CROWN DELEGATION AND THE DUTY TO CONSULT:
DELEGATUS POTEST DELEGARE (SORT OF)

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Christopher Devlin

DEVLIN GAILUS
Barristers & Solicitors
Suite C-100, Nootka Court
633 Courtney Street
Victoria, BC V8W 1B9

INTRODUCTION[1]

It is well established that the Crown has a duty to consult and accommodate First Nations. It is less clear to what extent the Crown can delegate aspects of this duty and to whom.

The Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*[2] held that the honour of the Crown requires that the Aboriginal rights[3] embedded in section 35(1) of the *Constitution Act, 1982* be determined, recognized and respected. One mechanism by which to do this is through consultation. The process of consultation and accommodation is directed towards the ultimate goal of reconciliation of those Aboriginal and Treaty rights with Crown sovereignty. The duty to engage in meaningful consultation arises when the Crown has knowledge, real or constructive, of the potential existence of Aboriginal or Treaty rights, and contemplates conduct that may adversely affect them. The scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the purported or existing rights or title, and the seriousness of the potentially adverse effect upon those rights or title. Consultation may give rise to a duty to accommodate where proposed actions might be modified to address a First Nation's concerns. The duty to consult and to accommodate does not entail a duty to agree, but only to make "reasonable efforts." Reasonable accommodation will involve a balancing of Aboriginal and societal interests, which may include the interests of industry proponents. The unique circumstances of each instance govern the existence and extent of the Crown's duty to consult and accommodate. [4]

One of the key issues in the *Haida* appeal was whether third party resource developers also held a duty to consult First Nations. The Supreme Court of Canada said no, because the duty to consult arises from the honour of the Crown and that rests solely (not

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[1] I would like to thank Robert Clifford, 2010 summer student with Devlin Gailus, for his assistance with the research for this paper.
[2] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 ("*Haida*")
[3] And Treaty rights too – see *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 ("*Mikisew*")
[4] *Haida.* at paragraphs 25, 35, 38-39, 43-45 and 62.

surprisingly) with the Crown. However, the Supreme Court did make the following one-line assertion:

> The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments.[5]

The fact that the Crown can delegate procedural aspects of consultation gives rise to two distinct lines of inquiry. The first concerns delegation to non-Crown actors, or third-party industry proponents. What limits are there to the Crown delegating to industry proponents? To what degree can the Crown rely upon this delegation regarding its duty to consult? Can the proponent ever become liable for the consultation?

The second line of inquiry concerns internal delegation, or delegation within the Crown. To which actors or agencies within the Crown may the duty be appropriately delegated? What kind of authority must those Crown actors have in order for the consultation and potential accommodation to be meaningful?

Admittedly, there is little jurisprudence on these issues. For the most part, litigants and courts have muddled through most of the post-*Haida* consultation cases without much elucidation of the issue of delegation. This paper does not purport to provide an exhaustive survey of the case law. However, I do review a few of the post-*Haida* decisions to see what guidance may be gleaned.

DELEGATION TO THIRD PARTIES:

In *Haida,* the Supreme Court of Canada overruled the finding by the British Columbia Court of Appeal that Weyerhaeuser, as an industry proponent, owed an independent legal duty to consult and accommodate the Aboriginal interests of the Haida people. The Supreme Court deliberately refrained from finding that private sector industry proponents owed an independent duty to consult and accommodate aboriginal interests. Since it is

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[5] *Haida,* at paragraph 53.

the Crown's assumption of sovereignty that gives rise to the duty to consult and accommodate as a matter of the honour of the Crown, the court held that there is no legal basis for imposing this obligation on third parties:

> [The] Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. [6]

Nevertheless, while the Crown remains solely responsible for consultation, it may delegate procedural aspects of consultation to industry proponents. The question is, how much? To what degree is it appropriate for the Crown to delegate its constitutional duty to private sector proponents?

