

## **Recent Developments in the Law on the Duty to Consult in British Columbia**

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While the basic tenets of the duty to consult outlined in *Haida*<sup>1</sup> remain and have been affirmed in subsequent cases, the law on consultation continues to evolve on an incremental basis across Canada. This paper offers a summary of recent case law on consultation in British Columbia from 2011 and 2012.

### **A. 2011**

#### **1. *West Moberly First Nations***

The most significant consultation case in 2011 in British Columbia was the decision of the BC Court of Appeal in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*<sup>2</sup>.

West Moberly First Nations (“West Moberly”) brought an action as beneficiaries of Treaty No. 8 for the judicial review of three Crown decisions: two coal mining-related permit amendments and one license to cut and clear land. At dispute in the case was whether British Columbia had meaningfully consulted and accommodated West Moberly before granting the permit amendments and the license to cut.

Mr. Justice Williamson of the Supreme Court of British Columbia (“BC Supreme Court”) held that West Moberly’s Treaty right to hunt necessarily included specific protection for caribou, given that caribou are a species of central significance to West Moberly’s traditional way of

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<sup>1</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73. [*Haida*]

<sup>2</sup> 2011 BCCA 247 [*West Moberly*] In the interest of disclosure, I was counsel on *West Moberly* for the First Nation, along with my associate, Timothy Thielmann.

life.<sup>3</sup> Justice Williamson found that the Crown’s consultation was not sufficiently meaningful, and that the accommodation put in place was not reasonable.<sup>4</sup> British Columbia appealed that decision, arguing that the chambers judge erred by interpreting West Moberly’s Treaty 8 right to hunt as a “species specific right”, and by holding that the First Nations’ interests could only be accommodated in one specific way. The Province also argued that departmental officials cannot be held to an unreasonable standard with regard to the scope of their delegated authority.

Chief Justice Finch wrote the majority opinion on appeal, with Mr. Justice Hinkson concurring in all but one aspect, and Madam Justice Garson writing reasons in dissent. The majority dismissed the appeal, holding that the Province’s energy and mines ministry officials had failed to adequately consult or meaningfully accommodate West Moberly’s Treaty rights in the approval of First Coal Corporation’s permits.<sup>5</sup> The majority directed that First Coal’s permits be stayed until meaningful consultation occurred.<sup>6</sup> The Supreme Court of Canada denied the Province’s application for leave to appeal.

An important issue in this case was the characterization of the Treaty right to hunt and trap: is this a general right to hunt for meat, or a specific right to hunt for caribou? The chambers judge interpreted West Moberly’s right to hunt as a specific right to hunt caribou in its traditional area as part of its seasonal round. The BC Court of Appeal divided, however, on the issue of characterization. In her dissenting judgment, Madame Justice Garson opined that the Treaty right was not a specific right to hunt caribou, but rather to hunt in general, and that therefore the chambers judge erred in his characterization of the Treaty protected right as the right to hunt caribou.<sup>7</sup> However, the majority held that the chambers judge was correct in interpreting the right to hunt as a specific right to hunt caribou in its traditional area as part of its seasonal round.<sup>8</sup> The finding that Treaty rights provide species-specific protection (and even herd-specific protection) is significant, as it may set the groundwork for future legal claims, negotiated

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<sup>3</sup> *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, paras. 64 and 75. [West Moberly BCSC]

<sup>4</sup> *West Moberly* BCSC, para. 71

<sup>5</sup> *West Moberly*, para. 166

<sup>6</sup> *West Moberly*, para. 167

<sup>7</sup> *West Moberly*, para. 218

<sup>8</sup> *West Moberly*, paras. 127-140

agreements, or planning processes to protect any culturally significant feature of the traditional seasonal round of a First Nation, particularly one with a historic Treaty.

