

# “Irreconcilable? The Duty to Consult and Administrative Decision Makers”

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## I. Introduction

*Haida Nation v British Columbia (Minister of Forests)*<sup>1</sup> ushered in a new era in Aboriginal law. In contrast to the emphasis on history in section 35's first 20 years,<sup>2</sup> the *Haida Nation* era offered a determinedly forward-looking approach to the reconciliation purposes ascribed to Aboriginal rights by the Supreme Court. Under the *Haida Nation* paradigm, and the duty to consult and accommodate it imposed on the Crown in relation to pre-proof aboriginal rights claims, reconciliation is a process that “begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense.”<sup>3</sup> Nine years after *Haida Nation*, the legal parameters and the institutional structures involved in implementing the duty to consult and this new direction remain incomplete and formative.

The Supreme Court has decided only two additional duty to consult cases since the *Haida Nation* trilogy<sup>4</sup>—*Beckman v Little Salmon/Carmacks First Nation*<sup>5</sup> and *Rio Tinto Alcan v Carrier Sekani Tribal Council*<sup>6</sup>—and has accepted only one leave application in a consultation related matter since then.<sup>7</sup> These cases offer small refinements and rely heavily on administrative law principles to emphasize that the duty fits within the Canadian public law framework. The reliance on existing frameworks plays into the tension that commentators have noted in the duty to consult jurisprudence regarding the limited potential of these frameworks to promote a more fundamental restructuring of legal, po-

litical and economic relationships that the reconciliation objectives of section 35 rights arguably require.<sup>8</sup> As Ria Tzimas asks, “Is dialogue through consultations and modern treaty negotiations intended to make *some* room for Aboriginal participation in the overall socio-economic growth and well-being of the country? Or, is reconciliation intended to enable a more profound reshaping of the Crown-Aboriginal relationship?”<sup>9</sup> Nevertheless, even within existing legal frameworks there are approaches that promote at least some rethinking of decision-making around land and resource management. Tapping into this potential, however, requires that Aboriginal rights be given their full status as constitutional rights within Canadian public law. Recent interpretations of the jurisdiction of administrative decision makers<sup>10</sup> in relation to the duty to consult demonstrate instead that Aboriginal rights are excepted from well-established principles of public law.

The Court's framing of the duty to consult in *Little Salmon/Carmacks* and *Carrier Sekani* suggests interpretive space to treat the constitutional duty to consult differently from procedural rights grounded in other aspects of the constitution or administrative law. In *Little Salmon/Carmacks*, for example, Binnie J clearly wished to avoid crystallizing consultation processes as constitutional rights: “The honour of the Crown has thus been confirmed in its status as a constitutional principle. However, this is not to say that every policy and procedure of the law adopted to uphold the honour of the Crown is itself to be treated as if inscribed in

section 35. The concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and should not be viewed independently from its purpose.”<sup>11</sup> Further relying on the variability of the content of the duty, the Court thus rejected arguments that the Crown’s constitutional duty gave rise to a reciprocal constitutional right to be consulted on the part of Aboriginal peoples, and consequently distinguished the duty to consult from other constitutional procedural protections, even potentially variable ones such as those rooted in fundamental justice under section 7 of the *Charter*. Similarly, the Court in *Carrier Sekani* offered the following observations on the nature of duty: “Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy and compromise.”<sup>12</sup> Thus, a decision maker’s obligation to consult has potentially less legal content than a decision maker’s obligation to decide in accordance with the requirements of procedural fairness, which in administrative law is treated as a question of law.<sup>13</sup>

The implications of the unusual status attributed to the duty to consult in Canadian public law are not well understood. This paper will explore the interface of Aboriginal and other areas of public law in the context of administrative decision-making processes and argue that the aim of reconciliation in Aboriginal law is undermined by the exceptional treatment of the duty to consult. Beginning with an overview of the duty to consult and the state of the law following the Supreme Court’s decisions in 2010, I then focus on emerging issues around the jurisdiction of administrative boards and tribunals to review and carry out the duty to consult.<sup>14</sup> The Court attempted to set clear guidelines to determine tribunal jurisdiction in relation to the duty to consult in *Carrier Sekani*, but decisions since that case show the law is far from settled. Relying on the jurisprudence from administrative law, the discussion will highlight inconsistencies in court and tribunal approaches to the duty as compared to other areas of public law. I will show that through critical points of departure from established administrative law principles, courts and tribunals

have narrowed tribunal jurisdiction in relation to the duty to consult relative to tribunal jurisdiction over other constitutional matters. This narrowing permits governments and legislatures to avoid the changes in administrative decision-making anticipated by *Haida Nation* and arguably required to implement the duty to consult in a manner that is capable of promoting reconciliation.

## II. The Duty to Consult and Accommodate

### i) Source: The honour of the Crown

The most important innovation in *Haida Nation* was applying the duty to consult to rights that were asserted but not yet proven or settled through negotiations. Before *Haida Nation*, the duty to consult was confined to its position under the *R v Sparrow*<sup>15</sup> justification analysis, arising only if a right could be proven (or the Crown otherwise agreed to recognize the right). After *Haida Nation*, the duty ensures that Aboriginal rights and interests are taken into account in government decision-making even if there is no agreement on the nature or existence of those rights. The duty to consult was always an obligation aimed at preventing unjustified and perhaps unnecessary infringements of Aboriginal rights; by moving the trigger for the duty out “in front” of the proof of rights, *Haida Nation* made it more likely that the duty would accomplish this purpose.

This re-orientation was grounded in the honour of the Crown. As McLachlin CJC said in *Haida Nation*:

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests.... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.<sup>16</sup>

To preserve the Aboriginal rights and interests pending recognition and settlement, the duty to consult and, if appropriate, accommodate thus arises where the claimed Aboriginal right would potentially be negatively affected by proposed government conduct. Since *Haida Nation*, the Supreme Court has confirmed the centrality of the honour of the Crown principle in guiding the Crown's relations with Aboriginal peoples.<sup>17</sup> As the constitutional source of the duty to consult, the honour of the Crown also structures responsibility for how the duty to consult is carried out. As described in *Haida Nation*, “[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development” but “the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.”<sup>18</sup>

## ii) Triggering the duty

In *Carrier Sekani*, the Supreme Court delineated three elements involved in the threshold analysis to identify when the duty will be triggered: Crown knowledge of an Aboriginal right; Crown contemplation of an action (or decision); and the possibility that the contemplated action may adversely impact the exercise of the right.<sup>19</sup> The knowledge element is satisfied by “credible assertions” of rights and Crown knowledge of “the potential existence” of an Aboriginal right, a standard that ensures that the duty arises before proof or recognition of such rights.<sup>20</sup> Further, knowledge may be attributed to the Crown (“constructive knowledge”) when, for example, the government is aware of an Aboriginal group's traditional occupation of an area.<sup>21</sup>