The short answer provided by the Supreme Court of Canada is that, although procedural aspects may be carried out by a third-party, the Crown alone remains responsible to satisfy its duty to consult.[7] Aboriginal groups do not have an actionable claim against third-parties for failing to discharge the Crown's duty to consult and accommodate.[8] Legal responsibility to consult First Nations respecting proposed Crown-authorized activities that may negatively affect their Aboriginal or Treaty rights rests upon the Crown.

Legally, it is not entirely clear how much procedure the Crown may delegate to an industry proponent with respect to First Nation consultation. Presumably the Crown may only rely upon third parties' "delegated procedural aspects" to the extent that such aspects do not fetter the Crown's final determination as to whether Aboriginal interests have been appropriately considered, and where reasonable, accommodated. The clear and obvious "procedural" aspects of consultation would appear to be non-controversial: provision of an application package and explanation of the technical aspect of the proposed activity. However, the degree to which procedure becomes substance may become blurred in First Nation/Crown consultations. For example, the denial by a

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[6] *Haida*, at paragraph 53.
[7] *Ibid.* at paragraph 53.
[8] *Ibid.*at paragraph 56.

proponent of a request by a First Nation for a study or to participate in the design of a study (or even an aspect of the project itself) may be a procedural step but, in hindsight, could be viewed by a court as the denial of a reasonable accommodation measure.

Practically speaking, industry proponents often do a significant amount of the consultation when seeking a particular development. The motivation can range from adhering to best practices to maintaining a healthy skepticism about the adequacy of Crown efforts to consult. The Crown may under-resource its consultation efforts, while an industry proponent, in terms of resources, may be better equipped to fulfill many of the procedural aspects of consultation. Industry proponents also have a vested interest in protecting their development opportunity and in ensuring that the Crown's duty to consult is appropriately met. Ultimately, the consequences arising from the lack of consultation by the Crown with a First Nation are arguably more onerously visited on a proponent than on the Crown, in terms of delays in project approval, changes to project design, the ensuing financial challenges, and so on. While courts have been reluctant to set aside permits granted to third parties as a result of government failure to satisfy the Crown's duty to consult, the outcome remains a possibility and the alternative remedies of stays or suspensions of permit can have equally onerous effects on proponents.[9]

The Supreme Court of Canada did not make clear in *Haida* to what extent consultation and voluntary modifications to proposed actions by industry proponents can be relied upon in discharging the Crown's duty to consult and accommodate. The court merely held that procedural aspects may be delegated to proponents but not the duty itself. What does that mean? An examination of recent case law in which consultation by a proponent has worked to offset but not completely satisfy the Crown's duty may help elucidate where the limits of such delegation may lie.

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[9] John J.L. Hunter, Q.C., "Current Themes in Consultation and Accommodation". Continuing Legal Education Society of British Columbia seminar, *Aboriginal Law Fundamentals*, held in Vancouver B.C., on October 4, 2006. The courts have issued stays or suspensions of permits, rather than quashing them, in several cases, including: *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)* [2005] B.C.J. No. 444 (B.C.C.A.) (QL); *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* [2006] O.J. No. 3140, 272 D.L.R. (4th) 727 (Ont. S.C.J.); and *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354.

Preliminary Assessments of the Nature and Scope of the Section 35(1) Right

The decision in *Wii'litswx v. British Columbia (Minister of Forests)*[10] involved the replacement of six forest licences within the traditional territory of the hereditary chiefs of the First Nation. Although there was significant effort made by the Crown to consult and accommodate the interests of the First Nation respecting the forest licence replacements, the First Nation brought a judicial review of the replacements on the grounds of inadequate consultation and accommodation of their Aboriginal interests. The BC Supreme Court held it was a critical factor that the Crown failed to conduct a proper initial assessment of the scope and extent of its duty to consult and accommodate. This assessment should be conducted at the outset of consultation to inform the process.[11] However, it is important to note that in this case, the third party licensees played no part in the proceeding. While the forest companies were served with the petition, they did not participate in the hearing as the First Nation agreed they would not seek an order to quash the replacement forest licences themselves, or to amend their terms, or to direct the licensees to participate in any future consultation.