With respect to the issue of cumulative effects, the majority also agreed that past impacts on Treaty rights are relevant to consultation on current decisions. Finch, C.J. distinguished *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*,<sup>9</sup> a case in which there were no new adverse impacts to Aboriginal rights, and found that “the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners’ Treaty right to hunt,”<sup>10</sup> a statement with which the other two judges agreed. The BC Court of Appeal found that the Crown thus erred in deciding to issue the permit amendments and license to cut by refusing to consider that the depleted state of caribou in West Moberly’s territory would increase the seriousness of the adverse effects of mining exploration.

## **2. *Nlaka’pamux Nation Tribal Council***

In *Nlaka’pamux Nation Tribal Council v. British Columbia (Environmental Assessment Office)*,<sup>11</sup> the Nlaka’pamux Nation Tribal Council sought judicial review of an environmental assessment process related to a proposed landfill extension on land over which the Tribal Council claimed Aboriginal rights and title. While the provincial EAO solicited input from member First Nations of the Tribal Council, there was no direct consultation with the Tribal Council. It claimed that it was entitled to be consulted before the scope of the assessment was established. The Tribal Council also claimed that the order setting out the methods and procedures for assessment was flawed because it lacked a provision requiring the provincial EAO or the proponents of the project to consult with the Tribal Council. The Tribal Council sought a declaration that the Crown, through the provincial EAO, failed to comply with its duty of consultation and orders to quash the approvals granted in the assessment process.<sup>12</sup>

The chambers judge held that the Crown had the discretion to decide on an appropriate consultation process, and that the Crown had acted reasonably in these circumstances.<sup>13</sup>

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<sup>9</sup> 2010 SCC 43. [*Rio Tinto*]

<sup>10</sup> *West Moberly*, para. 117

<sup>11</sup> 2011 BCCA 78. [*Nlaka’pamux*]

<sup>12</sup> *Nlaka’pamux*, paras. 3 and 4

<sup>13</sup> *Nlaka’pamux*, para. 6

However, this decision was overturned on appeal. The BC Court of Appeal held that, notwithstanding the complexity of dealing with competing interests between First Nations, the Crown was not entitled to balance its obligation to consult with its obligation to carry out its statutory duty in an effective manner:

The Crown's duty to act honourably toward First Nations makes consultation a constitutional imperative. Difficult as it might have been to fulfill, it could not be compromised in order to make the process more efficient.<sup>14</sup>

The court also commented that complex, statutory processes are not always necessary to fulfil the Crown's duty to consult: "Accommodation that can be made without the need for an expensive and cumbersome administrative structure is to be welcomed rather than discouraged."<sup>15</sup>

However, the issue in this case was not the absence of a regulatory structure but rather the substitution of it by the Crown with an *ad hoc* process. Ultimately, the BC Court of Appeal held that where statute provides for a particular consultative process, an *ad hoc* consultation cannot be substituted for consultation under the legislated procedure.<sup>16</sup> The provincial assessment process is a detailed investigation of the environmental effects of a project, and is critical to the process leading to an environmental assessment certificate. Denying the Tribal Council a role within the formal assessment process was to deny it access to an important part of the high-level planning process.

Given that the Crown had conceded that "deep consultation" with the Tribal Council was required, this resulted in a declaration by the BC Court of Appeal that the provincial certificate was somewhat defective.<sup>17</sup> It was not entirely clear from the reasons for judgment what this meant, practically speaking. The court refused to quash the certificate, in part, because some consultation had occurred after the decision below notwithstanding the dismissal of the petition.<sup>18</sup> It would appear that all the court resolved was a point of law - that a section 11 order

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<sup>14</sup> *Nlaka'pamux*, para. 68

<sup>15</sup> *Nlaka'pamux*, para. 89

<sup>16</sup> *Nlaka'pamux*, paras. 97 and 98

<sup>17</sup> *Nlaka'pamux*, para. 107

<sup>18</sup> *Nlaka'pamux*, para. 102

under the provincial Environmental Assessment statute must set out the scope of any First Nation consultation that is to take place as part of the assessment process.<sup>19</sup>

### **3. *Moulton Contracting***

The BC Court of Appeal also addressed issues of consultation in *Moulton Contracting Ltd. British Columbia*<sup>20</sup> although this was not a typical “duty to consult” case. Certain members of the Fort Nelson First Nation had blocked a road to prevent the logging company from accessing its forest tenures. Those members belong to one family group which held the trap-line affected by the forestry tenures. The company sued the Province, the First Nation and the family members for damages. In their defence, the family members raised the issue of consultation. They argued that because the Crown had failed to adequately consult with them as the trap-line holders who have the right to trap under Treaty No. 8, the forestry permits issued by the Province and held by Moulton were not legal. Moulton and the Province applied to strike these sections of the defence. They succeeded in chambers and the family members appealed.