The duty applies to both Aboriginal and treaty rights,<sup>22</sup> including rights deriving from modern treaties as determined by the Supreme Court in *Little Salmon/Carmacks*. In regard to treaty rights, the Court has held that the Crown will always have notice of the rights contained in the treaty.<sup>23</sup> Treaty rights, however, are not entirely determined by the text of the historic treaties.<sup>24</sup> Moreover, as *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*<sup>25</sup> recently demonstrated, disagreements over the nature and scope of treaty rights can profoundly change the outlook on what con-

sultation obligations and accommodation measures might be owed. In that case, the coal exploration licenses in issue impacted the habitat of the endangered Burnt Pine Caribou Herd, which the First Nation had voluntarily stopped hunting in the 1970s to protect the herd. The BC Court of Appeal could not find common ground about the nature of the treaty rights at stake, highlighting lingering uncertainties in the Aboriginal rights jurisprudence about whether Aboriginal or treaty harvesting rights might be species specific and about the territorial application of treaty rights.<sup>26</sup> These uncertainties stem from the seeming contradiction between statements of principle in the cases that Aboriginal rights are geographically but not species specific,<sup>27</sup> alongside commercial rights cases that have been decided on a species specific basis without an explanation of why the commercial context might alter this characteristic of Aboriginal rights.<sup>28</sup>

Although the Crown may have *notice* of at least the rights identified in the text of the treaty, notice does not define the content of those rights. Finch CJ commented on this point:

it must be remembered that [a treaty right is] not merely a right asserted and as yet unproven, as in the cases of Aboriginal rights claims in non-treaty cases. Here the right relied on is an existing right agreed to by the Crown and recorded in a Treaty. While there may be disagreement over the limits on or the scope of the right, consultation must begin from the premise that the First Nations are entitled to what they have been granted by the Treaty.<sup>29</sup>

While a text-based anchor for a treaty right would seem to be enough to support a “credible assertion” to that content, the scope and nature of treaty rights may be as contentious as unproven or unrecognized Aboriginal rights. In the end result, there may be less of a distinction between asserted Aboriginal and treaty rights at the threshold stage of the consultation analysis than Finch CJ suggests.

The other two elements of the duty's trigger—Crown conduct and the potential for adverse effects on the rights—are also defined broadly. Meaningful consultation of a standard capable of upholding the honour of the Crown

may require that consultation occur early and throughout multi-step government decision-making processes such as environmental assessment.<sup>30</sup> The duty also applies to decisions that may not have an immediate impact on Aboriginal rights; for example, the development of strategic plans and decision-making frameworks such as the water management plan at issue in *Tsuu T'ina Nation*.<sup>31</sup> However, past Crown conduct and past impacts or infringements of Aboriginal rights will not, on their own, trigger the duty to consult. This issue was clarified in *Carrier Sekani*, in which the Carrier Sekani Tribal Council First Nations argued that the continued negative impact on their Aboriginal fishing rights caused by a dam built on the Nechako River in the 1960s gave rise to a duty to consult. The dam supported a power plant for an aluminum smelter and BC Hydro purchased the extra power produced by the power plant. When the energy purchase agreement between BC Hydro and Carrier Sekani came up for renegotiation and approval, the Carrier Sekani argued that the BC Utilities Commission had an obligation to ensure that there was adequate consultation before approving the renegotiated agreement. The Supreme Court disagreed, holding that because the renegotiation of the energy purchase agreement created no new impact on the fishing rights in issue—i.e., it did not further alter the water levels in the river—the duty to consult was not triggered in this case.

### iii) The content of the duty

This concern to separate past and present impacts at the threshold stage of the analysis migrates into the analysis of the content of the duty. The content of the duty to consult is determined in relation to the preliminary assessment of the strength of the rights claim and the seriousness of the potential adverse impacts of the Crown action on the exercise of those rights.<sup>32</sup> Rights claims that appear tenuous or less intrusive impacts, such as a short disruption of harvesting practices, will still trigger the duty but will attract only light consultation obligations. Strong rights claims and/or serious impacts on the exercise of those rights attract 'deep' consultation obligations, including accommodation. The overall aim of this spectrum analysis is to

ensure that the content of the duty accords with the honour of the Crown in the particular setting in which the duty has been triggered.

The content of the duty at the lighter end of the spectrum is illustrated by *Little Salmon/Carmacks*, in which the duty was triggered by an application for an agricultural land grant that affected one third of one percent of a Little Salmon/Carmacks First Nation member's trapline.<sup>33</sup> In the Court's assessment, this was a small impact meriting consultation obligations at the lower end of the spectrum. Although the First Nation argued that its interests had not been taken seriously and required accommodation, the Court found that the duty to consult was satisfied by notice of the decision and opportunities to state its concerns to the Yukon government decision makers involved in the decision. As Nigel Bankes observed, the content of consultation in *Little Salmon* was "no greater than that which would be provided by the application of standard principles of administrative law."<sup>34</sup>

The potential requirement of accommodation has thus, rightly or wrongly, generally become associated with the deeper end of the consultation spectrum. Characterized as a substantive rather than procedural requirement, *Haida Nation* was clear that accommodation is only required where "appropriate," as determined through the spectrum analysis.<sup>35</sup> The parameters of accommodation—when it is required and what constitutes adequate accommodation—remain one of the least developed areas in the duty to consult jurisprudence.<sup>36</sup> As described in *Haida Nation*, accommodation with respect to at least unproven Aboriginal rights is about "seeking compromise" through "good faith efforts to understand each other's concerns and move[s] to address them."<sup>37</sup> As a result, consultation and accommodation does not have to result in agreement. Instead, Aboriginal parties' consent to the contemplated conduct will be required only in rare cases in relation to established rights.<sup>38</sup> In *Delgamuukw*, for example, the possibility of a consent requirement was contemplated in relation to the regulation of harvesting activities on recognized Aboriginal title land.<sup>39</sup>

**iv) The limitations of the duty: Addressing historical and cumulative impacts on Aboriginal rights through consultation**

Coming back to the issue of historical and cumulative impacts on Aboriginal rights, the limit at the threshold stage of the analysis does not preclude the consideration of cumulative impacts of development within a consultation process where, unlike in *Carrier Sekani*, the current Crown conduct can be less clearly detached from the adverse effects of past Crown conduct. However, the scope of the duty to consult in such cases is unclear, particularly whether past impacts must be addressed through accommodations or whether the consultation process should only seek to address the impact of the most recent Crown conduct. In *Upper Nicola Indian Band v British Columbia (Minister of Environment)*,<sup>40</sup> for example, the project in issue was an expansion of a transmission line right-of-way to accommodate a proposed new high voltage line to run parallel to the old one. The BC Supreme Court held that the original impacts of the 1960s transmission line were out of scope for the present consultation process. In reaching this decision, Savage J extended statements from *Carrier Sekani* about the trigger to characterize the whole duty as confined “to adverse impacts flowing from the specific Crown proposal at issue—not to larger adverse impacts of which it is part. The subject of consultation is the impact on the claimed rights of the *current* decision under consideration.”<sup>41</sup> Equally important to Savage J’s decision was the emphasis in *Carrier Sekani* on alternative remedies and avenues, such as damages and the treaty table, for addressing historic and continuing breaches.<sup>42</sup> The possibility of a damages remedy for past breaches of the duty, mentioned in *Carrier Sekani*, has yet to be developed.