In contrast, the industry proponent played a crucial role in the consultation efforts discussed in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*.[12] In that case, a mining company consulted with the First Nation regarding the potentially negative impacts of its exploratory mining operations on a threatened caribou herd and the First Nation's Treaty right to harvest those caribou. The mining company carried out what it considered "considerable" consultation, and as a result undertook steps in attempt to reduce the First Nation's concerns:

> [Steps included] retaining consultants, providing funds to assist in monitoring caribou, and retaining a wildlife biologist to develop a plan to restore altered landscapes and to monitor the caribou population.

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[10] 2008 BCSC 1139 *("Wii'litsw")*
[11] *Ibid.* at para. 245.
[12] 2010 BCSC 359 ("*West Moberly*")

> First Coal agreed to close the Spine Road [which negatively impacted caribou migration], and participated in a number of meetings with provincial wildlife biologists and First Nations groups to discuss the caribou population. It took steps to inform its employees and visitors to the area about procedures and practices that would ensure the impact upon the caribou was as minimal as possible.[13]

The Crown relied upon *Haida,* submitting that it could delegate procedural aspects of consultation to the mining company. The court was satisfied that the mining company had taken reasonable steps to address the First Nation's concerns. Nonetheless, the court ruled that the Crown's consultation efforts were not meaningful and that accommodation provided was not reasonable. Why? The Crown was "extremely slow" in providing its preliminary assessment of the potential adverse impacts on the First Nation's Treaty rights. The Crown had engaged in a less than meaningful exchange of information. Most importantly, the core concerns of the First Nation about the possible extirpation of the caribou herd (and with it, their ability to harvest those caribou) were not addressed, and the accommodation measures adopted by the Crown did not occur in response to the First Nation's concerns.[14]

What guidance may be drawn from these recent decisions? At the *outset of consultation,* the honour of the Crown obligates it to make a preliminary assessment of the strength of the claim (i.e. the nature of the right) and the potential adverse effects of government action, thereby informing itself of the scope of the required consultation and accommodation. Should the Crown choose to delegate procedural aspects of consultation to industry proponents, it is necessary for the Crown to provide the proponent (and the First Nation) with a structured framework identifying the scope and extent of required consultation, as opposed to *ad hoc* "let's just play it by ear" consultation by an industry proponent with no real idea of what section 35(1) rights are in play, let alone their significance to the First Nation and the corresponding seriousness of potential impacts to those rights. The preliminary assessment of the nature and scope of section 35(1) rights, it appears, cannot be delegated to a third party proponent.

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[13] *Ibid.* at paragraph 46.
[14] *Ibid.* at paragraph 50-61.

Procedures for Responsive and Meaningful Information Exchanges

In *Mikisew,* the Supreme Court of Canada held that the duty to consult includes the meaningful exchange of information, and includes "both informational and response components".[15] Honourable consultation requires the Crown to set up procedures for the meaningful exchange of information.[16]

Again, this does not appear to be something industry proponents can entirely discharge themselves. Often times, the proponent may not have the information requested by the First Nation e.g. wildlife studies, records of other Crown tenures or developments in the area, and so on.

In my view, industry proponents should demand that the Crown set out these procedures when starting a consultation process i.e. what are the procedures we should take to ensure that the consultation process is meaningful in these particular circumstances? By what standard are we to measure the exchange of information we have with the First Nation to ensure that such an information exchange is meaningful?

Outcomes Proportionate to Right at Stake and Seriousness of Impacts

Adherence to a process alone will not necessarily satisfy the Crown's duty to consult. In *Wii'litsw,* meaningful consultation was characterized by good faith negotiations and an attempt by both parties to understand each other's concerns and move to address them in the context of the ultimate goal of reconciliation of the Crown's sovereignty with the section 35(1) rights at issue.[17] An assessment of whether consultation was meaningful inevitably leads to an examination of what accommodations were reached. [18] In other words, reasonable results count more than steps taken.