The BC Court of Appeal found that a challenge to the rights of a third party on the basis of a breach of the duty to consult can only come from the “collective in whom the treaty and constitutional rights inhere”.<sup>21</sup> Because the defendants were individual members and did not speak on behalf of the Fort Nelson First Nation, the court held that the defendants lacked standing to raise the issue of consultation as a defence.<sup>22</sup> The court held the decision to challenge Crown granted instruments on the basis of a failure of consultation lies only with the First Nation.<sup>23</sup> Absent an order made in a review process initiated by the First Nation, the family members were required to take the forestry permits as valid.<sup>24</sup>

The Supreme Court of Canada is scheduled to hear the further appeal of this matter on December 11<sup>th</sup>, 2012.

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<sup>19</sup> *Nlaka'pamux*, para. 103

<sup>20</sup> 2011 BCCA 311. [*Moulton Contracting*]

<sup>21</sup> *Moulton*, para. 39

<sup>22</sup> *Moulton*, para. 41

<sup>23</sup> *Moulton*, paras. 32 and 39

<sup>24</sup> *Moulton*, para. 43

#### **4. *Da'naxda'xw/Awaetlala First Nation***

In *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Minister of Environment)*<sup>25</sup>, the duty to consult was used successfully to prevent Crown land from being added into a conservation area, to enable a First Nation to partake in economic development opportunities within its traditional territory.

The Da'naxda'xw/Awaetlala First Nation requested that the Crown amend the boundaries of a conservation area on the central coast of British Columbia in order to facilitate economic development. The Minister refused to recommend the boundary change, and so the Da'naxda'xw brought a case for judicial review.

The Da'naxda'xw argued that the Minister's decision implicated their ability to use the land, water and resources in their asserted traditional territory to promote the economic and social well-being of their people,<sup>26</sup> while the government submitted that the preservation of the land was more likely to enhance the Da'naxda'xw's claims of Aboriginal title and rights.<sup>27</sup>

Interestingly, the court found that a denial of the boundary amendment could adversely affect the First Nation's Aboriginal title claim, as it would limit future uses of the land.<sup>28</sup> As such, the Crown had a duty to consult before deciding whether or not to recommend the amendment, and it had failed to fulfill this duty.<sup>29</sup>

#### **5. *Halalt First Nation***

The BC Supreme Court in *Halalt First Nation v. British Columbia (Minister of Environment)*<sup>30</sup> considered whether the Crown had adequately consulted and accommodated the Halalt First Nation regarding a groundwater extraction project.

The District of North Cowichan proposed a new groundwater extraction system to replace the existing surface water system providing drinking water to the community of Chemainus, located

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<sup>25</sup> 2011 BCSC 620. [*Da'naxda'xw*]

<sup>26</sup> *Da'naxda'xw*, para. 126

<sup>27</sup> *Da'naxda'xw*, para. 127

<sup>28</sup> *Da'naxda'xw*, para. 139

<sup>29</sup> *Da'naxda'xw*, para. 142

<sup>30</sup> 2011 BCSC 945. [*Halalt*] The decision is extremely lengthy, weighing in at 755 paragraphs.

on Vancouver Island. The petitioners, Halalt First Nation, challenged an Environmental Assessment Certificate issued for the project. The First Nation alleged that the Crown, through the provincial Environmental Assessment Office, failed to fulfill its duty to consult and accommodate Halalt.

