultation process. A failure to adequately consult is fatal to a project, as the Courts have consistently found that this provides a valid basis for refusing to allow the subject project to proceed, until this obligation is satisfied. Additionally, there is ample precedent for litigation on this issue taking several years to resolve. In short, this is one of the most critical issues that would face the Project and we do not consider that the NPA will assist TransCanada in reducing the duty to consult that would otherwise apply to it or the relevant Governments. As indicated at the outset, while impacted First

Nations may not "oppose" the Project per se, we are of the view that these groups will use the processes available to them to maximize the benefits to be derived from a project of this magnitude.

One area where First Nations are likely to be active is in land acquisition matters. In this regard, we will examine each of the areas where the pipeline is proposed to be constructed. Based on our review of available government maps, it appears that the Project route will potentially pass through several areas of Yukon where Final Agreements—settling outstanding land claims and clarifying aboriginal land ownership and other rights—have been reached with local First Nations. These areas are the traditional territories (from west to east along the proposed route) of the Kluane First Nation, the Champagne and Aishihik First Nations, the Kwanlin Dun First Nation, the Ta'an Kwach'an Council, the Carcross/Tagish First Nation, and the Teslin Tlingit Council. Two areas of Yukon will be traversed by the Project where land claims remain unsettled. In the west of Yukon, the White River First Nation has not settled its claims within a traditional territory that overlaps 100% with the traditional territory of the Kluane First Nation. In the east of Yukon, the Kaska Nation (comprised of the Kaska Dena Council, Ross River Dena Council and Liard First Nation) have not settled their land claim. It does not appear that Canada or Yukon are currently engaged in settlement negotiations with either the White River First Nation or the Kaska Nation.

In northern British Columbia no land claims have been settled in the area traversed by the Project; and thus persisting aboriginal title may remain on lands required for the pipeline right-of-way. Proving aboriginal title in Court is difficult, requiring the claimant to show occupation of the land prior to the assertion of British sovereignty, a degree of continuity between present and pre-sovereignty occupation, and exclusive occupation by the claimant group (*Delgamuukw v. British Columbia*, 3 S.C.R. 1010 (S.C.C.)). Consequently, aboriginal groups have been reticent to seek Court judgments to determine aboriginal title, and when litigation to prove title does arise, it has consistently taken many years (see for example, *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, the latest aboriginal title case in Canada, which took some seventeen years). As a result, most First Nations in B.C. have opted to participate in an

ongoing process of tri-partite treaty negotiations with the B.C. and Federal Governments, to seek mutual agreement on aboriginal ownership of lands and other persisting rights to traditional practices. It appears that the following First Nations groups have made claims under the B.C. treaty process to traditional territory that may be crossed by the Project: Kaska Dena Council; Ross River Dena Council; Liard First Nation; Acho Dene Koe First Nation; Teslin Tlingit Council; and the Taku River Tlingit First Nation. These groups are in various stages of the negotiation process, but none is close to a final agreement.[81]

In Alberta, the route of the Project has not been specified in the TransCanada Application, thus it is difficult to identify which aboriginal groups may be impacted by the Project. In Alberta, however, aboriginal land claims were settled under historic treaties signed during the late 19th century. Consequently, aboriginal title is not in dispute on lands in Alberta and aboriginal land ownership is limited to clearly delineated reserves. Off-reserve, First Nations may, however, enjoy hunting and fishing rights pursuant to the terms of the historic treaties, and certain rights to other traditional practices, such as berry picking, under constitutional law. It is important to understand that First Nations could seek to participate in any Alaska Pipeline Project process on the basis that such traditional uses and rights will be negatively impacted, even if they do not claim Aboriginal title rights.

TransCanada makes the following statements with respect to the role of First Nations in land acquisition matters for the Project:

- In Yukon, TransCanada's easement rights for the route, and "reservations by notation" for compressor station sites, access roads, stockpiles and borrow pits, discussed above, are "Encumbering Rights" within the meaning of the *Umbrella Final Agreement* settling land claims in Yukon. "Accordingly, these lands have been withdrawn from the First Nation settlement process" and "cannot be eroded through ongoing discussions regarding final agreements with individual Yukon First Nations" (Application, p. 2.2-76 & 2.2 84).

[81] See the website of the B.C. Treaty Commission: http://www.bctreaty.net/files/updates.php .

- In respect of B.C. and Alberta, TransCanada acknowledges that it will require an easement, predominantly on Crown land. "Agreements with First Nations to obtain access to lands are not required, although Foothills is required under the terms of its certificates of public convenience and necessity to consult with, provide opportunities to and address barriers impeding participation of First Nations" (Application, p. 2.2-76).

- Regarding B.C., TransCanada claims the route required for the pipeline is subject to Mineral Reserves and Map Reserves, which do not create legal interests but give notice of intended use to all others. TransCanada further states that these Reserves "effectively remove Provincial Crown land from settlement discussions with First Nations" (Application, p. 2.2-85).

- In addition, TransCanada states "the Crown (federal or provincial) has an obligation to consult with and accommodate the interests of First Nations before taking further action to enable the Project to proceed" (Application, p. 2.2-76).

Based on the above, there are a number of issues that warrant consideration in the context of TransCanada's proposal.

a. What are the Constitution's obligations imposed on the Crown agencies to consult with First Nations that are potentially impacted by the proposed pipeline?

TransCanada correctly states in its Application that Crown agencies, both federal and provincial have an obligation to consult with and accommodate the interests of First Nations before taking action to enable the Project to proceed. Consultation is required where there is an assertion of an aboriginal right, either title or right to a traditional practice, which has not been proven at law, but could be impacted by a project requiring government action to proceed (*Haida Nation* v. *British Columbia (Minister of Forests)* 2004 SCC 73 ("*Haida Nation*")). Consultation is also required where known treaty rights, such as hunting and fishing under the historic treaties in Alberta, may be

impacted (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69). The duty to consult rests with the Crown. However, the Supreme Court of Canada has provided that procedural aspects of consultation may be delegated from the Crown to a project proponent.

The Supreme Court of Canada has held that the scope and content of the duty to consult varies along a spectrum, depending on the *prima facie* strength of the claim to the subject aboriginal right and the seriousness of impacts on that right if the project were allowed to proceed. If a claim to a right is weak and potential impacts limited, then consultation requires notice, disclosure of information, and limited discussion of aboriginal concerns. In contrast, if claims to a right are *prima facie* strong (or proven in the case of existing treaties) and impacts potentially severe, then "deep consultation, aimed at finding a satisfactory interim solution, may be required...entailing the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida Nation*, p. 43-54).

To the extent that the Project will run in parallel to the existing right-of-way for the Alaska Highway, and not in pristine wilderness areas, it would appear that impacts from the Project on aboriginal traditional practices and title will be comparatively lower, since these rights may already have been affected by the Alaska Highway. This would suggest that consultation duties along the portions of the Route next to the Highway should be lower than would otherwise be the case. However, we would caution that the relevant Governments and TransCanada would be taking a significant risk if they seek to minimize the level of consultation conducted. A conservative approach, erring on more versus less consultation, would clearly be preferred given the significant negative consequences associated with a finding that inadequate consultation had been done.

Often, determining where a situation fits along the consultation spectrum is challenging. There has been considerable litigation in the last several years respecting the adequacy of Crown consultation provided to aboriginal groups, and recently a widespread practice has developed of project proponents reaching agreements with

First Nations in order to avoid litigation over Crown consultation. TransCanada is strictly correct, however, that the duty to consult does not provide an aboriginal group a veto over a project, since aboriginal agreement is not *required* for the Crown to acquit its consultation duty in advance of a project that may impact aboriginal rights (*Haida Nation*, p. 45). Moreover, consultation is a two-way process, and the Courts have held that aboriginal groups must participate in good faith with the Crown (and the project proponent, when the Crown delegates aspects of consultation), or in essence forfeit their right to consultation. Notwithstanding, a failure to conduct adequate consultation is a major concern and in our experience project proponents often have to work with the relevant Government bodies to ensure that they are in fact adequately fulfilling their duty to consult. In the end result, it is the project proponent who will suffer (as their project would be delayed) even if it is the Government(s) that fail to fulfill their obligations.