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[15] *Mikisew*, at paragraph 64
[16] *Wii'litswx,* at paragraph 10; *Haida,* at paragraph 46
[17] *Wii'litswx*, at paragraph 178
[18] *Wii'litswx*, at paragraph 179

Ultimately, it is the Crown that approves a project or authorizes a permit, licence, lease or other such instrument. Arguably, the greatest opportunity for accommodation of First Nation concerns lies with the Crown's ability to impose conditions or changes to a proposed activity by a proponent, or even to deny it entirely. This is not to say that proponents themselves cannot or should not try to address First Nation's concerns. Proponents often have the means to modify and alter a proposed activity to address concerns raised by First Nations.

However, when a First Nation's concerns transcend a particular project, it may well only the Crown that has the means to provide appropriate accommodation measures, regardless of the procedural steps undertaken by a proponent or the mitigating steps taken as a result. This was the case in the *West Moberly* decision. There, the mining company agreed to implement a caribou monitoring and mitigation plan in which the First Nation was a participant. Nevertheless, the court held that the plan was not a sufficient accommodation measure; only a caribou recovery and augmentation plan was deemed to be an adequate accommodation, something which the Crown had to do itself.[19] Importantly, the court found no fault with the mining company in terms of the consultation steps that it had undertaken.[20]

The overarching principle for measuring the substantive adequacy of accommodative measures is that accommodation must *balance Aboriginal and societal interests* in a way that is consistent with the honour of the Crown and the objective of reconciliation:

> Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.[21]

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[19] *West Moberly*, at paragraphs 52, 53 71, 77, 79 and 80
[20] *West Moberly*, at paragraph 48
[21] *Haida*, at paragraph 50

> [A]ccommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.[22]

Furthermore, the Supreme Court of Canada has provided guidance to the Crown with respect to the appropriate weight or priority to be given when attempting to balance competing interests. [23] First priority should be accorded to conservation; second priority to Aboriginal rights for food, social and ceremonial purposes; third priority to Aboriginal commercial rights;[24] and fourth priority to non-Aboriginal commercial rights. Part of the consultation process often involves trying to reconcile the Aboriginal interests with social and economic interests. It is difficult to imagine how this step of reconciling competing interests could be fairly undertaken, if at all, by a proponent.

Higher-Level Planning

The decision in *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*[25] involved the judicial review of the approval of a Forest Stewardship Plan ("FSP') submitted by a forest company on the grounds of inadequate consultation and accommodation of the Aboriginal title and rights of the affected First Nation. The FSP was a landscape-level planning document which outlines the strategies and results by which the licensee proposes to conduct its operations within a specified area in order to achieve government objectives.[26] The FSP was at the heart of the traditional territory over which the First Nation asserted Aboriginal title and rights.[27] The approval of the FSP was an initial step in the legislative process leading to timber harvesting, although it did not itself provide the forest company with authority to harvest timber. The position of the

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[22] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 ("*Taku River*"), at paragraph 2
[23] *R. v. Sparrow*, [1990] 3 CNLR 160 (SCC) at paragraph 78
[24] *R. v. Gladstone*, [1996] 4 CNLR 65 (SCC) at paragraphs 62 and 63
[25] 2008 BCSC 1642 ("*Klahoose*")
[26] *Klahoose* at paragraph 11.
[27] *Klahoose* at paragraph 60.

Crown was that the approval of an FSP in and of itself has little-on-the-ground impact on the exercise of Aboriginal rights.[28]

The court disagreed. It found that there were potential adverse effects upon the Aboriginal title and rights to the First Nation by approving the FSP overlaying the heartland of their traditional territory. The court found that it did not matter that the FSP was but one step in the process of moving from obtaining the right to harvest timber to exercising it – any step in that process carries the potential of adversely affecting the First Nation's interests to a serious degree.[29] In the result, the court ordered a stay of all further activity and operations under the existing approved FSP besides the application to amend the FSP.[30] The court further stated that the Crown's consideration of the application to amend the FSP would be expected to involve an appropriate sharing of information including information that may not be statutorily required in relation to an FSP, such as operational and access information.[31] Further, it would involve the First Nation directly in the decision-making process concerning any accommodation of the First Nation's Aboriginal title and rights.[32]

From the *Klahoose* decision and others like it,[33] it is clear that involving a First Nation in higher-level strategic planning is a procedural step that is very different than merely reviewing operational plans with a proponent. The landscape level land use management process directly involves Crown actors, even if they receive advice from industry proponents. It does not appear that involving First Nations in high-level planning is something which the Crown can functionally delegate to a third party resource developer.