The BC Supreme Court determined that the Crown had indeed failed to meet its obligations. The court found that the First Nation had a *prima facie* claim of Aboriginal title to both the land in the area and the groundwater under it, clarifying the case law with respect to both title claims over groundwater and the effect of shared exclusive occupation. As such, the project had the potential to significantly impact and adversely affect Halalt's interests,<sup>31</sup> and that therefore the Crown had a duty to engage in deep consultation.<sup>32</sup>

However, the Crown did not undertake a preliminary assessment of the strength of Halalt's claims, nor was there any evidence that it engaged with the First Nation about *prima facie* strength of its claims. This was contrary to law, which obliged the Crown to perform "a timely and transparent assessment of the strength of claims".<sup>33</sup>

The court also found that changes to the provincial environmental assessment legislation mean that meeting the statutory requirements under that legislation no longer sufficient to discharge the Crown's duty to consult, as it had been in *Taku River*.<sup>34</sup> The court reiterated the principle articulated in *West Moberly* that the duty to consult "is a constitutional and legal one that is 'upstream' " of the provincial environmental assessment legislation.<sup>35</sup>

Finally, the court found that artificially narrowing the scope of an assessment, thereby deferring the consideration of problematic aspects of the project to a later date and exempting them from the full assessment process, cannot be seen as accommodation.<sup>36</sup> As a result, the court concluded

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<sup>31</sup> *Halalt*, para. 629

<sup>32</sup> *Halalt*, para. 682

<sup>33</sup> *Halalt*, paras. 635 to 640

<sup>34</sup> *Halalt*, paras. 643 to 651

<sup>35</sup> *Halalt*, para. 652

<sup>36</sup> *Halalt*, paras. 688, 700, and 711

that the Province had failed in its constitutional duty to consult with the First Nation, let alone accommodate the First Nation's interests.<sup>37</sup>

The case is currently under appeal before the BC Court of Appeal. In my view, the most interesting part of the judgment in the court below was the finding of the chambers judge that the First Nation had established a *prima facie* claim to Aboriginal title and rights to the groundwater under their reserve. That, however, is not at issue in the appeal.<sup>38</sup>

## 6. *Upper Nicola Indian Band*

*Upper Nicola Indian Band v. British Columbia (Minister of Environment)*<sup>39</sup> involved the judicial review of a decision to issue an Environmental Assessment Certificate for a transmission line construction project. The First Nations argued that the duty to consult, once engaged by current actions, includes existing and ongoing impacts of past failures to consult.<sup>40</sup> Specifically, they argued that the duty required the Crown to consult about the *aggregate* impacts of the proposed project and two existing transmission lines.<sup>41</sup>

However, the BC Supreme Court reiterated that, as stated in *Rio Tinto*, the duty to consult only applies to adverse impacts of a current decision, and does not apply in respect of historical infringements.<sup>42</sup> Given that the existing transmission lines were not part of the project,<sup>43</sup> consultation was not required to include them. The petition was dismissed.

It is difficult to reconcile the court's statement that "*Rio Tinto* appears to place historic effects on potential claims of Aboriginal rights outside of the scope of the right to consultation"<sup>44</sup> with the BC Court of Appeal's unanimous view in *West Moberly* that the historic context is always relevant to the consultation process. One explanation may be that *Upper Nicola* was decided before *West Moberly*, such that the lower court did not have the benefit of the BC Court of Appeal's view on *Rio Tinto*.

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<sup>37</sup> *Halalt*, para. 747

<sup>38</sup> *Halalt First Nation v. British Columbia (Environment)*, 2012 BCCA 191, para. 20

<sup>39</sup> 2011 BCSC 388. [*Upper Nicola*]