The duty to consult applies broadly to all government decisions that may impact aboriginal rights. This would include approvals for a project and dispositions of Crown land. The Courts, in the context of the Mackenzie Gas Project, have also held that the Government must consult respecting the *design* of a regulatory and environmental review for a project that may have significant impacts on aboriginal rights, to ensure that aboriginal concerns are adequately reflected in the process (*Dene Tha' First Nation v. Canada (Minister of Environment)* 2006 FC 1354). As discussed herein, this authority will place considerable pressure on the federal Government to consult with aboriginal groups concerning the design of the regulatory process for the Project. There is also authority that once the environmental assessment process issues recommendations and proposed mitigative measures for a project, the Government must consult with First Nations that participated in the environmental assessment *prior* to modifying recommendations and approving a project on this modified basis (*Ka'a'Gee Tu First Nation v. Canada (Attorney General)* 2007 FC 763). Consequently, when the regulatory review process for the Project (under YESAA, CEAA, or the NPA) issues recommendations, the Governments' response to these recommendations must be informed by further aboriginal consultation, where aboriginal rights are at stake.

b. Are these obligations impacted by the "rights", if any, previously acquired by TCPL?

The prior issuance of Certificates to Foothills under the NPA and the securing of an easement through Yukon will have limited impact on the current content of the Crown's duty to consult. The case law provides that the consultation duty is owed prior to any government decision that may impact an aboriginal right. Given that multiple government decisions remain in respect of the Project, there will be a number of Crown decision points requiring consultation. These multiple decision points also give First Nations ample opportunities to challenge the adequacy of consultation during the stages of development of the Project, giving rise to the significant risk of litigation discussed herein. As discussed below, the existing easement through the Yukon should arguably simplify, but does not eliminate, Crown consultation duties in Yukon.

c. What is the legal process for securing access to land that is subject to First Nations ownership or land claims?

In Yukon, the Umbrella Final Agreement ("UFA") was reached in 1993 between the Government of Canada, the Government of Yukon and Yukon First Nations, as represented by the Council of Yukon First Nations ("CYFN"). The UFA is not itself legally enforceable, but is a policy document providing a common template for completing First Nation Final Agreements. Yukon is home to 14 First Nations. To date, eleven of the 14 Yukon First Nations have signed and are implementing Final Land Claims Agreements. Each of the individual settlement agreements incorporates the UFA, giving its provisions legal effect in the settled traditional territories, along with provisions that apply specifically to individual First Nations, notably lands selection for First Nations ownership within broader traditional territories. Lands included in individual First Nations lands selections are categorized to include: Category A lands for which the First Nations hold the equivalent of fee simple ownership to the surface and sub-surface; and, Category B lands for which they received surface rights only (collectively, "Settlement Lands"). Under Final Land Claims Agreements, Yukon First Nations are empowered: to enact bylaws for the use of and occupation of Settlement Land; to develop and administer land management programs related to Settlement Land; to charge rent or other fees for the use and occupation of Settlement Land; and,

to dispose of Settlement Land. In the first instance, First Nations' permission is required for commercial access to Settlement Lands. If agreement cannot be reached on terms and conditions for voluntary access, then a right-of-entry order can be sought from the Yukon Surface Rights Board. Chapter 8 of the UFA and the Final Land Claims Agreements sets out the jurisdiction of the Yukon Surface Rights Board, requiring it, *inter alia*, to set reasonable terms and conditions for access and compensation.

The UFA and each of the Final Land Claims Agreements provide at their respective sections 5.4.2 that Settlement Lands are subject to the exception and reservation of "any right, title or interest less than the entire fee simple therein existing at the date the land became Settlement Land...". The UFA and Final Agreements define such existing rights as "Encumbering Rights". On the basis of provision 5.4.2, we concur with TransCanada that the Yukon Easement granted to Foothills in November 1983, and discussed in detail above, is an "Encumbering Right" expressly carved out from any lands selected under Final Land Claims Agreements for First Nations ownership. Consequently, even if the Easement traverses Settlement Land, the agreement of relevant First Nations will not be required for access. Moreover, given the consistent policy of relying on the UFA as a template for all land claims in Yukon, the Easement, for so long as it remains valid, is effectively protected from any subsequent lands selection in unsettled areas.

TransCanada also states that its "reservations by notation" for compressor station sites, access roads, stockpiles and borrow pits, discussed above are also "Encumbering Rights" within the meaning of the UFA and Final Land Claims Settlements. On a strict reading of section 5.4.2, we do not agree that reservations by notation would qualify as Encumbering Rights and thus necessarily be excluded from Settlement Lands. This is because reservations by notation do not create legal interests, but are purely for administrative purposes. Nonetheless, we have reviewed each of the Final Land Claims Agreements relevant to the Project in the Yukon and each, in addition to provision 5.4.2, contains the following express exception to lands selected under the Agreements (Appendix A, s. 3.2.11):

> Parcels will be subject to the temporary access corridors, permanent access corridors and reservations by notation as shown in the Alaska Highway Gas Pipeline Project (Yukon Section) Route Maps, Revised 88- 07, prepared by Foothills Pipe Lines (South Yukon) Ltd. as if those corridors and reservations were reservations by notation for Northern Pipeline Agency within the meaning of 5.4.2 for the purposes of this Agreement and subject to the Northern Pipeline Act, R.S.C. 1985 c. N–26.

The effect of this provision is to deem reservations by notation, as reflected in Foothills Route Maps Revised 88-07, as "Encumbering Rights" under provision 5.4.2. Consequently, it appears that TransCanada is correct that locations in relation to compressor station sites, access roads, stockpiles and borrow pits have been excluded from Settlement Lands to date and thus First Nation agreement is not required for access. Given the consistent practice of excluding these locations from Settlement Lands to date, it also seems reasonable to expect that locations in Yukon subject to existing reservations by notation for the Project would be excluded from lands selection under any future final settlement agreements.

In sum, TransCanada's Yukon Easement and ancillary pipeline locations reserved by notation are excluded from Settlement Lands under existing Yukon Final Land Claims Agreements, and would most likely be excluded from any future agreements. Three additional points are, however, required in relation to aboriginal land issues raised by the Project in Yukon.[82]

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[82] A fourth proviso is mentioned here for completeness. Provision 5.6.10 of the UFA and existing Final Agreements states that:

> If Legislation is amended to authorize Government to increase the term permitted for an Encumbering Right, Government shall not increase the term of that Encumbering Right pursuant to that amendment without the prior consent of the affected Yukon First Nation.

As the detailed discussion of the Yukon Easement above explains, under the Easement Agreement it is possible that the Easement could terminate on September 20, 2012 if Foothills does not give prior notice to extend the Agreement or if the rights under the Easement did not "continue to be exercised by", i.e. actively utilized by Foothills. If this were to occur, then the question would become whether the Federal Government could, of its own initiative, extend the term of the Easement. In our view, the Governor in Council has broad discretion to do so under s. 37(1) of the NPA, and this would not require an amendment to "legislation". NPA s. 37(1) provides:

> 37. (1) If the Governor in Council is of the opinion that lands in Yukon are required temporarily or otherwise for the construction, maintenance or operation of the pipeline including, without limiting the generality of the foregoing, lands required for camps, roads and other related works, the Governor in Council may, by order, after consultation with the member of the Executive Council of Yukon who is responsible for the lands, take the

First, if the Project route differs from the Easement Agreement of 1983, or if ancillary Project locations, i.e. for access roads, differ from those under reservations by notation reflected in Foothills Route Maps Revised 88-07, *and* TransCanada requires access for the Project on Settlement Lands, then access agreements will be required with relevant First Nations, or resort had to the Yukon Surface Rights Board, potentially adding to the time required for acquiring Yukon land rights.

Second, although Yukon First Nations with Final Land Claims Agreements cannot claim ownership of the Project Easement and ancillary sites subject to reservation by notation, the Crown will nonetheless have a duty to consult with these groups in relation to the Project. Under Chapter 16 of the Final Land Claims Agreements, First Nations members continue to enjoy certain rights within their traditional territory, but off Settlement Lands, notably a right to hunt and fish for subsistence. The Courts have held that the Crown's duty to consult applies to these rights (*Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)* [2007] 3 C.N.L.R. 42). Consequently, when a Government decision respecting the Project may impact rights to hunt and fish, notably the issuance of land use permits for the Project by Yukon, the duty to consult will be engaged, no doubt extending the time for Government to make requisite decisions. It appears that the Yukon Government has formalized consultation protocols with all the First Nations along the route, specifying *inter alia*, requirements for convening consultation meetings, which will provide an administrative basis for conducting consultation for the Project.