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[28] *Klahoose* at para. 13.
[29] *Klahoose* at paragraph 68.
[30] *Klahoose* at paragraph 150.
[31] *Klahoose* at paragraph 152
[32] *Klahoose* at paragraph 152
[33] See also *Ka'a'Gee Tu First Nation v. Canada Attorney General*, [2007] 4 CNLR 102 (FCTD) ("*Ka'a'Gee Tu*") at paragraph 117

DELEGATION WITHIN THE CROWN

Ultimately it is the Crown that must ensure that appropriate consultation and accommodate takes place. However, the Crown is a multi-facetted creature as a matter of modern law and governance. In certain circumstances, one manifestation of the Crown may act as a regulator while another manifestation acts as the proponent for a proposed activity.[34] As there are limits to what delegation can occur external to the Crown, so there appears to be limits to delegation within the Crown.

Appropriate and Authorized Delegates to Conduct Consultation

In *Hupacasath First Nation v. British Columbia (Minister of Forests)*[35] a consultation process was supplemented with a 'corporate table' at which provincial ministries with different mandates could be represented. While there appeared to be some confusion about the goal of the 'corporate table', [36] the court noted as follows:

> Since it is the Province that (by necessity) divides its mandate among Ministries and agencies, it is incumbent on the Province to do its best to ensure that the mandate of the specific Ministry or agency with which a First Nation is interacting is made clear, and to ensure that responsibility for consultation and accommodation is not lost in the complexity of (sometimes shifting) governmental structures. The Crown's duty is to carry on a process that is as transparent as possible.[37]

In *West Moberly* the court found it very problematic that the Crown delegated its duty to consult and accommodate to departmental officials who lacked both the authority to consider fully the concerns presented by the First Nation and the power to accommodate those concerns.[38] In response to cumulative impact concerns raised by the First Nation, departmental officials stated that those concerns were beyond the scope of their project to

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[34] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 ("*Carrier Sekani Tribal Council*") at paragraphs 55 and 56. This decision is currently under appeal at the Supreme Court of Canada. At the time of writing, judgment was reserved.
[35] 2008 BCSC 1505 ("*Hupacasath*")
[36] *Ibid.* at paragraph 77.
[37] *Ibid.* at paragraph 147.
[38] *West Moberly,* at paragraph 54.

assess.[39] The court denounced this reply and the general practice of delegating responsibility to officials who do not hold the appropriate mandate, finding that such practice offended the honour of the Crown.[40]

Thus it appears that the Crown may delegate the duty to consult to departmental officials so long as those officials either are granted the authority to consider fully the First Nation's concerns and the power to accommodate those concerns or are given direction to seek out those with such authority and power as appropriate in the circumstances.

Procedural Fairness

It is not uncommon in practice for there to be a disconnection between the government-actor statutorily authorized to make a decision and the government-actors who actually engage in the consultation process with a First Nation. First Nation groups engaged in consultation commonly encounter an "Aboriginal relations" officer or an "Aboriginal liaison" specialist as their primary point of contact in addition to or, sometimes, rather than the statutory decision-maker.[41] When Aboriginal relations officers engage in consultation, they often do so without the requisite statutory authority or power to accommodate the First Nation's concerns. These officers will instead report back to other people within government with the legal authority to make the final decision about the consultation performed on behalf of the Crown by the officers.