<sup>40</sup> *Upper Nicola*, para. 8

<sup>41</sup> *Upper Nicola*, para. 13

<sup>42</sup> *Upper Nicola*, para. 156

<sup>43</sup> *Upper Nicola*, paras. 45 to 50

<sup>44</sup> *Upper Nicola*, para. 124

## 7. *Louis*

In *Louis v. British Columbia (Energy, Mines & Petroleum Resources)*<sup>45</sup> the Stellat'en First Nation sought judicial review of provincial approval of significant upgrades to an existing open-pit molybdenum mine in central British Columbia.<sup>46</sup> The mine's leases included both Crown land and land held in fee simple. The First Nation asserted unextinguished Aboriginal title to the Crown lands. No new leases were required for the pit upgrades, although the operating permit required amendment to build a new mill building on a fee simple parcel owned by the mining company.<sup>47</sup> The First Nation challenged the approval of the amendment allowing the construction of the new mill building, on the grounds that the Crown failed to consult or accommodate their Aboriginal interests adversely affected by the amendment. The First Nation took the view that no expansion could proceed without completing consultation on the existing and new permits.<sup>48</sup>

The BC Supreme Court held that the consultation process never really got off the ground because the First Nation insisted on discussing alleged past infringements related to the opening of the original mine in 1965 and its continuing operation since then.<sup>49</sup> The court held that, by virtue of the Supreme Court of Canada's decision in *Rio Tinto*, the Crown was not obliged, as part of the consultation process respecting the present-day amendments, to consult with the First Nation regarding alleged historic breaches or past infringements.<sup>50</sup> In this case, the court concluded that the Crown's consultation was adequate and did not trigger a duty to accommodate.<sup>51</sup>

Like in *Upper Nicola*, the decision in *Louis* pre-dates the BC Court of Appeal's decision in *West Moberly*. Again, it is difficult to reconcile the court's conclusion in *Louis* that consultation cannot include consideration of past infringements as they may relate to the present activities with the BC Court of Appeal's comments respecting *Rio Tinto* in *West Moberly*.<sup>52</sup> That said, it is

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<sup>45</sup> 2011 BCSC 1070. [*Louis*]

<sup>46</sup> *Louis*, paras.1, 9 and 15

<sup>47</sup> *Louis*, paras. 17 to 20

<sup>48</sup> *Louis*, paras. 91 and 92, 115 to 117

<sup>49</sup> *Louis*, para. 156

<sup>50</sup> *Louis*, paras. 157 and 162

<sup>51</sup> *Louis*, para. 242

<sup>52</sup> *West Moberly*, para. 117: "... the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' Treaty right to hunt"

interesting that the court in *Louis* expressed the same concerns about causality as did Justice Hinkson on *West Moberly*, as follows:

... the focus on judicial review is on the demonstration of causality between Crown's contemplated conduct or proposed decision and potential novel adverse impact on asserted Aboriginal title or rights<sup>53</sup>

## **B. 2012 (TO DATE)**<sup>54</sup>

There have been fewer decisions in 2012 (so far) related to or touching on the duty to consult.

### **1. *Adams Lake Indian Band***

The most recent case from the BC Court of Appeal involving the duty of consultation is its decision in *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*.<sup>55</sup> This decision involved consideration of the Crown's duty to consult a First Nation with respect to the incorporation of a local government.

The Adams Lake Indian Band sought judicial review of a provincial Order in Council to incorporate a winter ski resort area, Sun Peaks Resort Corporation, as a municipality. The BC Supreme Court found that although the Order in Council at issue had a legislative character, it was not a legislative act, and that the discretion exercised by the Lieutenant Governor in Council was found to be judicially reviewable and not insulated from the duty to consult simply because it has a legislative character.<sup>56</sup> In terms of the adequacy of the consultation, the chambers judge found that the Province had ignored the Band's concerns that the incorporation would further entrench the influence of the Sun Peaks Resort Corporation over the new local government.<sup>57</sup> It found that the Province had failed to meaningfully consult with the Band with respect to the incorporation of the municipality, and that the accommodation arising therefrom was not within the range of reasonable available outcomes as it did not address the Band's concerns.<sup>58</sup>

However, because the municipality had relied on the incorporation decision in good faith, in

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<sup>53</sup> *Louis*, para. 158

<sup>54</sup> As of the time of writing on August 30, 2012

<sup>55</sup> 2012 BCCA 333. [*Adams Lake*]