By contrast, in the more recent decision in *West Moberly* the BC Court of Appeal distinguished *Carrier Sekani*.<sup>43</sup> In *West Moberly*, the licenses for expanded exploration activities were remitted to the parties for further consultation with direction that the historical impact of exploration on the Burnt Pine Caribou Herd was within the scope of those consultations. The consideration of these historical impacts

was seen as essential to a proper understanding of the potential impacts of the present licensing decision. However, the majority did not agree on whether historical impacts might also be taken into account in relation to accommodation measures. Chief Justice Finch refrained from deciding whether the rehabilitation plan ordered by the trial judge was an appropriate accommodation measure but left it open as a possibility pending further consultation. Justice Hinkson, concurring in the result, held that the rehabilitation plan was an inappropriate accommodation measure because accommodation should not be concerned with “remedying harm caused by past events.”<sup>44</sup>

Addressing cumulative effects of development and past infringements through the duty to consult is a difficult issue for parties and the courts alike, with implications for the role of administrative decision makers given their limited mandates. In some cases, the courts acknowledge that the Aboriginal parties are pressing for recognition of their rights or corrections of past rights infringements, even acknowledging their frustration with available avenues for resolving claims and achieving an effective voice in the management of lands and resources.<sup>45</sup> In such cases, the courts have generally resisted allowing consultation on a specific project to be overtaken by historical grievances and larger issues of self-determination. This is consistent with *Haida Nation*’s clear insistence that the duty to consult will generally not arrest development on lands subject to Aboriginal rights and title claims. But *Haida Nation* also insists on meaningful consultation, consistent with the BC Court of Appeal’s recognition in *West Moberly* that issues of cumulative environmental impacts must be given attention within consultation processes.<sup>46</sup> A strict line between past and present cannot accommodate Aboriginal perspectives in consultation, nor will it support the development of “mutually respectful long-term relationship[s].”<sup>47</sup>

While cautious treatments of past infringements may be rationalized as responsive to fears that consultation issues could bring resource development to a halt and related needs to keep consultation burdens manageable, these direc-

tions also demonstrate the limitations and assimilationist tendencies of the duty to consult.<sup>48</sup> Aboriginal peoples are allowed a voice (and, with good negotiators, a potential slice of the economic pie) in relation to the latest incursion on their territories, but are asked to leave resolution of historical grievances at the door. Objectives of gaining a greater say in the management of lands and resources are also set aside for another time. The duty to consult as envisioned in *Haida Nation* requires strong parallel avenues and remedies to right historical grievances and restructure relations between the Crown and Aboriginal peoples. The most recent Supreme Court cases, with their emphasis on consultation as a strictly forward-looking endeavour, only increase the need for adequate parallel negotiations, dispute resolution processes, and remedies.

The tensions inherent in the limited scope of the duty to consult carry over into concerns about the role of administrative decision makers in implementing the duty to consult, emphasizing the need to consider the larger aims of reconciliation in the interpretation of their jurisdiction. Below we turn our attention to this issue in particular, with some examples of how administrative decision makers and courts are interpreting tribunal jurisdiction in relation to the duty to consult.

### III. The Role of Administrative Decision Makers

In addition to the threshold issues surveyed above, *Carrier Sekani* drew on established jurisprudence regarding the constitutional jurisdictions of administrative decision makers to delineate tribunal jurisdiction in relation to the duty to consult. This jurisprudence has established that administrative decision makers are both subject to and (potentially) interpreters of the *Charter* and the constitution more generally,<sup>49</sup> an approach that can be traced back to McLachlin J's (as she was then) famous dissent in *Cooper v Canada (Human Rights Commission)*:

The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All

law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception. Many more citizens have their rights determined by these tribunals than by the courts. If the *Charter* is to be meaningful to ordinary people, then it must find its expression in the decisions of these tribunals.<sup>50</sup>

Is McLachlin J's concern that the *Charter* be meaningful any less applicable to section 35 rights and the duty to consult? As noted in the introduction to this paper, both *Carrier Sekani* and *Little Salmon/Carmacks* rely heavily on established principles of administrative and constitutional law, but the Court's articulations of the duty to consult as a constitutionally derived Crown obligation that does not create a reciprocal constitutional right to be consulted on the part of Aboriginal peoples,<sup>51</sup> and as a complex constitutional process rather than a question of law,<sup>52</sup> leave us on unfamiliar constitutional turf. By distinguishing the process of consultation from other constitutional procedural rights in *Carrier Sekani* and *Little Salmon/Carmacks*, did the Court set the duty on a different constitutional path? Some lower courts and tribunals seem to think so.

Before turning to consider the interpretation of tribunal jurisdiction over the duty to consult since *Carrier Sekani*, I will first briefly review the principles regarding tribunal jurisdiction in relation to the *Charter* that ground the Court's reasoning in *Carrier Sekani*.

#### i) The jurisdiction of administrative decision-makers in relation to constitutional questions and remedies

The interpretation of tribunal jurisdiction over questions of constitutional law has established administrative decision makers as key actors in the interpretation and enforcement of constitutional rights. As Abella J explains in *R v Conway*, "[t]he jurisprudential evolution has resulted in this Court's acceptance not only of the proposition that expert tribunals should play a primary role in the determination of *Charter* issues falling within their specialized jurisdiction, but also that in exercising their statutory discretion, they must comply with the *Charter*."<sup>53</sup>

The first line of jurisprudence demonstrating this evolution encompasses *Nova Scotia (Workers' Compensation Board) v Martin*, which established the rule that tribunals have the jurisdiction to decide *Charter* rights in relation to their statutory mandate where they have the authority to decide matters of law, unless such jurisdiction is clearly precluded by statute.<sup>54</sup> The second line of jurisprudence includes cases such as *Blencoe v British Columbia (Human Rights Commission)*,<sup>55</sup> in which the Court held that the actions of the Human Rights Commission were subject to the *Charter* under section 32, even in the exercise of adjudicative functions.<sup>56</sup> The Court also articulated the principle that bodies exercising powers delegated by statute must do so in compliance with the *Charter* because “[t]o hold otherwise would allow the legislative branch to circumvent the *Charter* by establishing statutory bodies that are immune to *Charter* scrutiny.”<sup>57</sup> Finally, *Conway*—relied on extensively by the Court in *Carrier Sekani*—“consolidated” these lines of authority (along with a third line of cases on remedies) by holding that tribunals that have authority to decide *Charter* rights also have authority to grant section 24 *Charter* remedies within the range of the tribunal’s statutory remedial powers.