The fact that a statutory decision-maker may not engage in the consultation process does raise some administrative law issues. It is a general principle of procedural fairness that requires that "the one who hears must also decide."[42] Over-reliance on Aboriginal relations officers limits the decision maker's ability to hear the concerns and submissions made by the First Nation prior to making a decision.

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[39] *Ibid.* at paragraph 54.
[40] *Ibid.* at paragraph 55.
[41] I have one First Nation client whose lands officer has a keen sense of humour about "Aboriginal relations" officers. He invariably directs their attention to his official title printed on his business cards - "Caucasian Specialist".
[42] *Wah Shing Television Ltd. v. Canada (Radio-television & Telecommunications Commn.),* [1984] 2 F.C. 381 (QL).

In addition, just as decision makers cannot fetter their own judgment, so they cannot allow others to direct that a certain decision should be made.[43] Over-reliance on an Aboriginal relations officer (or third-party industry proponents for that matter) may raise this concern. It is the delegate's role to carry out the procedural aspects of consultation; the substantive decision rests with the statutory decision maker and the Crown. Although advice from other persons or agencies can be relied upon, unlawful dictation occurs when a decision maker fails to exercise an independent judgment due to feeling compelled to exercise statutory authority in accordance with the views of another.[44]

Thus, if delegation within the Crown amounts to the fettering of discretion it could violate administrative law principles of procedural fairness and might result in the failure to adequately discharge the duty to consult and accommodate.

Consultation Through Regulatory Regimes

The Crown can also delegate its duty to consult to processes under an administrative regime. The Supreme Court of Canada in *Haida* clarified that consultation may be carried out within the institutional setting of a regulatory scheme, provided that the Crown ultimately determines that the regime is appropriately suited to the task.[45]

Certainly this was true in the companion case to *Haida*. In *Taku River,* British Columbia asserted that by engaging in the process under its environmental assessment legislation, it had fulfilled the requirements of its duty to consult. The Supreme Court of Canada agreed, noting that:

> The Province was not required to develop special consultation measures to address TRFN's [Taku River First Nation's] concerns, outside of the process provided for by the *Environmental Assessment Act*, which

[43] *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (QL).
[44] *Muliadi v. Canada (Minister of Employment and Immigration)* [1986] 2 F.C. 205 (C.A.) (QL)
[45] *Haida,* at paragraph 51.

> specifically set out a scheme that required consultation with affected Aboriginal peoples.[46]

Notwithstanding the delegation of procedural consultation to a regulatory agency, the Crown may retain important consultation duties. In *Ka'a'Gee Tu*, oil and gas development occurred under the authority of the National Energy Board pursuant to the *McKenzie Valley Resource Management Act* ("the Act"). The Act provides for two regulatory boards, the Mackenzie Valley Environmental Impact Review Board and the Mackenzie Valley Land and Water Board. These boards provide guidelines on how consultation is to be undertaken by developers when applications are made to the respective board. The Act provides for significant consultation between the developer and the affected First Nation group. While the court approved of the consultation process under the Act, the Crown unilaterally modified some of the recommendations provided by the Review Board. Resulting from this decision was the Crown's failure to discharge its duty to consult and accommodate. The court noted that;

> It is not enough to rely on the process provided for in the Act. From the outset, representatives of the Crown defended the process under the Act as sufficient to discharge its duty to consult, essentially because it was provided for in the Act. I agree with the Applicants that the Crown's duty to consult cannot be boxed in by legislation.[47]

Despite optional recourse to a regulatory regime, the Crown is always ultimately obligated to ensure that consultation is ultimately meaningful and there is accommodation where reasonable, regardless of the administrative process through which consultation may occur.

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[46] *Taku River,* at paragraph 40. Interestingly, however, British Columbia amended its environmental assessment legislation shortly thereafter, eliminating the specific reference to consulting First Nations in the statutory scheme: *Kwikwetlam First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 ("*Kwikwetlam*") at paragraphs 51-54 and 69

[47] *Ka'a'Gee Tu,* at paragraph 121.