<sup>56</sup> 2011 BCSC 266. [*Adams Lake BCSC*] para. 128

<sup>57</sup> *Adams Lake BCSC*, para. 189

<sup>58</sup> *Adams Lake BCSC*, para. 201

issuing its remedy, the court chose not to quash the Order in Council. Instead, it ordered the parties to resume consultation under limited judicial supervision.<sup>59</sup>

The BC Court of Appeal overturned this decision and dismissed the petition. Mr. Justice Low, writing for the court, held that consultation with respect to the issue of incorporation was adequate and that the accommodation was reasonable.<sup>60</sup> Justice Low found that it was proper for the Crown to consider consultation regarding incorporation separately from consultation on other outstanding issues.<sup>61</sup> He held that “[i]t is not generally the role of the court to supervise ongoing consultations and provide directions as to how they are to be conducted. The court should avoid involvement in ongoing consultations.”<sup>62</sup> Justice Low reasoned that while the Province had a duty to consult regarding the incorporation of the municipality, “the impact of incorporation on the Bands’ claims to rights and title was and remains insubstantial.”<sup>63</sup> Consultation fell at the low end of the spectrum, and the Court found that because the impacts of incorporation were minimal, it was not necessary for the Crown to perform a strength-of-claim analysis.<sup>64</sup>

Mr. Justice Low appears to have taken a narrow view of the Supreme Court of Canada’s decision in *Rio Tinto* to say the effects of ongoing consultation are not relevant to the issue under consideration. It is difficult to reconcile this with the same court’s decision in *West Moberly* to the effect that potential future impacts are always relevant to the consultation process. However, *West Moberly* was not mentioned in the judgment, let alone distinguished.

One underlying issue seems to be the court's disapproval of the Band's tactics during the consultation process. For example, the Band refused to provide the Crown with specific concerns in writing. Contrast this with the 95 page report tabled by the First Nation in the *West Moberly* case, and this case may be an example of a First Nation relying on legal principles alone in the absence of a strong factual matrix.

What the decision does not answer is whether, once incorporated, a municipality has the duty to consult. The chambers hearing proceeded under the assumption that Sun Peaks did not, but the

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<sup>59</sup> *Adams Lake* BCSC, paras. 208, 209, and 214

<sup>60</sup> *Adams Lake*, paras. 78 and 79

<sup>61</sup> *Adams Lake*, para. 84

<sup>62</sup> *Adams Lake*, para. 63

<sup>63</sup> *Adams Lake*, para. 74

<sup>64</sup> *Adams Lake*, para. 74

BC Court of Appeal did not address that issue. We may have to wait for the appeals court to impart its wisdom on this issue in the appeal of the case below - *Neskonlith Indian Band v. Salmon Arm*.

## 2. *Neskonlith Indian Band*

In *Neskonlith Indian Band v. Salmon Arm (City)*<sup>65</sup>, the BC Supreme Court addressed the issue of whether local governments have a duty to consult First Nations about land use decisions that may adversely affect Aboriginal or Treaty rights.

The Neskonlith Indian Band brought a petition to quash a development permit issued by the City of Salmon Arm (the “City”) permitting the construction of a shopping centre on the Salmon Arm delta and floodplain, an environmentally hazardous area. The First Nation also sought a declaration that the City had a constitutional duty to consult and accommodate the First Nation prior to the issuance of any development permit.

After a review of the case law, the court concluded that municipalities do not have an independent constitutional duty to consult. Citing *Rio Tinto*,<sup>66</sup> the court ruled that honour of the Crown is non-delegable and rests at all times with the Province. It further held that procedural aspects of consultation may be delegated to a third party such as a municipality, but only where authority is expressly or impliedly conferred by statute.<sup>67</sup> The court concluded that the *Local Government Act* provided no express or implied statutory delegation requiring or empowering the City to engage in *Haida* consultation. The court also found the applicability of *Charter* jurisprudence to local governments to be an unpersuasive analogy. As such, the First Nation’s petition was dismissed.