In *Paul v British Columbia (Forest Appeals Commission)*, the rule from *Martin* regarding tribunal jurisdiction to decide *Charter* rights was confirmed to also apply in the context of section 35 Aboriginal and treaty rights.<sup>58</sup> However, the Court noted that section 24 of the *Charter* does not apply to section 35 rights and that issues of the remedial authority of the Forest Appeals Commission were not raised by the case.<sup>59</sup> This is the point at which *Carrier Sekani* picks up the trail of this jurisprudence. In *Carrier Sekani*, the Court characterized the obligation to consult as a governmental power rather than as a restraint on governmental authority, thus aligning the duty with the *Charter* remedies line of jurisprudence discussed in *Conway*. Following from that starting point, the Supreme Court drew a line between the authority to consider the adequacy of consultation and the authority to carry out consultation and emphasized that the scope of a tribunal’s authority in a given case would be determined through

interpretation of the tribunal’s enabling legislation.<sup>60</sup> Below we turn to consider how tribunals and courts have interpreted each of these jurisdictions in turn.

## ii) The jurisdiction of administrative decision makers to review the adequacy of consultation

In *Carrier Sekani*, the Court extended the rule from *Paul* regarding jurisdiction to consider constitutional issues, stating that “the power to decide questions of law implies a power to decide constitutional issues that are properly before [the tribunal], absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal’s power.”<sup>61</sup> While some tribunals have interpreted their statutory mandates as excluding the authority to review the adequacy of consultation in a manner consistent with this rule,<sup>62</sup> recent decisions of the Alberta Energy Resources Conservation Board (ERCB) and a related Joint Review Panel demonstrate reluctance to view this issue as within the scope of their decision-making.

The ERCB held that it does not have jurisdiction to consider the adequacy of consultation efforts in relation to the Osum Oilsands Corp.’s Taiga Project<sup>63</sup> and shortly thereafter, a Joint Review Panel (of which the ERCB is a constituent entity) reached the same conclusion in relation to Shell Canada’s application to expand its Jackpine oil sands mine.<sup>64</sup> In both decisions, the rule from *Carrier Sekani* and *Conway* was stated correctly and there was no question that these environmental review boards have jurisdiction to decide questions of law within their statutory authority. Nevertheless, the statutory mandates were interpreted narrowly to distinguish *Carrier Sekani* and excluded consideration of the adequacy of consultation. Exemplifying the reasoning at play here, the Joint Review Panel held that its remedial authority does not extend over the Crown when the Crown is not party to the proceedings.<sup>65</sup> In *Carrier Sekani*, BC Hydro, a Crown corporation and agent of the Crown, was a party to the proceedings before the Utilities Commission. By contrast, in both the Taiga Project and Jackpine Mine Extension applications, the applicants were private corpo-

rations, a fact used by the ERCB and the Joint Review Panel to distinguish *Carrier Sekani*. Nigel Bankes has observed that the Crown will only very rarely be the project applicant before the ERCB, with the result that this interpretation by the ERCB effectively exempts the duty to consult from the Board's purview.<sup>66</sup> According to the Joint Review Panel's reasons, this distinction is significant in relation to understanding the Panel's remedial jurisdiction because any conditions it might place on the Project's approval would govern "Shell's conduct, but will not and cannot authoritatively direct the conduct of the Crown."<sup>67</sup>

As both Bankes and Neil Reddekopp have pointed out, *Carrier Sekani* provides no basis to exclude this jurisdiction simply because the Crown is not the project applicant.<sup>68</sup> Moreover, this line of reasoning misunderstands the structure of the duty to consult, particularly the provision made in *Haida Nation* for delegating the procedural aspects of the duty to third party proponents like Osem or Shell Canada. For example, Reddekopp discusses how Alberta's consultation policy relies heavily on Crown delegation to industry proponents to carry out its obligations.<sup>69</sup> That delegation does not take the Crown out of the picture; rather, because the Crown is ultimately responsible for the adequacy of consultation, it suggests that a reporting relationship between the Crown and proponent is established. The Crown does not have to be the actor in order for conditions placed on project approvals to be effective in guiding the conduct of consultation and the Crown's ultimate assessment of whether that consultation has upheld the honour of the Crown.

Further, the Notice of Questions of Constitutional Law required under section 12 of the *Administrative Procedures and Jurisdiction Act*<sup>70</sup> and used in both applications, provides the Crown with the opportunity to participate in the proceedings.<sup>71</sup> In both applications, the Crown appeared and made submissions on the constitutional questions at stake. The ERCB discussed this participation and found that it did not place the Crown under its authority: "The Board is satisfied that this 'party' status under the *APJA* does not extend the mandate of the

Board to supervising the Crown's conduct when the Crown would not otherwise be a 'party' to an application before the Board as either the applicant or objector."<sup>72</sup> This must be wrong. The issue before the Board is not a matter of supervising the Crown's conduct but a question of whether the consultation process is adequate to satisfy the constitutional standards required. Given that the ERCB's mandate includes deciding matters of constitutional law, and that the *NQCL* makes sure that the Crown has an opportunity to participate in such proceedings precisely because tribunals empowered to decide questions of law also interpret and advise on the constitutionality of government conduct, as emphasized by Abella J in *Conway*, there is no problem of "supervising" the Crown's conduct outside of that mandate involved. Ultimately, the Crown must conduct its business within constitutional limits and administrative decision makers such as the ERCB are empowered by the legislature to interpret those limits. Thus, the limited involvement of the Crown at the time of the proponent's application to the ERCB or the Joint Review Panel cannot give rise to a deficiency of jurisdiction to determine adequacy of consultation at an important moment in the life of these large energy projects. There is, however, a demonstrated avoidance of treating the duty to consult like other questions of constitutional law in this reasoning.<sup>73</sup>