Assessing the Adequacy of Consultation

How does the Crown determine whether consultation is ultimately meaningful? The straightforward way is for the statutory decision-maker e.g. a Minister or a civil servant with delegated authority to assess whether the Crown's efforts were adequately given the nature of the right in question, the seriousness of the potential infringements and the mitigation or accommodation measures that resulted from the consultation process.

Sometimes, however, the assessment of the adequacy of consultation is delegated as a matter of law to a Crown agency acting in a quasi-judicial capacity. While a quasi-judicial tribunal does not itself owe First Nations a duty to consult,[48] the honour of the Crown requires that a quasi-judicial regulatory tribunal must decide any consultation disputes which arise within the scheme of its regulation.[49] In *Kwikwetlam*, the court held that the BC Utilities Commission was a quasi-judicial administrative tribunal that nevertheless had an obligation to assess the adequacy of the consultation with First Nations by other Crown actors appearing before it.[50] So long as the governing statute of the tribunal provides it with the power to decide questions of law, such power includes deciding relevant constitutional questions, such as whether the Crown has a duty to consult and whether it has fulfilled such a duty.[51]

Perhaps more importantly, it appears that such quasi-judicial tribunals cannot defer assessing the adequacy of consultation if the issue arises before them, even if another Crown actor may be in a position down the road to do so. In the *Kwikwetlam* decision, the BC Utilities Commission had decided that it did not need to consider the adequacy of consultation when it was considering a certificate of public convenience, because the assessment of the adequacy of consultation was better left to the Ministers with the power to issue an environmental assessment certificate.[52] The court found this approach to be an error in law, holding that the utility commission had a constitutional duty to determine

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[48] *Quebec (Attorney General) v. Canada (National Energy Board),* [1994] 1 SCR 159
[49] *Carrier Sekani*, at paragraph 54
[50] *Carrier Sekani*, at paragraphs 35-41, 50 and 56; *Kwikwetlam*, at paragraphs 8 and 61
[51] *Carrier Sekani*, at paragraphs 40-41
[52] *Kwikwetlam*, at paragraphs 6, 7 and 35

when the Crown's duty to consult arose, the scope of that duty, and whether it was fulfilled before certifying the project as necessary and convenient in the public interest.[53]

Thus, a quasi-tribunal that has the duty to assess the adequacy of consultation is the one that has the power to make the necessary first approval on which the rest of the project is based.[54] The decision to assess the adequacy of the Crown's consultation, in other words, cannot be passed "up the chain" to a higher yet subsequent decision-making authority.

CONCLUSIONS

Without purporting to present an exhaustive list of those aspects of consultation that lie at the heart of the Crown's non-delegable parts of its duty to consult, the brief discussion in this paper would suggest that the Crown at a minimum cannot delegate to an third party proponent:

- The preliminary assessment of the nature and scope of the asserted Aboriginal or Treaty right;
- The establishment of procedures for the meaningful exchange of information;
- The responsibility for the reasonableness or appropriateness of the outcomes of the consultation process; and
- The involvement of First Nations in higher-level strategic land use and resource planning as an accommodation measure.

In terms of delegation within the Crown, there also appear to be a few issues to keep in mind:

- the Crown may delegate the duty to consult to departmental officials so long as

[53] *Ibid.*, at paragraphs 13, 14, and 62
[54] *Ibid.*, at paragraphs 59 and 63

  - those officials either are granted the authority to consider fully the First Nation's concerns and the power to accommodate those concerns or are given direction to seek out those with such authority and power as appropriate in the circumstances; and
  - those officials abide by the administrative law principles of procedural fairness;
- the Crown may also fulfill its consultation obligation through a regulatory process but the Crown is ultimately obligated to ensure that consultation is meaningful and the accommodation reasonable, regardless of the administrative process used; and
- the adequacy of consultation undertaken by one Crown actor must be assessed by a Crown quasi-judicial administrative tribunal with the power to decide questions of law within the scheme of its regulation if the issue arises before them, and cannot be deferred to a higher yet subsequent Crown actor with decision-making authority.