There are good reasons to suggest that local governments should owe a duty to consult. The honour of the Crown applies to all its dealing with First Nations<sup>68</sup> and local governments are creatures of statute that derive all their law-making authority from the provincial Crown.<sup>69</sup> While the court in *Neskonlith* dismissed this analogy, the Supreme Court of Canada in *Godbout*

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<sup>65</sup> 2012 BCSC 499. [*Neskonlith*]

<sup>66</sup> *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*]

<sup>67</sup> *Neskonlith*, para. 54

<sup>68</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

<sup>69</sup> *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 52 [*Godbout*]

*v. Longueuil (City)*<sup>70</sup> has ruled that local governments must uphold the *Charter of Rights and Freedoms* (the “*Charter*”). The court in *Godbout* reasoned that as the *Charter* clearly applies to the Province, and since municipalities derive their existence and authority from a delegation of power from the Province, the *Charter* applies to municipalities as well.<sup>71</sup> It is arguable that if tribunals and statutory decision-makers have a duty to consult, so too should municipalities.

The Neskonlith Indian Band filed a notice on April 23, 2012 seeking leave to appeal to the BC Court of Appeal.

### **3. *William (Tsilhqot’in Nation)***

*William v. British Columbia*<sup>72</sup> was another major decision in the development of Aboriginal law this year. While the focus of the decision remained centred on Aboriginal rights and title, the BC Court of Appeal also provided further comments on the duty to consult.

At stake is a claim by the Xeni Gwet’in people of the Nemiah Valley in central British Columbia to roughly 800,000 hectares of land, over which they assert Aboriginal title through the Tsilhqot’in Nation. In 2007, the trial judge made unprecedented findings of fact respecting the existence of Aboriginal title in British Columbia, though declined to issue a declaration of Aboriginal title due to a technical legal error. However, the trial judge did issue a declaration that the Tsilhqot’in Nation has unextinguished, proven Aboriginal rights to over 400,000 hectares, the magnitude of which far surpassed any previous finding of Aboriginal rights. The plaintiffs, Canada and British Columbia appealed the decision. The appeal was heard in 2010 and primarily centred on issues of Aboriginal rights and title. Reasons for Judgment were delivered in June 2012, dismissing all three appeals but for different reasons than that of the trial judge. The Tsilhqot’in Nation has stated that it will seek leave to appeal in the Supreme Court of Canada.

The BC Court Appeal addressed the issue of consultation in its discussion of infringement. The trial judge had held that:

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<sup>70</sup> *Godbout*.

<sup>71</sup> *Godbout*, at para. 51

<sup>72</sup> 2012 BCCA 285 [*William*]

... the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.<sup>73</sup>

On appeal, British Columbia argued that the trial judge had erred in holding that an acknowledgement of Aboriginal rights was a prerequisite to consultation. The BC Court of Appeal clarified the issue as follows:

It is clear that the Crown need not accept the validity of asserted, but unproven, claims to Aboriginal rights as a prerequisite to meaningful consultation. Indeed, it is the uncertainty surrounding such rights that forms the basis for the duty to consult that was established in *Haida Nation*. Read in context, however, I do not think that the judge meant that the Crown is required to accept the validity of unproven rights claims as a condition precedent to meaningful consultation. Rather, as the plaintiff argues, all that is required is that the Crown treat the claim seriously by making a preliminary evaluation of its strength, and entering into consultations commensurate with that evaluation ...