The ERCB and Joint Review Panel's insistence on excluding the duty to consult from their purview also has broader implications. Their reasoning reverses the implication around the jurisdiction to decide constitutional issues seen in the *Martin* and *Paul* decisions (and ever since). *Martin* and *Paul* established that jurisdiction to decide *Charter* and Aboriginal rights questions attaches to jurisdiction to decide questions of law *unless* the legislature has acted to clearly preclude this presumption. Since those cases, some legislatures, including BC and Alberta, have responded by setting out which tribunals have jurisdiction over which constitutional questions. In Alberta, the legislature has allowed for specification of tribunals that have jurisdiction to decide constitutional questions under section 16 of the *APJA*.<sup>74</sup> But legislatures have not yet responded to the duty to consult

law in the same way. The Joint Review Panel and ERCB's line of reasoning around tribunal jurisdiction, which was neither accepted nor rejected by the Alberta Court of Appeal in its denial of an application for leave to appeal from the Joint Review Panel decision,<sup>75</sup> alleviates the pressure on governments and legislatures to do so. This reasoning is out of step with the Supreme Court's jurisprudence on constitutional law in administrative settings as described above. Moreover, this reasoning does not take into account the clear access to justice concerns animating the *Martin* and *Paul* decisions and the insistence in *Haida Nation* that Aboriginal rights are actionable prior to the proof of those rights. The accessibility of tribunal process is as much of an issue for Aboriginal claimants as for others seeking administrative justice. Thus in order to spark legislative responses in a manner parallel to those sparked by *Martin* and *Paul*, it is important that courts and tribunals not exempt the duty to consult from the presumptions around tribunal jurisdiction established in *Martin*. As anticipated in *Haida Nation*, implementing the duty to consult will require attention to the role of administrative decision makers and reconciliation demands that such work be undertaken in conversation with Aboriginal peoples.

Interestingly, the Alberta legislature has recently picked up this responsibility in passing the *Responsible Energy Development Act*.<sup>76</sup> When it comes into force, it will replace the ERCB with a new regulatory body for which the jurisdiction to assess the adequacy of consultation has been expressly excluded.<sup>77</sup> To the extent that this clear legislative statement reflects established principles of administrative and constitutional law, this is a positive development. Whether this exclusion will serve Aboriginal parties (or proponents) well, however, is another question. Such exclusions should be a matter determined through dialogue with affected Aboriginal groups, ensuring that Aboriginal communities have sufficient access to regulatory or other decision makers to allow for regular oversight and dispute resolution with respect to consultation processes.<sup>78</sup> This exclusion also does not answer whether the ERCB, the Joint Review Panel, or the yet-to-be established regulator will

be responsible for carrying out consultation, an equally problematic issue explored below. Thus, the duty to consult continues to be incompletely integrated in regulatory decision-making. Until legislatures demonstrate clear intentions regarding the implementation of the duty to consult, courts and tribunals must not try to solve regulatory inconveniences by "assuming away" their jurisdiction contrary to established law.

### iii) The jurisdiction of administrative decision makers to carry out the duty to consult

It is fair to say that the role of tribunals in carrying out the duty to consult also remains muddled post-*Carrier Sekani*. As noted above, the confusion perhaps stems from the many points in that decision (and in *Little Salmon/Carmacks*) in which the Court appears to suggest that the section 35 duty to consult is exceptional as a matter of constitutional law. Raising the same concerns that supported the Court's application of the *Charter* to administrative decision makers, McLachlin CJC stated in *Carrier Sekani* that: "if a tribunal is denied the power to consider consultation issues, or if the power to rule on consultation is split between tribunals so as to prevent any one from effectively dealing with consultation arising from particular government actions, the government might effectively be able to avoid its duty to consult."<sup>79</sup> However, McLachlin CJC also suggested that "[i]f the tribunal structure set up by the legislature is incapable of dealing with a decision's potential adverse impacts on Aboriginal interests, then the Aboriginal peoples affected must seek appropriate remedies in the courts."<sup>80</sup> Relying on *Conway*, McLachlin CJC then restricted the performance of the duty to administrative decision makers with appropriate remedial authorities as defined by statute. This result is not exceptional if the obligation to consult is understood as a question of power or remedial jurisdiction and thus properly aligned with *Conway* and the jurisprudence on section 24 of the *Charter*. On the other hand, this result is exceptional if the duty is understood as an obligation to respect rights that constrains and conditions the exercise of statutory powers, and thus is properly aligned with the second line of *Charter* jurisprudence that addresses the "ap-

plication” of the *Charter* under section 32.<sup>81</sup>

The delegation of the duty to consult to statutorily created bodies is of particular concern in relation to municipalities. Courts have considered the non-delegable nature of the source of the obligation (the honour of the Crown) in relation to municipalities and have tentatively offered opinions that, parallel to third party proponents, only the procedural aspects of the duty can be delegated to municipalities, or that there is no duty to consult on the part of municipalities.<sup>82</sup> The recent decision of the BC Court of Appeal in *Neskonlith Indian Band v Salmon Arm (City)* is the first to tackle this issue directly.<sup>83</sup> *Neskonlith Indian Band* argued that because the *Local Government Act*<sup>84</sup> delegates land-use decisions to municipalities with no oversight by the province, the responsibility for consultation necessarily follows. The Band drew on the *Charter* jurisprudence around section 32 and Justice La-Forest’s reasons in *Godbout v Longueuil (City)*<sup>85</sup> to argue that the duty is automatically delegated with the decision-making power because the province would otherwise be permitted to shirk its constitutional responsibilities through such delegations. They also argued that the delegation of decision-making authority to the municipality via legislation is distinct from the delegation of procedural aspects of the duty to third parties, and that the application of the duty as restraint to statutory delegates was not prevented by the caution in *Haida Nation* that the “honour of the Crown cannot be delegated.”<sup>86</sup> Acknowledging these arguments as “strong,” Newbury JA nevertheless rejected the analogy to the *Charter* jurisprudence and held that this instruction from *Haida Nation* applied equally to third party proponents and statutory delegates.<sup>87</sup>

Although not discussed by Newbury JA in her reasons, a distinction might be drawn between how the duty is understood in relation to *asserted* Aboriginal rights, as were in issue in both *Carrier Sekani* and *Neskonlith*, as opposed to *proven* or *recognized* Aboriginal rights, as would be in found in a modern or historic treaty (even if the scope of such rights is not settled). In relation to asserted rights, the strength of the analogy to section 32 of the *Charter* may be

arguable. Although this interpretation does not promote the regularization of Aboriginal rights within Canadian public law, asserted rather than recognized rights might be considered as inadequately defined to act as constraints on government action and it may be appropriate to understand the obligation as a remedial process to preserve the Aboriginal interests pending resolution of the rights at stake, as described in *Haida Nation*. However, in the context of proven or recognized Aboriginal rights, the argument is strong that the obligation to consult should be aligned with the section 32 jurisprudence as a constraint on the exercise of governmental authority, including decisions by administrative bodies. There is no principled basis for treating at least proven or recognized rights as different from *Charter* rights. Justifiable infringements under *Sparrow* require adequate consultation and accommodation.