Third, with respect to the White River First Nation and Kaska Nation, whose land claims remain unsettled, a robust consultation process will be required, to identify their interests and assess Project impacts thereupon, and to accommodate their concerns to the extent possible. In the absence of Final Agreements with these two groups, consultation will be more complex than with other Yukon First Nations, since locations

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administration and control of them from the Commissioner and transfer the administration of those lands to the Minister.

However, if, unexpectedly, a legislative amendment were held to be required to extend the term of the Easement, then pursuant to provision 5.6.10 of the UFA and Final Agreements, the agreement of First Nations with Settlement Lands, traversed by the Project would be required. If this were not forthcoming, then presumably a new easement across Settlement Lands would have to be negotiated with First Nations, or resort had to the Yukon Surface Rights Board.

How many "Final Agreements" are yet to be reached along the proposed route?

where aboriginal ownership of land continue, a hunt and fish, for example, will not be as clear. Failure on the part of the federal and territorial Crown to rigorously consult these two groups may be seen to invite litigation. Based on the experience of the Mackenzie Gas Project, it is aboriginal groups without Final Agreements that tend to be the most litigious, presumably because litigation gives them leverage in their protracted negotiations toward final settlements.

Mackenzie

This same general point can be made with respect to B.C., where as noted, land claims have not been settled along the route of the Project. It will be necessary for the federal and provincial Crowns to engage relevant B.C. First Nations in a rigorous consultation process, covering all potential government decision points required to advance the Project. It appears that this consultation process will likely have to be designed on an *ad hoc* basis. The B.C. Government is currently negotiating with First Nations leaders for a comprehensive policy setting out standard approaches to Crown consultation in the Province. These negotiations, dubbed the "New Relationship", have however been moving slowly,[83] and based on our research do not appear anywhere near completion.

Certain administrative processes in B.C. already contemplate consultation with First Nations. For example, prior to the issuance of Crown land for energy projects, pursuant to the regulatory process under the *Land Act* discussed above, the Crown, as a matter of course consults with potentially affected First Nations (*Land Use Operational Policy, Oil and Gas*, Crown Land Administration Division, Ministry of Agriculture and Lands, Effective August 16, 2004, www.al.gov.bc.ca/clad/leg_policies/policies/oil_gas.pdf). The challenge for TransCanada will be to minimize the risk of litigation, by ensuring that the federal and provincial Crowns *adequately* consult ~~at all~~ decision points where Courts may expect aboriginal consultation. This will be an onerous process, potentially adding materially to the time required to secure all approvals and land dispositions for the Project in B.C.

Yukon

[83] See for example, First Nation Consultation and Accommodation: A Business Perspective, submission to The New Relationship Management Committee from the B.C. Chamber of Commerce, January 19, 2007, www.bcchamber.org/files/PDF/First_Nation_Consultation_Paper--A_Business_Perspective.pdf.

Note that we have considered TransCanada's claim that because the Project route is subject to Mineral Reserves and Map Reserves, lands required for the Project are "effectively" removed from settlement discussions with First Nations (Application, p. 2.2-85). In our view, this is not correct. As discussed above, Mineral Reserves and Map Reserves are administrative tools highlighting intended uses of Crown surface and sub-surface tracts, prior to actual dispositions. They do not create legal interests. Rather, it is a matter of Government discretion. In fairness, is seems highly unlikely that the Government would offer Crown land that is required by the Project as part of aboriginal settlement negotiations. However, it is also not inconceivable that detailed routing may have to be adjusted to avoid particular locations where First Nations make strong claims for ownership. The consultation process required in B.C. will create the forum for identifying such First Nations concerns.

In Alberta, because treaties are settled, there will be considerably less uncertainty respecting what aboriginal rights remain and may be impacted by the Project, as compared to B.C. However, First Nations enjoy hunting and fishing rights pursuant to the terms of the historic treaties in undisturbed areas of the Province and certain rights to other traditional practices, such as berry picking, under constitutional law. To the extent the Project may impact these rights, the Crown's duty to consult is engaged. Consequently, a prudent course would be for the federal and provincial Crowns to engage relevant First Nations in a robust consultation process, covering all potential government decision points required to advance the Project in Alberta.

Administratively, the Government of Alberta conducts aboriginal consultation under the guidance of its *First Nations Consultation Guidelines*, issued September 2006. The Guidelines set out standard procedures for various branches of Government upon receipt of applications that may impact aboriginal rights, including Alberta Sustainable Resource Development—charged with issuing pipeline easements on Crown land. While the Guidelines offer a framework for consultation, project proponents must ensure that actual consultation meets legal standards. For example, the Guidelines tend to extensively delegate consultation to project proponents.

Increasingly, First Nations are arguing that due to the degree of delegation, the Alberta Crown has failed to consult adequately.

6. 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. It is possible that 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.

As stated, the NPA was not grandfathered with the passing of the continent wide free trade agreement. Therefore, having regard to the current context in which the NPA must operate, the issue arising with respect to the TransCanada Application is whether the provisions of NAFTA could impact the operation of, and thereby TransCanada's reliance on, the NPA. Further, assuming that a challenge was brought in respect of whether the NPA is inconsistent with NAFTA, an issue arises regarding whether such a challenge could impact the timing of the TransCanada proposal. While we have not made a definitive determination as to whether the NPA is inconsistent with NAFTA, it is our view that there is a risk that a challenge could be brought on the basis that the NPA is not consistent with NAFTA. In a submission by Enbridge and Alliance, *Facts about the Alaska-Canada Natural Gas Pipeline*, these parties state:

> Fact: The NPA preceded the NAFTA by many years, and was not grandfathered under NAFTA.
>
> Fact: If the NPA process were to result in preferences for the use of Canadian goods and services, those preferences may be in conflict with Canada's NAFTA and WTO obligations.
>
> Conclusion: If the federal government confirms the NPA project on the basis of purported exclusive rights granted to TransCanada/Foothills, any NAFTA investor willing to compete for the right to build the pipeline may have a claim

for damages against the federal government if not given a fair opportunity to compete.[84]

Moreover, we note that NAFTA is not specifically identified in the TransCanada Project Key Risk Assessment and Mitigation chart provided in Section 2.7 of the TransCanada Application. As such there is a risk that any such challenge to the NPA could delay the TransCanada project schedule. The impact of this timing delay would ultimately depend on the basis for the NAFTA challenge, when the NAFTA challenge is brought, and the avenue pursuant to which the challenge is sought to be resolved. Of particular interest with respect to the TransCanada Application are Chapters 11 and 12 of NAFTA. The obligations of a NAFTA member apply to investments, investors and to goods and services providers, pursuant to Chapters 11 and 12 of NAFTA.

One of the underlying principles of NAFTA is non-discrimination. Two fundamental principles of non-discrimination implemented by the NAFTA are the requirements for "national treatment" and the application of most-favoured nations treatment, as noted in the preamble to NAFTA 102. National treatment requires that a member nation such as Canada treat investors and investments, and goods or service providers, of other member nations no less favorably than its own.[85] That is, rules cannot be structured so as to favour local companies, and rules cannot interfere with the conduct of an investment, including the requirement for the purchase of local materials or services. The concept of most-favoured nations requires that a NAFTA country give to other NAFTA members the best treatment that may be given by the NAFTA country to other NAFTA members or to non-NAFTA members. Questions could

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[84] Similarly, in a Staff Report of the Federal Energy Regulatory Commission (January 18, 2001): United States Senate Committee on Energy and Natural Resources – Alaska Natural Gas Transportation Act, the FERC itself raised NAFTA stating with respect to International consideration: "The 1979 Agreement Between the United States of America and Canada on Principles Applicable to a Northern Natural Gas Pipeline, ... specifies the route of the ANGTS and contains numerous conditions applicable to the system. ... To the extent that particular proposals either favour or disfavour transportation of either American or Canadian gas supplies, the provisions of the U.S.-Canada Free Trade Agreement and the Northern American Free Trade Agreement might be relevant."