The judge's criticism in this case was not that the government failed to accept the validity of Tsilhqot'in claims prior to consultation, but rather that it failed to gather important information before choosing its course of conduct.<sup>74</sup>

This comment is consistent with the 2011 comments of the court in *West Moberly*, emphasizing the procedural importance of the Crown undertaking a preliminary assessment of the First Nation's claim at the onset of the consultation process.<sup>75</sup>

#### **4. *Kwicksutaineuk***

Although a Federal Court decision, *Kwicksutaineuk Ah-kwa-Mish First Nation v. Canada*<sup>76</sup>, concerned a consultation dispute arising from the Broughton Archipelago on the coast of British Columbia respecting the issuance of two finfish aquaculture permits issued by the federal

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<sup>73</sup> *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 1294

<sup>74</sup> *William*, paras. 340 and 341

<sup>75</sup> *West Moberly*, paras. 149 to 151

<sup>76</sup> 2012 FC 517 [*Kwicksutaineuk*]

Department of Fisheries and Oceans. Originally, aquaculture had been regulated by the Province, but as the result of unrelated litigation in the BC Supreme Court, jurisdiction to regulate was held to be in the domain of the federal government. As a result, the Department undertook a two year process to develop a regulatory framework and to address tenure of existing aquaculture operations in the area.

The First Nation's traditional territory includes fishing stations in the Broughton Archipelago. The First Nation claimed those fishing stations, and indeed their asserted Aboriginal right to harvest fish and other marine species, would be adversely affected by the aquaculture operations proposed to be regulated under the new federal scheme.<sup>77</sup> The First Nation also took the position that the Department should engage in a multi-nation, area-based management plan for the Broughton Archipelago prior to issuing any specific licences, in order to assess the cumulative effects of the proposed large number of aquaculture farms to operate in the area.<sup>78</sup>

In the decision, the Federal Court dealt with several issues, including motions to strike and questions about standing. With respect to the substantive consultation issue, the court held the new federal scheme might adversely affect the First Nation's asserted Aboriginal rights in two ways: the indeterminacy of the principles by which the new regulatory scheme may operate, and the effective renewal of the licences.<sup>79</sup> Nonetheless, the court held that the Department had done what was required in the circumstances to maintain the honour of the Crown, having consulted "extensively" with the First Nation over a 22 month period.<sup>80</sup> Although the First Nation advanced a request, as an accommodation measure, for the Department not to renew the licence of 6 of the 22 salmon farms as part of a fallowing strategy, the court held this was unreasonable without broader consultation on an area management plan.<sup>81</sup> The petition was dismissed.

Interestingly, the Federal Court appears to have adopted a wider view of *Rio Tinto* than did the BC Supreme Court in the 2011 decisions summarized above, as follows:

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<sup>77</sup> *Kwicksutaineuk*, paras. 10 to 13, 21, 43

<sup>78</sup> *Kwicksutaineuk*, paras. 45 and 46

<sup>79</sup> *Kwicksutaineuk*, paras. 105 to 110

<sup>80</sup> *Kwicksutaineuk*, paras. 116, 119, 124 and 125

<sup>81</sup> *Kwicksutaineuk*, paras. 122 and 123

In my view, the duty to consult arises each time a licence is renewed, because each new licence may potentially affect the claim right or title, if only incrementally. Otherwise, the duty to consult would be spent once the initial licence has been granted, for however long a period it is renewed and irrespective of the impacts the renewed licences may have down the road. Such reasoning would make a mockery of the duty to consult and of the honour of the Crown.<sup>82</sup>

### C. CONCLUDING REMARKS

The development of the common law is, by definition, an accretion of whatever cases come before the court. It can be difficult if not disingenuous to attempt to thread together a group of cases simply because they were all decided in the same time period. That said, of the cases reviewed above, a few themes seem to emerge that are worthy of note.

First, the BC courts continue to grapple with the issue of past infringements, cumulative effects and what the Supreme Court of Canada really meant in *Rio Tinto*. Possibly as a result, the BC courts are paying increasing attention to the causality of the proposed activity to the alleged adverse impacts on asserted or existing Aboriginal rights.

Second, the BC courts have emphasized the importance of a preliminary assessment by the Crown of the strength of a claim to the consultation process.

Third, the BC courts continue to emphasize that the duty to consult lies “upstream” of the statutory regimes in which decisions are made.

Fourth, how the duty to consult plays out at the level of municipal or regional governments is very much an emerging issue that deserves to be tracked with some interest.

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<sup>82</sup> *Kwicksutaineuk*, para. 110