Newbury JA reasoned in *Neskonlith* that there was no automatic application of the duty as a constraint to administrative decision makers. She considered the statutory context and remedial authority of the municipality as required by *Carrier Sekani* which in turn relied on *Conway*. Under *Conway*, tribunals with jurisdiction over the *Charter* are assumed to have jurisdiction to grant section 24 remedies subject to the remedial limitations of the enabling statute. In this approach, *Charter* jurisdiction is distributed but the *Charter* is not “power-conferring.”<sup>88</sup> Both *Carrier Sekani* and *Conway* mandate a case-by-case analysis of legislative intent and the scope of the administrative decision maker’s authority. Nevertheless, Newbury JA departed from these authorities to reach categorical conclusions:

Such [remedial] powers have not been granted to municipalities, just as they have not been granted to quasi-judicial tribunals. As the third order of government, municipal councils are simply not in a position to, for example, suspend the application of bylaws or the terms of OCPs [official community plan], grant benefits to First Nations or indeed to consider matters outside their statutory parameters. ... *A fortiori*, local governments lack the authority to engage in the nuanced and complex constitutional process involving “facts, law, policy

and compromise” referred to in *Rio Tinto*.<sup>89</sup>

This conclusion is remarkably unconstrained by law, relying instead on the “practical resources” available to municipalities.<sup>90</sup> Newbury JA further commented that the “push down” of the duty to consult into “small particles” through “the mundane decisions regarding licenses, permits, zoning restrictions and local bylaws” was both “completely impractical” and unlikely to serve reconciliation objectives.<sup>91</sup>

The BC Court of Appeal’s reasoning appears to reverse the direction set in *Haida Nation*, in which the trigger was broadly defined. *Haida Nation* was a call for a broadly distributed dialogue in relation to development on lands subject to Aboriginal rights and title claims, leaving it open to legislatures to provide further structure for this dialogue. As in the ERCB and Jackpine Joint Review Panel’s reasoning, reviewed above, the BC Court of Appeal’s decision alleviates the pressure for legislatures to act to rationalize and implement the duty to consult. It is up to legislatures—not courts—to ensure that the duty is addressed through land use planning regimes that give an effective voice to Aboriginal parties in land and resource management, which might help avoid the granulated approach that Newbury JA describes as impractical.

McLachlin CJC’s overriding concern in *Carrier Sekani* was that the duty attaches only to tribunals with the remedial authority capable of responding to a decision’s potential adverse impacts on Aboriginal interests. This concern is reflected in a number of cases involving regulatory bodies that carry out extensive pre-project approval assessments.<sup>92</sup> Boards such as the Jackpine Joint Review Panel and National Energy Board (NEB) may be “well-suited to address mitigation, avoidance and environmental issues that are site or project specific ... [but] the remediation of ... project specific concerns may not answer the problem presented by the incremental encroachment of development upon [claimed and traditional] lands.”<sup>93</sup> Ignoring for the moment this statement’s concern for remedies that may be beyond the scope of a given consultation process in any event,<sup>94</sup> the NEB-type of mandate seems to be an easy fit with the necessary authority to address the duty to

consult. Moreover, *Taku Tlingit First Nation* indicates that the constitutional duty to consult may be carried out within existing statutory frameworks.<sup>95</sup> There is no basis to distinguish municipal jurisdictions and planning processes in relation to land development.<sup>96</sup>

When administrative decision makers are mandated to conduct public consultations and have the ability to approve or recommend development proposals, including requiring or recommending conditions or mitigation measures, it is difficult to understand such delegations of the duty to consult as strictly “procedural.”<sup>97</sup> Moreover, the principle that “[t]he honour of the Crown cannot be delegated”<sup>98</sup> should condition but not prevent legislative prescriptions about how the Crown carries out its duty. The duty, after all, is a “valuable adjunct” that supports the honour of the Crown but “should not be viewed independently from its purposes.”<sup>99</sup> As argued by the Neskonlith band, delegation of the duty is not the same as delegation of the honour of the Crown. The Court’s hesitation in *Carrier Sekani* to imply that all administrative decision makers have the duty need not be read as requiring such decision makers to have complete remedial powers to address all aspects of Aboriginal parties’ concerns before they will be seen as having a duty to consult. Although potentially frustrating for Aboriginal and other parties to have to deal with such a granulated approach to the duty, recognizing a limited constitutional authority to address Aboriginal concerns raised in consultation on the part of administrative decision makers is consistent with the principles that emerge from *Conway*.

One further concern raised by the Neskonlith Indian Band and unaddressed in the Court of Appeal’s decision in *Neskonlith* is the potential for the decisions of municipalities to be final, and unlike the NEB-type processes, with no further opportunities for consultation by a supervising ministry in relation to a given development. In *Neskonlith* the decision at stake was an Environmentally Hazardous Area Development Permit to allow a shopping centre to be located on a flood plain, as required by Salmon Arm’s official community plan (OCP). Although the Court reviewed consultations in

relation to earlier decisions to amend the OCP to allow for the development, those decisions and processes were not impugned in the case.<sup>100</sup> The permit is apparently the last decision required for the project to proceed. Newbury JA's lack of attention to this point again appears to reverse the directions set by *Haida Nation* to establish an actionable claim for First Nations pending proof of their Aboriginal rights. If there is no duty to consult prior to a decision of municipality that is final, this remedy has effectively been eliminated. Alternatively, the case raises the possibility a different remedy—a constitutional challenge to the legislation itself for being inconsistent with the duty to consult. In that regard, a recent observation by the Yukon Court of Appeal bears repeating: “Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist.”<sup>101</sup>

## IV. Conclusion

The Supreme Court's decisions in *Little Salmon/Carmacks* and *Carrier Sekani* confirmed the forward-looking nature of the duty as well as a forward-looking emphasis in the Supreme Court's model of reconciliation. However, these decisions and directions leave many historical grievances insufficiently resolved. Large differences remain with respect to the scope and nature of both treaty and Aboriginal rights and the remedial avenues for past breaches of consultation obligations and rights infringements remain undeveloped. Additionally, the scope for addressing such concerns through accommodation within consultation processes remains disputed. In its rejection of the leave application in the *West Moberly* case—which raised important issues of treaty interpretation, the handling of past and cumulative impacts, and the judicial supervision of the duty, especially accommodation—we might divine that the Supreme Court is satisfied to have the lower courts continue to evolve the duty for the time being.