[85] The United States of America and Canada Agreement Concerning Transit Pipelines (in force 1 October 1977) (the "Transit Treaty"), also appears to prohibit discriminatory treatment in respect of a Transit Pipeline or hydrocarbons in transit. For example, Article 3 of the Transit Treaty precludes a public authority in either Canada or the United States from imposing any fee, duty, tax or other monetary charge on or for the use of any Transit Pipeline unless the charge would also apply to other similar pipelines within its jurisdiction. Similarly, Article IV (2) requires that all regulations, requirements, terms and conditions imposed with respect to Transit Pipelines and the transmission of hydrocarbons through a Transit Pipeline shall, under substantially similar circumstances with respect to all hydrocarbons transmitted in similar pipelines, excepting intra-provincial and intra-state pipelines, be applied equally to all persons and in the same manner.

arise regarding whether the existing requirements of the NPA are consistent with the above provisions.

We note that NAFTA 1108 permitted the Parties to NAFTA to make reservations and exceptions from the provisions of NAFTA to identify circumstances where existing non-conforming measures were maintained by a Party at the federal level. Notably, Canada did not make a reservation in Annex I to the NAFTA with respect to the NPA.

As a NAFTA country, Canada must extend to investors and investments of other NAFTA countries national treatment with respect to the establishment, acquisition, expansion, management, conduct or operation of investments.[86] In this regard, NAFTA 1102: *National Treatment* states:

> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale of other disposition of investments.

NAFTA 1103 imposes the most-favoured nation ("MFN") obligation on Canada, requiring that Canada treat investors of other NAFTA countries no less favourably than it treats any investor of a NAFTA or non-NAFTA country.[87] NAFTA 1103: *Most-Favoured-Nation Treatment* provides as follows:[88]

> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or

[86] NAFTA 1102.

[87] NAFTA requires a Party to accord to investors of another Party and to investments of investors of another Party the better treatment required by Articles 1102 and 1103.

[88] Pursuant to Annex IV, Canada took an exception to the MFN treatment in respect of bilateral or multilateral agreements in force or signed prior to the entry into force of NAFTA.

of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other dispositions of investments.

Further, NAFTA 1106 imposes performance requirements with respect to the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party in its territory. In this regard, NAFTA 1106 prohibits the imposition or enforcement of certain performance requirements, including the following:

(i) to export a given level of goods or services;

(ii) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory.[89]

Therefore, treatment that favours locals over foreigners that in some form harms the foreigner could be the basis for a claim against NAFTA.

Although NAFTA 1106(6) provides an exception for measures that are necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of NAFTA, as long as such measures are not applied in an arbitrary or unjustifiable manner or do not constitute a disguised restriction on international trade or investment,[90] it is arguable that such an exception is not applicable to the circumstances considered herein.

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[89] NAFTA 1106(1)(c). This provision of NAFTA is the basis for a Notice of Intent to Submit a Claim to Arbitration Under NAFTA Chapter Eleven, brought by Mobil Investments Canada Inc.

[90] NAFTA 1106(6) also provides an exception for measures necessary to protect human, animal or plant life or health or necessary for the conservation of living or non-living exhaustible natural-resources.

NAFTA also imposes requirements with respect to the provision of "cross-border services" pursuant to Chapter 12 of NAFTA . The cross-border provision of a service is defined in NAFTA 1213 as follows:

> ... means the provision of a service:
>
> (a) from the territory of a Party into the territory of another Party;
>
> (b) in the territory of a Party by a person of that Party to a person of another Party; or
>
> (c) by a national of a Party in the territory of another Party.[91]

NAFTA Chapter 12 also imposes "national treatment" and "most-favoured nations" requirements on member nations. NAFTA 1202 requires the following national treatment:

> 1. Each Party shall accord to service providers of another Party treatment no less favourable than that it accords, in like circumstances, to its own service providers.
>
> 2. The treatment accorded by a Party under paragraph 1 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to service providers of the Party of which it forms a part.

Further, NAFTA 1203 requires a NAFTA country to extend the most-favoured nation treatment to service providers of other NAFTA Parties. NAFTA 1203 provides as follows:

> Each Party shall accord to service providers of another Party treatment no less favourable than that it accords, in like

[91] NAFTA provisions respecting services apply generally to the provision of services, except for financial services covered by NAFTA 14; enumerated air services; procurement by a Party or state enterprise; subsidies or grants provided by a Party or state enterprise.

circumstances, to service providers of any other Party or of a non-Party.[82]

In our view, arguments could be advanced that certain provisions of the NPA, including those contained in the Agreement which is appended to the NPA, are inconsistent with the provisions of NAFTA. Further, arguments exist that the provisions of the NPA which require Canadian participation, and indeed maximum participation of Canadians, are contrary to the NAFTA provisions requiring national treatment in respect of both investors and cross-border trade in services.

While arguments exist to suggest that the NPA is contrary to NAFTA requirements, it is also arguable that the NPA does not provide any advantage to Canadian nationals, investments or investors, or goods and services, and that what the NPA requires is that goods and services be procured on a generally competitive basis, without exclusion of any NAFTA members. For example, while the purposes of NAFTA set forth in Section 4 of the legislation do support the "highest possible degree of Canadian participation", the legislation also arguably requires that the procurement of goods and services be "on generally competitive terms". Arguably, the requirement for competitive terms is not to the exclusion of investors or enterprises of other member nations.

Similar wording respecting the requirement for competitive terms is found in the Agreement between Canada and the United States. That is, while part of the preamble requires the maximization of industrial benefits to the United States and Canada, Section 7 requires the adoption of "generally competitive terms for the supply of goods and services". Arguably, such is not to the exclusion of investors or enterprises of other member nations.

Further, while the *Terms and Conditions* imposed by Schedule III to the NPA on the Certificates granted pursuant to Section 21 of the NPA require Canadian participation, it is debatable whether such provisions provide an advantage to Canadian participation. Indeed, Section 10 which requires the establishment of a procurement

[82] NAFTA requires a Party to accord to service providers of another Party the better treatment required by Articles 1202 and 1203: NAFTA 1204.

program does not require Canadian participation to the exclusion of others NAFTA members. Rather, the provision requires that Canadians have a "fair and competitive opportunity to participate in the supply of goods and services." The requirement for Canadians to have a fair opportunity to participate does not appear to violate the NAFTA requirements.

Further, the above cited passage from the submission made by Enbridge and Alliance suggests that arguments could be made that NAFTA investors who are not provided a fair opportunity to compete for the project may have a basis for a NAFTA claim. The fact that Foothills was issued the Certificates pursuant to the NPA does not in itself suggest that Foothills was preferred over other investors or that others were not provided a fair opportunity to compete for the pipeline. Indeed, the Certificates were issued to Foothills after a lengthy regulatory process, pursuant to which other parties had an opportunity to participate and present competing proposals. However, it is not clear that such a public process would necessarily preclude a current NAFTA challenge if the Canadian Government took measures to preclude consideration of other proposals, such as a Greenfield option that parties proposed pursuant to a NEB process.

While no final determination is made herein with respect to whether the NPA is inconsistent with the NAFTA provisions, in our view, the NAFTA provides another ground for dispute for interested parties that could result in a delay to the construction and operation of the TransCanada proposal. Of interest is the fact that the joint submission, dated April, 2005, made by Alliance Pipeline and Enbridge Inc. and the FERC Staff Report cited above regarding the Project expressly raised NAFTA issues. In our view, this is indicative of the fact that parties are aware of this ground of dispute and could seek to make use of NAFTA as a basis for challenging TransCanada's Application under the NPA.

7. Alberta Component of the Overall Project

TransCanada's Application is unclear with respect to 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 inexpensive expansibility) on existing pipelines should be used for transportation of Alaskan based natural gas. The information filed in the ongoing Alberta Inquiry into NGL matters, as well as a recently released report by the Canadian Energy Research Institute, forecast that existing pipelines will have significant excess capacity by the time the Project is proposed to be in-service. Should TransCanada demonstrate a willingness to work jointly with third party carriers, it may be able to reduce the impacts associated with debates that would likely otherwise ensue. To the extent that TransCanada would be relying upon NEB or Alberta Utilities Commission approved facilities in Alberta (versus pursuant to the NPA) there will be a ready forum for such a debate.