Beyond the specific elements of the duty to consult, the fit of this area of law with the rest of Canadian public law also remains a work in

progress. By signaling in both *Carrier Sekani* and *Little Salmon/Carmacks* that the duty is constitutional in nature, but something different than the constitutional rights and questions to which we are accustomed, the Supreme Court set yet another course of “Aboriginal difference.” As described above, this course leaves many questions regarding the role of administrative decision makers in the implementation of the duty to consult and accommodate. I have argued that courts should strive for more consistency with administrative law approaches to constitutional issues, and particularly that courts should avoid interpreting statutory mandates as excluding the duty to consult unless legislation makes those exclusions express. This approach is necessary to ensure that the directions set out in *Haida Nation* are achieved, including the legislative restructuring required to support implementation of the duty to consult in a matter that preserves Aboriginal interests pending settlement and thus has a better chance of promoting reconciliation. Although *Carrier Sekani* provides some guidance, the embrace of Aboriginal law within the constitutional values and constraints that are part of administrative decision making has a long way to go.

## Notes

- \* Assistant Professor, Thompson Rivers University Faculty of Law. I would like to thank Nicole Schabus for helpful comments and discussion, Brock Roe, and Chris Albinati (JD 2014) for his excellent research assistance.
- 1 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].
- 2 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.
- 3 *Haida Nation*, *supra* note at 1 para 32.
- 4 The trilogy included *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River Tlingit*] and *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree* cited to SCC].
- 5 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon/Carmacks* cited to SCC].
- 6 2010 SCC 43, [2010] 2 SCR 650 [*Carrier Sekani* cited to SCC].
- 7 *Moulton Contracting Ltd. v Behn*, 2011 BCCA 311, leave to appeal to the SCC granted, 2012 CanLII 179819 (SCC).

- 8 See, e.g., Gordon Christie “Developing Case Law: The Future of Consultation and Accommodation” (2006) 39 UBC L Rev 139 [Christie]; Mark D. Walters, “The Morality of Aboriginal Law” (2006) 31 Queen’s L J 470; and Janna Promislow & Lorne Sossin, “In Search of Aboriginal Administrative Law” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Ltd, 2012) 449 [Promislow & Sossin].
- 9 E Ria Tzimas, “To What End the Dialogue?” (2011) 54 Sup Ct L Rev (2d) 493 at 495 [emphasis in original].
- 10 By administrative decision makers, I am referring to the large variety of administrative bodies empowered to make governmental decisions through statutory delegations of power. This includes boards, commissions and tribunals. For the purposes of this discussion, it is important to note that this also includes municipalities. In the conventions of administrative law, these bodies are often referred to simply as boards or tribunals; see Colleen M Flood & Jennifer Dolling, “An Introduction to Administrative Law: Some History and a Few Signposts for a Twisted Path” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Ltd, 2012) 1.
- 11 *Little Salmon/Carmacks*, *supra* note 5 at paras 42-44.
- 12 *Carrier Sekani*, *supra* note 6 at para 60. For further discussion of the unusual constitutional nature of the duty, see Promislow & Sossin, *supra* note 8 at 479-481.
- 13 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 129, [2008] 1 SCR 19 (Binnie J, concurring reasons); Grant Huscroft, “From Natural Justice to Fairness: Thresholds, Content and the Role of Judicial Review” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Ltd, 2012) 147 at 181-2. For discussion, see Promislow & Sossin, *ibid* at 477.
- 14 There are, of course, many other issues that could be usefully addressed. To list a few: the development of causation analysis in different elements of the duty to consult and related burdens of proof; the approach to preliminary rights assessments; the role of financial compensation in accommodation and related remedial authorities; the need for appropriate funding structures and capacity to support Aboriginal parties carrying out the duty to consult; and, the standard of review analysis in relation to consultation decisions.
- 15 [1990] 1 SCR 1075 [*Sparrow*].
- 16 *Haida Nation*, *supra* note 1 at para 27.
- 17 *Little Salmon/Carmacks*, *supra* note 5 at para 42.
- 18 *Haida Nation*, *supra* note 1 at para 53.
- 19 *Carrier Sekani*, *supra* note 6 at para 31.
- 20 *Ibid* at para 35.
- 21 *Ibid* at para 40.
- 22 *Mikisew Cree*, *supra* note 4.
- 23 *Ibid* at para 34.
- 24 *R v Marshall*, [1999] 3 SCR 456.
- 25 2011 BCCA 247, 18 BCLR (5th) 234, leave to appeal to the SCC refused, 2012 CanLII 8361 (SCC) [*West Moberly* cited to BCCA].
- 26 Garson JA’s dissent was premised on a general view of the treaty right to hunt in conjunction with evidence that other opportunities for hunting within the treaty territory remained. She consequently found only a negligible impact on treaty rights arising from the exploration activities on the caribou habitat (*ibid* at para 222). Finch CJ, writing for the majority on this point, found that the impacts on the specific caribou herd, which were part of the First Nations’ seasonal hunting rounds at the time of the treaty, are impacts on treaty rights and therefore trigger the duty (*ibid* at paras 128, 139).
- 27 *R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686: Aboriginal rights “are not generally founded upon the importance of a particular resource. In fact an Aboriginal right cannot be characterized as a right to a particular resource because to do so would be to treat it as akin to a common law property right” (at para 21). See also *R v Powley*, 2003 SCC 43, [2003] 2 SCR 207 [*Powley*]: the right was “not to hunt moose but to hunt for food in the designated territory” (at para 20, emphasis in original).
- 28 *R v Gladstone*, [1996] 2 SCR 723 and *Lax Kw’alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, [2011] 3 SCR 535 [*Lax Kw’alaams*], in which Binnie J commented that “[t]he ‘species specific’ debate will generally turn on the facts of a particular case” (at para 57). See also *William v British Columbia*, 2012 BCCA 285 at para 287.
- 29 *West Moberly*, *supra* note 25 at para 129.
- 30 See, e.g., *Dene Tha’ First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 [*Dene Tha’*], aff’d in *Canada (Minister of Environment) v Imperial Oil Resources Ventures Ltd*, 2008 FCA 20. See also Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009) at 54-55.
- 31 *Tsuu T’ina Nation v Alberta (Minister of En-*

vironment), 2010 ABCA 137 [*Tsuu T'ina Nation*]. See also *Carrier Sekani*, *supra* note 6 at para 44. Interestingly, the transfer of a Tree Farm Licence was held to trigger the duty as a matter reflecting “strategic planning for utilization of the resource” in *Haida Nation* (*supra* note 1 at para 76) but the incorporation of a new municipality was held not to trigger the duty to consult in *Adams Lake Indian Band v Lieutenant Governor in Council*, 2012 BCCA 333, refused, 35023 (April 11, 2013).