8. Acquisition of Land Rights

Subject to the issues discussed below, it appears that TransCanada has obtained an "easement" across the Yukon. The same does not appear to be the situation with respect to both British Columbia and Alberta, where TransCanada does not have any secure rights to the necessary rights-of-way across these two Provinces. The acquisition of such rights could take a considerable amount of time; and provide leverage to affected stakeholders. While the NPA approvals would clearly give TransCanada an advantage over any third party pipeline proposal, particularly in the Yukon, the completion of the required land acquisition process could create material delays. Based on its AGIA Application, the precise manner in which TransCanada proposes to handle outstanding land acquisition matters is unclear. A number of specific matters are discussed below.

a. Validity of TransCanada's Assessment of its Land Rights in the Yukon

As discussed above, TransCanada's Application asserts that an easement has been acquired across Yukon lands for purposes of the Project and further, that certain lands have been reserved by virtue of "reservations by notation". The following sections

provide additional detail on the status of the easement and the reservations by notation in respect of required land rights for the Project through the Yukon, given the importance of these matters.

(i) The Yukon Easement

By written grant dated November 28, 1983, Her Majesty the Queen in right of Canada granted to Foothills Pipe Lines (South Yukon) Ltd. ("Foothills") an easement to lay down, construct, operate, maintain, inspect, patrol (including aerial patrol), alter, remove, replace, reconstruct and repair a gas pipeline across the lands which are shown in the plans, profiles and books of reference (the "Easement") as certified by the Designated Officer of the Northern Pipeline Agency.

The grant of Easement was expressly made subject to the terms of a November 24, 1983 Agreement as between Her Majesty and Foothills, as amended (the "Agreement"). Pursuant to the Agreement, Foothills agreed to pay an annual fee to Her Majesty for the right within the right of way to enter upon and clear and lay down, construct, operate, maintain, inspect, patrol (including aerial patrol), alter, remove, replace, reconstruct and repair the pipeline (the "Rights"). These Rights are subject to (1) the payment by Foothills of the annual fee and (2) any nghts previously granted with respect to the lands which are the subject of the Easement.[93] Foothills agreed pursuant to the terms of the Agreement that it would not exercise its Rights under the Easement without first having obtained the Minister's written consent to do so (the "Section 1 Consent"). Based on the information available, it does not appear that the Section 1 Consent has been obtained from the Minister at this time.[94] Notwithstanding, we are not aware of any reason that would prevent TransCanada from fulfilling the requirements to obtain the necessary consent.

Based on our review of publicly available documentation, Foothills does appear to hold an easement in the Yukon which it has held since November 28, 1983. The Easement appears to be in the name of "Foothills Pipe Lines (South Yukon) Ltd.", rather than being held on Foothills' behalf by the NP Agency, as suggested by TransCanada.

[93] See page 2 of the Agreement.

[94] The Minister currently responsible for the Northern Pipeline Agency is The Honourable Gary Lunn, P.C., M.P.

Note that while the Certificate of Title 84Y726 dated July 6, 1984 in respect of the Easement does not show any "previously granted rights", we have not at this time undertaken a detailed analysis of the certificates of title in relation to the lands which are the subject of the Easement across the Yukon to assess whether these lands may be subject to any "rights previously granted".

The fact that Foothills has not received the Section 1 Consent may be important for purposes of assessing the term for the Easement. The initial term for the Easement was for a 25 year period from November 28, 1983 (i.e. to November 27, 2008). However, this initial term was subsequently extended by agreement dated November 4, 1992 to 25 years from either the date that the Minister provides Section 1 Consent or September 20, 2012, whichever first occurs. The Easement would then continue at Foothills' option for 24 years, provided that (1) notice to extend is given at least 6 months prior to the end of the 25 year term and (2) the rights under the easement "continue to be exercised by" Foothills. Under the terms, therefore, it is possible that the Easement and all rights, licenses, liberties and privileges granted thereunder could terminate on September 20, 2012 if Foothills does not give notice to extend, Section 1 consent is not given, or if the rights under the Easement did not "continue to be exercised by" Foothills.[95]

Notably, the Easement granted to Foothills is in relation to the following lands:

> Those lands vested in [Her Majesty the Queen] in right of Canada in the Yukon Territory, comprising 18,407 hectares, more or less, as shown on the copies of the plans, profiles and books of reference certified by the Designated Officer of the Northern Pipeline Agency pursuant to subsection 6(2) of the Northern Pipeline Act and provided to the member of Our Privy Council for Canada, designated to act as the Minister for the purposes of that Act, by the grantee pursuant to the provisions of subsection 37(2) of the said Act, a copy of which plans, profiles and books of reference has been filed in The Land Titles Office at the City of Whitehorse in the Yukon Territory as Instrument No. 67550.

[95] The Minister may terminate the Easement if the *Agreement Between Canada and the United States of America on Principles Applicable to a Northern Natural Gas Pipeline* is terminated prior to the date on which the Section 1 Consent is given.

[Emphasis added.]

We have been unable to obtain from Yukon Land Titles offices all of the plans, profiles and books of reference certified by the Designated Officer. Therefore, we have not been able to confirm whether the plans, profiles and book of reference certified by the Designated Officer conform to the current route proposed in the TransCanada Application. Should TransCanada's currently proposed route deviate from that certified by the Designated Officer, TransCanada would require additional land rights in the Yukon. This requirement could delay the construction and operation of the pipeline.

We observe that the initial section of the plans, profiles and books of reference show the pipeline entering into the Yukon through Beaver Creek. The NPA and the Agreement describe the route through Boundary and Border City, Alaska. The implications of this discrepancy have not been examined at this point. Further information in the form of the plans, profiles and books of reference, and Certificates of Title subject to the Easement, would be beneficial in further assessing the validity of TransCanada's claims in this regard.

b. Reservations by Notation

As discussed above, the TransCanada Application states that certain lands have been reserved for the purposes of the Project by virtue of "reservations by notation". We have been unable to find reference to "reservations by notation" in land documents of the Yukon in order to assess the status or nature of such "reservations by notation".

However, it appears that a "reservation by notation" is essentially the same as a "map notation", which reserves certain lands for a particular purpose. No legal documentation or rights are granted pursuant thereto. Notwithstanding, to the extent therefore, that lands required for compressor station sites, access roads, stockpiles and borrow pits in respect of the Project are subject to a map reserve, or a "reservation by notation", TransCanada's assertion that such lands have been reserved for the Project, may be accurate.

The TransCanada Application, as well as a slide presentation by TransCanada in April 2007,[96] suggest that the "reservations by notation" are held by the NP Agency, rather than Foothills or any other Government department. We have not been able to confirm that the NP Agency, in fact, holds reservations by notation in respect of these lands. Interestingly, we understand that the policy of the Lands Branch is to grant reservations only to Government. As the NP Agency is an agency of the Canadian Federal Government, it is possible that the NP Agency would hold a land tenure other than a "reservation by notation", such as a lease or other form of land tenure in respect of the lands required for compressor station sites, access roads, stockpiles and borrow pits. However, this is not clear from the information available at this time. In our view, further investigation is required in order to confirm the current status of the asserted reservations by notation.

Finally, TransCanada acknowledges that land use permits will still be required for use of the lands which are subject to the reservation by notation.[97] The key point to understand is that these reservations by notation do not provide any legal entitlements to Foothills. Access to vacant Crown land in the Yukon requires that an application be made to the Yukon Government - Lands Branch, which regulates land use permitting.[98]

Further, in addition to the Land Use permits, Section 4 of the Agreement requires Foothills to consult with Her Majesty as to the appropriate location for above ground facilities. It is not clear whether such consultation has taken place between Her Majesty and Foothills with respect to the location of such facilities, or the location of the corresponding reservations by notation, and therefore it is not clear whether locations for compressor station sites, access roads, stockpiles and borrow pits have actually been finalized between Foothills and the Minister.

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[96] State of Alaska – Senate Judiciary/House Resources Testimony (April 13/14, 2007).

[97] Section 2.2, Development Plan, Section 2.2.4.2, page 2.2-84. The Yukon Government Lands Branch regulates land use permitting for a variety of uses, including site clearing or earth works; constructing new roads, trails, or access; clearing or installing utility rights-of-way, or conducting geo-technical or hydrological studies. Land use is regulated pursuant to the *Territorial Land (Yukon) Act*, S.Y. 2003, and associated regulations.

[98] Prior to April 1, 2003, land management in the Yukon was handled by the federal Department of Indian and Northern Affairs. These responsibilities have now been transferred to the Yukon Government.

If private lands are required by Foothills in the Yukon, the Yukon Surface Rights Board has the jurisdiction to consider unresolved matters in relation to Yukon lands and may provide an avenue pursuant to which disputes about access on Yukon lands can be resolved.[99] We have not further assessed this option as the TransCanada Application does not make reference to the need for privately held lands in the Yukon.

In conclusion, the status of the reservations by notation is not clear. Assuming that certain lands have been reserved pursuant to "reservations by notation", the reservations may provide a timing advantage to TransCanada, to the extent that such reservations would preclude overlapping interests and delineate locations for such facilities or access roads. However, the reservations do not appear to provide to Foothills any legal interest in the subject lands or any significant timing advantage. TransCanada will still need to proceed with acquiring land rights and other approvals, including land use permits, that could result in timing delays.[100]

c. Validity of TransCanada's Assessment of its Land Rights in British Columbia

The TransCanada Application notes that it will need to obtain rights to Crown and privately held lands in British Columbia.[101] The Application states:

> There is a map reserve 1640 yards wide held in the name of Foothills Pipe Lines Ltd.[102]

As well, the Application states:[103]

> All Provincial Crown land required for the pipeline is subject to Mineral Reserves under the provincial Mineral Act and the *Mining (Placer) Act*, and Map Reserves under the *Land*

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[99] Yukon Surface Rights Board Act, S.Y. 1994, c. 43, c. Y-4.3.

[100] While TransCanada acknowledges the need for a land use permit, there are several other permits that would potentially be required for purposes of constructing and operating the APP: work within right of way permit issued by Department of Highways; explosives storage issued by Natural Resources Canada; transport of dangerous goods issued by Department of Highways; waste storage approvals; timber cutting; permits and authorizations for quarries.

[101] Executive Summary, page 12; Section 2.2, Development Plan, Section 2.2.4.2, page 2.2-85.

[102] Project Description, page 2.1-9.

[103] Development Plan, page 2.2-84 to 85.

Act.[104] While neither instrument creates a legal interest in Foothills, the effect is to give notice of intended use to all others and effectively removes Provincial Crown land from settlement discussions with First Nations.

To perfect its interest in Provincial Crown land Foothills will require a License of Occupation under the *Land Act*.

With respect to the required rights across Crown land in B.C., the TransCanada Application states that a license of occupation will be required under the *Land Act*, R.S.B.C. 1996, c. 245. Section 39 of the *Land Act* in British Columbia states that the Minister "may issue a license to occupy and use Crown land called a license of occupation, subject to the terms and reservations the Minister considers advisable." In our view, Foothills will not only require a License of Occupation entitling it to occupy Provincial Crown land, but may also require a right of way/easement over such lands, pursuant to Section 40 of the *Land Act*. Notably, any person may object to the application for a Crown land disposition at any time before a disposition is made.[105] Further, after a hearing into such objection, an appeal may be taken to the B.C. Supreme Court and then to the B.C. Court of Appeal with leave of a justice of the Court of Appeal, all of which could extend any time frame for obtaining a Crown disposition in British Columbia.

The TransCanada Application states that all Provincial Crown land required for the Project is subject to Mineral Reserves under the *Mineral Act* and the *Mining (Placer) Act*, and Map Reserves under the *Land Act*. However, the TransCanada Application acknowledges that neither the Mineral Reserves nor the Map Reserves creates a legal interest in Foothills. Rather, TransCanada states that the effect of these Reserves is "to give notice of intended use to all others".[106] As such, the required land rights will still need to be acquired.

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[104] The footnote as found in the Application states: Order in Council No. 922, B.C. Regulation 100/1977 and order in Council No. 923, B.C., Regulation 101/1977, made under the *Mineral Act* R.S.B.C. 1960, c. 244, s. 12(5) as amended (repealed and replaced by the *Mineral Tenure Act* R.S.B.C., c. 292); *Placer Mining Act*, S.B.C. 1974, c. 63, s.13 as amended (repealed and replaced by the *Mineral Tenure Act* R.S.B.C. 1996, c. 292). Notwithstanding the repeal or [sic] both the *Mineral Act* and the *Placer Mining Act*, the mineral reserves created by the above referenced Orders in Council remain in full force and effect through 22(3) of the *Mineral Tenure Act*..

[105] Section 63, *Land Act*.

[106] Section 2.2, Development Plan, Section 2.2.4.2, page 2.2-85.

d. Validity of TransCanada's Assessment of its Land Rights in Alberta

The TransCanada Application acknowledges that Foothills will require land rights in Alberta across both Provincial Crown lands and privately held lands for purposes of the construction and operation of the Project in Alberta.[107] The Application states:

> Both Provincial Crown (65-75%) and privately held (35-25%) lands are required to construct and operate the pipeline in Alberta. Foothills holds a Consultative Notation with respect to Provincial Crown lands. While this does not establish any form of legal tenure it does identify a pipeline corridor and provides Foothills with the opportunity to review and comment upon any conflicting proposed development near that corridor.
>
> To secure land tenure with respect to Provincial Crown lands, Foothills will be required to enter into a Pipeline Agreement (right-of-way) or a Pipeline Installation Lease (other pipeline facilities) under the *Public Lands Act*.

As the route that would be followed by the Project in Alberta has not been specified, we have not been able to confirm that Foothills holds a "consultative notation" with respect to all Provincial Crown lands in Alberta. While the TransCanada Application recognizes that the "consultative notation" held by Foothills with respect to the Crown lands does not establish any form of legal tenure, the Application notes that the notation "does identify a pipeline corridor and provides Foothills with the opportunity to review and comment upon any conflicting proposed development near that corridor."[108]

In Alberta, a "consultative notation" or "CNT" is used by Governmental agencies to register an interest in certain lands. Where an industry member uses a "consultative notation", the notation is referred to as a "consultative notation company" or "CNC" which records the interest of a non-governmental agency with a justified interest in the land and which wishes to be consulted prior to any commitment or disposition on the

[107] Section 2.2, Development Plan, Section 2.2.4.2, page 2.2-85. See also, Executive Summary, page 12.
[108] Section 2.2, Development Plan, Section 2.2.4.2, page 2.2-85.

land.[109] Therefore, where a surface disposition is proposed, the holder of a CNC in respect of that same land is advised. However, the CNC does not restrict land uses and provides no authority for the holder of the CNC to have any proposed disposition rejected or to have any conditions imposed on the proposed disposition.

It is our view that the "consultative notation" does not provide Foothills with anything more than the right to be consulted if a disposition is proposed in respect of lands for which it holds a CNC. Therefore, Foothills would be required to apply to Alberta - Sustainable Resource Development ("ASRD") to acquire necessary land rights over Provincial Crown Lands and would be required to address concerns raised by First Nations with respect to any impact on their traditional uses and rights. As acknowledged, Foothills would be required to acquire an agreement (for either a pipeline or a right of way installation[110]) and a pipeline installation lease (generally off right-of-way) pursuant to the *Public Lands Act*, R.S.A. 2000, c. P-40 and the *Dispositions and Fees Regulation*, Alta. Reg. 54/2000 made pursuant thereto.[111] Foothills would also require the consent of any landholder/leaseholder should any of the required lands be occupied.[112] From a timing perspective, it is our view that even assuming that the consultative notations are validated, Foothills would still be required to obtain necessary land rights across both Crown and privately held lands for the construction and operation of the Project.

As a more general note with respect to the acquisition of land rights across privately held lands, the TransCanada Application does not make assertions with respect to acquired land rights across privately held lands or the process for acquiring such rights. While we have not undertaken a detailed assessment of the processes required for acquisition of land rights across private lands, we do note that the interplay

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[109] See publication of Alberta Sustainable Resource Development – Reservation/Notation Type Codes (Last review/updated February 15, 2006).

[110] "Right of way installation" is defined in Section 98(g) of the *Dispositions and Fees Regulation* as follows: "means any equipment, apparatus, mechanism, machinery or instrument that is incidental to the operation of a pipeline and is within a right of way, including, without limitation, (i) a valve, vale box, drip, blow-down, connection, foundation, bridge or support structure for a pipeline above the surface, scraper trap and cathodic protection apparatus, and (ii) any other installation that the Minister considers to be a right of way installation."

[111] Pursuant to Section 106 of the *Dispositions and Fees Regulation*, the maximum term for a pipeline installation lease is 25 years:

[112] *Dispositions and Fees Regulation*, Section 7(1)(d). Foothills would also require a license of occupation pursuant to the *Public Lands Act* to construct any structures that could have a negative impact on the bed and shore of a waterbody.

between the NEB Act land acquisition provisions and the NPA provisions is not clear in this regard. For example, Section 19 of Schedule III (Terms and Conditions) to the NPA states:

> When the company ascertains the lands of a landowner that may be required for the purposes of a section or part of the pipeline, the company shall serve a notice, in a manner and in a form to be determined by the Designated Officer, on the landowner, which notice shall set out the location of the offices of the Agency and the right of the landowner within thirty days of being served to make representations to the Agency respecting the final route of the pipeline for its consideration prior to its approval of the final detailed route.

Notably, beyond this provision and beyond the provisions under Part III of the NPA respecting Real Property in the Yukon, there is very little in the NPA respecting the process for acquiring land rights, particularly with respect to the acquisition of land rights across privately held lands. However, the NEB Act provides for a more detailed land acquisition process that empowers the NEB, pursuant to Section 104 of the NEB Act, to issue an immediate right of entry order in respect of lands that are the subject of the right of entry application. In this regard, Section 104 states:

> 104(1) Subject to subsection (2), the Board may, on application in writing by a company, if the Board considers it proper to do so, *issue an order to the company granting it an immediate right to enter any lands on such terms and conditions, if any, as the Board may specify in the order.*
>
> [Emphasis added.]

As noted previously, the TransCanada application is, at points, unclear in terms of the process it expects to utilize for consideration of the Project, including the process it would intend to utilize to acquire remaining land rights. Notably, TransCanada is proposing to complete all right-of-way processes and land acquisition as part of its Execution Phase (See Appendix "A"), which is at a critical time for Project development and construction purposes. Although TransCanada appears intent on relying heavily upon the NPA and the NP Agency for consideration of its proposal, we note that the absence of any statutory power in the NP Agency to grant an immediate right of entry

order, where land acquisition is required. The absence of a detailed process in the NPA for acquiring required land rights may impede the process of acquiring necessary land rights for the Project, which could have an unfavourable impact upon the construction and operation of the Project. It is expected that TransCanada would seek to rely on the NEB land acquisition process to address such issues.

While the NPA does not specify a process by which a pipeline company could acquire the lands needed for the pipeline, we note that section 7 of the NPA stipulates that the Designated Officer may, in respect of the pipeline, exercise and perform such of the powers, duties and functions of the Board (with certain specified explicit exemptions), as may be delegated to him by the Board. The powers of the NEB relating to land acquisition are not listed among the express exclusions. Therefore, it appears to be open to the NEB to delegate to the Designated Officer the powers required to assist TransCanada in acquiring land. While we cannot speculate on what would be required for the NEB to make such a delegation of its powers (or what process would be used), it seems that TransCanada could explore this option if it could not otherwise acquire the necessary lands. This approach would only apply in a situation where TransCanada was seeking to rely upon the NPA and not otherwise involve the NEB directly.

9. Fulfillment of Existing NPA Terms and Conditions

Even if TransCanada were successful in confining the process for examining the 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, as discussed above, 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 a similar process to ensure that a complete environmental assessment 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 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 of this matter is not accommodated.

10. Litigation

In our view, there are likely to be a significant number of "trigger points" which could provide the basis for a Court challenge. As noted at the outset, there has already been litigation regarding the NEB's Northern Pipelines 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 seldom hesitate to commence litigation if they are not satisfied with the outcome of commercial discussions. As noted, there has already been litigation involving a past Foothills Pre-Build application.

11. Conclusion

In our view, any single item identified above, or the risks acknowledged by TransCanada in its AGIA Application, could result in a material delay to the schedule detailed by TransCanada in its Application. Given the circumstances that one could reasonably expect to evolve following a TransCanada filing, it is foreseeable that several of these potential concerns identified above could become a reality. Again, much will depend on how TransCanada approaches these matters. Therefore, we consider the TransCanada proposed schedule to be aggressive, in the sense that it will be difficult to achieve in the time available. While we fully appreciate that TransCanada, as the project proponent, may wish to push the shortest possible timeline, it is our view that a more realistic schedule would allow time to accommodate delays associated with the risks identified in the TransCanada AGIA Application, as well as, the above identified considerations. While we agree that the NPA approvals are of value to TransCanada (and give it an advantage over any Third Party proponent), it is our view that the five and one-half years proposed by TransCanada for securing major Canadian pre-construction approvals following the issuance of the AGIA License, represents a

"best case" scenario and would likely be difficult to achieve. It is our view that a timeframe of seven to eight year is more realistic, as it is seen as reasonable to expect that at least certain of the issues identified will be raised during the preparation and regulatory approval phases of the Project, with the resultant impact on timing. In this regard, a seven year timeline may be viewed as a "base case" scenario, with the highest probability of success and the eight year end of the range providing a more pessimistic view.

With regard to timing, we would also note that the NP Agency appears to have been largely dormant for many years, with only a skeleton staff being employed. While public information indicates that the NP Agency has been attempting to have discussions with a number of bodies in light of the revived interest in an Alaskan pipeline project, there is little tangible evidence to indicate that any material work has been done to date. In our view, an extended period of time (up to 18-24 months) could be required in order to complete the necessary coordination in order to have all administrative bodies in the various jurisdictions address a TransCanada Application in an efficient manner. While TransCanada could obviously do some preliminary work prior to the establishment of such a coordinated process, it appears that the process has not yet commenced and, hence, the starting point for TransCanada's timeline may be delayed beyond what it currently expects.

As stated above, the timeframe required for TransCanada to complete the Project and reach its in-service date will be materially impacted by the strategy it employs in seeking the required approvals and the process that is adopted for the consideration of these matters. If TransCanada proposes or encourages a process that is inclusive of all stakeholders and which seeks to address relevant issues and concerns, it will enhance the prospect of TransCanada being able to maintain an expedited timeline for the Project. In any event, given the significant issues that will have to be addressed and the numerous risks that will surround the Project, we consider it reasonable to conclude that a certain amount of slippage will occur in TransCanada's proposed schedule.

We would caution that, while a seven to eight year period does incorporate a certain measure of delay associated with recourse to the Courts or review by another Government or Regulatory body, this may not be the "worst case" scenario, as there are several events which could trigger litigation that are not mutually exclusive. There could be several challenges at different points along the process timeline that could cause distinct delays before the specific issues are resolved. While we acknowledge that litigation, in and of itself, does not automatically result in delay, it would require some party to assume the litigation risk, if the Project is to continue to move forward while these matters are being resolved. Additionally, the above assessment does not take into account the timing consequences of any litigation against TransCanada being successful. If this were to occur, an extended period may be required to remedy any deficiency that was found by the Courts to exist. In our view, much will be impacted by the strategy adopted by TransCanada and whether or not this strategy is designed to minimize the process and procedural delays that would be available to intervening parties. To the extent that this is done, many of the potential negative impacts to the project timeline could be avoided.

While we consider TransCanada's proposed schedule optimistic, even an extended schedule for TransCanada as detailed herein may well be materially shorter than any Third Party proponent could achieve. In fairness to TransCanada, it is not "starting from scratch", as would be the case for any other proponent with a "Greenfield" pipeline proposal. While this is an advantage, our overall view is that it is unlikely to allow TransCanada to complete the Project approval phase within the timeframe it has outlined. As stated above, much will depend upon the overall approach adopted by TransCanada in moving the Project forward. In the end result, it is seen as reasonable for the State of Alaska to also examine a timeline of approximately seven years for the completion of the required approval processes as part of its overall assessment, in addition to the five and one-half period reflected in TransCanada's AGIA Application.

In summary, we would attach a low probability to the five and one-half year timeframe, but one cannot rule it out completely. If TransCanada adopted an expansive approach in its APP filing, that reflected not only current legislative and judicial

standards, but also facilitated the open participation of all impacted stakeholders, it is likely that TransCanada could minimize the risks associated with certain of the concerns identified herein. This scenario could enable it to complete the process in a timely manner.

In this regard, we agree that the timeline provided by TransCanada is longer than that required for a "typical" facilities approval process. In our view, this reflects TransCanada's reasonable acknowledgement that an Alaska Pipeline Project Application will certainly not be "typical" and will raise a broad spectrum of issues that will take time to address.

E. RATES AND ACCESS

1. New Versus Existing Facilities

An issue has arisen with respect to whether or not TransCanada could be required to make use of existing, underutilized facilities instead of constructing a new pipeline to facilitate the transportation of Alaskan natural gas. TransCanada's AGIA Application appears to acknowledge that infrastructure requirements in Alberta may well be influenced by the amount of available capacity at the time the Project is scheduled to be in-service. A key input into this determination is the forecasted decline of Western Canadian sedimentary basin sourced natural gas. At this time there appears to be a strong consensus that WCSB natural gas will continue its recent decline trend, with the direct result that existing pipeline facilities serving certain domestic and export market areas will be underutilized by the time the Project would come onstream. The degree to which additional facilities are required to service certain market areas, such as the Fort McMurray oil sands industry, and the timing of such requirements is fairly uncertain at this point in time.

It is also noteworthy that in its Application TransCanada speaks favourably of the option of using Transportation by Others, at least as it relates to its own Alberta system. What is unclear is whether TransCanada would be as eager to contract Transportation by Others on third party pipelines, such as the Alliance Pipeline. In our view the failure to consider using third party pipelines could be a source of contention that would cause

such parties to actively intervene in the Project process and urge the NP Agency, the NEB and the respective Governments to ensure that existing infrastructure, with available capacity is utilized to the maximum extent possible. In our view, to the extent that the NEB is involved in this aspect of the decision making process it would encourage TransCanada to adopt the most economic and efficient manner to transport the subject natural gas. The strategy employed by TransCanada with respect to such third parties will greatly influence the degree to which this becomes a controversial matter in any Alaska Pipeline Project proceeding. As discussed above, to the extent TransCanada is required or opts to use an NEB process for intra-Alberta facilities, there will clearly be a forum available for parties to advocate the use of existing facilities. In reality, this may not be a bad thing as otherwise these parties may be forced to seek alternative venues (NP Agency or the Courts) which may not have efficient processes to consider this issue.

2. Return on Equity

TransCanada's Application appears to suggest that it would be seeking a Return on Equity ("ROE") of 14% for both the U.S. and Canadian portions of the Project. This ROE would be substantially in excess of the level of return awarded by the NEB under its Generic Cost of Capital Decision. While there is precedent for the Board awarding a "Greenfield" pipeline project a higher return than that determined by the GCC formula, it is our view that 14% would be seen as being on the high side in today's return environment. The degree to which this becomes a significant issue in any Alaska Pipeline Project proceeding will be influenced to a large degree by whether or not TransCanada is able to arrive at a Negotiated Settlement for rates as will be discussed below. TransCanada may have put this rate on the table because U.S. returns have traditionally been higher than for Canadian pipelines and it gives some flexibility in negotiations.

3. NEB Rate Setting Approach

As with Regulatory Tribunals in many jurisdictions, the NEB's rate setting authority is contained in its governing legislation and requires that the NEB establish

"just and reasonable" rates for the services provided by the various pipelines under its jurisdiction. Traditionally, this rate setting authority relied upon a Cost of Service model, whereby the rates were set following a litigated process in which the various forecasted costs (O&M, Taxes, Depreciation, Return, etc.) were examined, debated and ultimately decided upon by the Board. While the NEB's approach to ratemaking shares several common elements which the structure utilized by the FERC, there are some material differences.

The NEB's ratemaking legislation expressly contemplates the concept of "negotiated rates" which would see the subject pipeline company reach an agreement with shippers/affected parties on the rates to be charged for firm transportation and other services. While the NEB is not obligated to accept such a negotiated settlement, as it must still make a determination that the subject rates are fair and reasonable, it is our experience that a highly supported Negotiated Settlement stands a very good chance of receiving approval from the NEB, as filed. In the past, the NEB has accepted a variety of negotiated settlements and, in fact, has largely regulated the Group 1 Oil and Gas Pipeline Companies (the larger companies such as TransCanada, Enbridge, etc.) on this basis for an extended period of time. To a large degree the Negotiated Settlement process has replaced the litigated cost of service approach that was representative of NEB regulation in the past.

Therefore, while the NEB has no real experience with a "recourse rate" concept, as that term is used before the FERC, it is our view that a similar end result can be achieved via a negotiated settlement process. We would observe that the past Negotiated Settlements accepted by the Board have been in a variety of different forms; and the Board has exhibited considerable flexibility in this regard. Additionally, for "Greenfield" pipeline projects the Board has been willing to accept fixed rates that vary depending on the duration of the commitment made by shippers and has been willing to give priority or guaranteed access to shippers making such firm commitments.

It is unlikely the NEB will depart from past practice to the extent that it would set rates within a range and allow the pipeline the ability to discount at its discretion. This

model has not been adopted to date by the NEB, although it has permitted pipelines the flexibility to respond to market conditions when setting interruptible service rates.

Likewise, the concept of levelized rates has not become a common practice before the NEB. Notwithstanding, the Board has allowed new pipelines to charge less than a Cost of Service rate in the early years (due to market constraints) and then charge above Cost of Service rates in later years (when the market can accommodate the increases). In short, there is a willingness on the part of the NEB to accept various methods of meeting its underlying legislative requirements; and we are of the view that a number of reasonable alternatives would be acceptable to the Board. We note that, in the context of the Project, there are certain rate making issues addressed in the NPA that may influence the final outcome of this issue.

4. Open Season

While not a common occurrence regarding NEB regulated pipelines, the Board has experience with the Open Season concept regarding a number of new pipeline projects. The fundamental underpinning for the conduct of an Open Season is the requirement that all potential shippers be offered the service under the same Terms and Conditions. Therefore, should an initial Open Season result in follow-up negotiations with certain Interested Parties, and amendments to the slate of services/benefits being offered shippers to induce them to execute Long-Term Firm Transportation Service Agreements, it would be necessary for TransCanada to conduct a supplementary Open Season (in order to ensure that all parties were offered the transportation service on precisely the same Terms and Conditions). Such a supplementary Open Season could be conducted quite expeditiously and should not delay the process in a material way. In our view, as long as these fairness requirements were met, the NEB would be prepared to accept the results of the Open Season process and consider the results as support for the subject pipeline proposal.

5. Import and Export Requirements

In recent years parties exporting natural gas from Canada to the United States have chosen to rely upon Short-Term Export Orders (maximum two year duration) instead of seeking approval for Long-Term Export Licenses (maximum term twenty-five years). The move away from Long-Term Licenses, which was prevalent up to the mid-1980s, was largely influenced by two factors. First, the process for obtaining Long-Term Licenses had become quite complex because of the involvement of Intervenor Groups who sought to expand the scope of the investigation conducted by the NEB into a consideration of upstream environmental impacts. While a standard approach was developed to deal with these applications, many parties opted to simply rely upon Short-Term Orders and avoid the more lengthy and complex process. The second reason was a fundamental change in the approach utilized by the NEB and shippers with respect to the requirements to make long-term commitments to support pipeline expansions and downstream projects. In the past, buyers relying upon the gas supply to support their projects (such as downstream pipeline facilities or cogeneration plants) required a demonstration of long-term approvals in order to be comfortable with the security that the supply would in fact be there. Additionally, pipelines required a long-term license as a demonstration of supply availability to meet the long-term commitments being made by shippers for pipeline transportation service. Finally, financial institutions viewed the long-term approval as confirmation of the economic viability of the proposed venture and support for the funding they would advance to either the pipeline or the downstream project proponent.

Over time, as the gas supply supporting export transactions moved more to a spot market, or hub, pricing approach (versus long-term Purchase and Sale Agreements) and pipeline expansions (which were decreasing over this time period) were supported by corporate warranty type agreements, parties concluded that short-term approvals were adequate for these purposes. Additionally, the stability of the NEB's regulatory regime and the comfort that short-term Orders would be renewed without any significant measure of difficulty reinforced the view that the short-term

authorizations were indeed adequate to support the associated commercial undertakings.

Notwithstanding the above, in circumstances where significant financial commitments are being made and the project is of a long-term duration, it may be considered desirable to secure such long-term approvals. It is our experience that a 9-12 month period would typically be required to obtain a long-term license. A short-term order can normally be obtained in less than a week and with minimal supporting information.