32 *Haida Nation*, *supra* note 1 at para 39.  
33 *Little Salmon/Carmacks*, *supra* note 5 at para 21.  
34 He also commented that “[t]his impoverished view of the duty to consult is hardly likely to contribute to the constitutional goal of inter-societal reconciliation” (Nigel Bankes, “Little Salmon and the Juridical Nature of the Duty to Consult and Accommodate”, ABlawg.ca archives, online: <<http://ablawg.ca/2010/12/10/little-salmon-and-the-juridical-nature-of-the-duty-to-consult-and-accommodate/>>).  
35 *Haida Nation*, *supra* note 1 at paras 30, 37, 43-45.  
36 *Halalt First Nation v British Columbia (Minister of Environment)*, 2012 BCCA 472 provides a rare review of accommodation measures, overturning the trial judge’s finding of inadequate accommodation primarily as a result of the Court’s narrowing of the scope of consultation required as compared to the trial decision. The Court of Appeal also commented on the trial judge’s suggestion that financial compensation is potentially an appropriate accommodation measure in pre-proof rights cases, stating that “[i]t is not difficult to discern strong policy reasons for refusing compensation” (para 180).  
37 *Haida Nation* *supra* note 1 at para 49.  
38 *Ibid* at para 48.  
39 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168 [*Delgamuukw*].  
40 2011 BCSC 388 [*Upper Nicola*].  
41 *Ibid* at para 121. The discussion in *Carrier Sekani* is found at para 53 [emphasis in original].  
42 *Upper Nicola*, *ibid* at para 125.  
43 *West Moberly*, *supra* note 25 at paras 116-117.  
44 *Ibid* at para 180. Justice Garson (in dissent) agreed with Hinkson JA (*ibid* at para 239).  
45 See, e.g., *Athabasca Regional Government v Canada (Attorney General)*, 2010 FC 948 at paras 149-50, 231, 234, 242, aff’d *Fond du Lac Denesuline First Nation v Canada (Attorney General)*, 2012 FCA 73.  
46 See also Mackenzie Valley Environmental Impact Review Board, *Report of Environmental Assessment and Reasons for Decision on the New*

*Shoshoni Ventures Preliminary Diamond Exploration in Drybones Bay*, 10 February 2004 (recommendation accepted by the Minister), online: <[http://reviewboard.ca/upload/project\\_document/EA03-004\\_REA\\_040211\\_NSV\\_1144786911.pdf](http://reviewboard.ca/upload/project_document/EA03-004_REA_040211_NSV_1144786911.pdf)>.  
47 *Little Salmon/Carmacks*, *supra* note 5 at para 10.  
48 See Christie, *supra* note 8 at 180-184.  
49 For a review of this jurisprudential development, see *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 [*Conway*]. See also Evan Fox-Decent & Alexander Pless, “The Charter and Administrative Law: Cross-Fertilization or Inconstancy” in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery Ltd, 2012) 407 [Fox-Decent & Pless].  
50 [1996] 3 SCR 854 at para 70.  
51 See note and accompanying text regarding this point from *Little Salmon/Carmacks*, *supra* note 11.  
52 See note and accompanying text regarding this point from *Carrier Sekani*, *supra* note 12.  
53 *Conway*, *ibid* at para 21.  
54 2003 SCC 54, [2003] 2 SCR 504 [*Martin*].  
55 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*].  
56 *Ibid* at 32-40. For a recent discussion of the s 32 jurisprudence, see the reasons of Paperny JA in *Pridgen v University of Calgary*, 2012 ABCA 139 and Jennifer Koshan, “Face-ing the Charter’s Application on University Campuses” ABlawg.ca, (13 June 2012), online: <[http://ablawg.ca/wp-content/uploads/2012/06/Blog\\_JK\\_Pridgen\\_June20123.pdf](http://ablawg.ca/wp-content/uploads/2012/06/Blog_JK_Pridgen_June20123.pdf)>.  
57 *Blencoe*, *ibid* at para 40. See also *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 at para 22.  
58 2003 SCC 55, [2003] 2 SCR 585 at para 38-39.  
59 *Ibid* at 40.  
60 *Carrier Sekani*, *supra* note 6 at paras 58-60.  
61 *Ibid* at para 69.  
62 *Re Grand Renewable Wind LP*, 2011 LNONOEB 325 at 19-20, Ontario Energy Board Archives, online: <<http://www.ontario-energyboard.ca/html/search/gsearchresults.cfm?cx=005682833260123491086%3Axd-9moiqtely&cof=FORID%3A10&ie=UTF-8&q+=EB-2011-0063>>. (Ontario Energy Board rejected jurisdiction to review the adequacy of consultation in light of narrow statutory mandate that excludes broader environmental assessment); and *Preserve Mapleton Inc v Ontario (Ministry of the Environment)* (2012), 67 CELR (3d) 207 at paras 67-80 (Ontario Environmental Review Tribunal rejected jurisdiction to review the adequacy of the Director’s consultation process based on narrow statutory mandate relevant to appeal).

- 63 *Osum Oil Sands Corporation, Taiga Project*, ERCB Application No. 1636580, Reasons for July 17, 2012 Decision on Notice of Question of Constitutional Law (24 August 2012), available online: < <http://ablawg.ca/wp-content/uploads/2012/09/Application-1636580-ERCB-Reasons-NQCL1.pdf> > [Taiga Project NQCL decision]. Shortly after this decision, Osum and Cold Lake First Nation (CLFN) reached an agreement and CLFN withdrew the objection to the project that had brought the consultation challenge before the ERCB. CLFN nevertheless sought leave to appeal the ERCB's decision. The Alberta Court of Appeal rejected this application on the basis of the mootness of the issue in this case, also noting that the matter would be before the Court again in relation to the Jackpine Mine expansion: *Cold Lake First Nations v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304.
- 64 Joint Review Panel established to review the Jackpine Mine Expansion Project, Letter of Decision in response to Notices of Questions of Constitutional Law, 26 October 2012, available online: < <http://www.ceaa.gc.ca/050/documents/p59540/83073E.pdf> > [Jackpine Mine Expansion NQCL decision].
- 65 For discussion see David Mullan, "The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?" (2011) 24 Can J Admin L & Prac 233 at 255-6.
- 66 Nigel Bankes, "Who decides if the Crown has met its duty to consult and accommodate?" *Ablawg.ca*, (6 September 2012), online: <<http://ablawg.ca/2012/09/06/who-decides-if-the-crown-has-met-its-duty-to-consult-and-accommodate/>> [Bankes, "Who decides?"].
- 67 Jackpine Mine Expansion NQCL decision, *supra* note 64 at 11.
- 68 Bankes, "Who decides?" *supra* note 66 and Neil Reddekopp, "Theory and Practice in the Government of Alberta's Consultation Policy", *Legal Education Society of Alberta's Constitutional Law Symposium*, 2012, (2013) 22:1 Const Forum Const (pp. 47).
- 69 Reddekopp, *ibid*.
- 70 RSA 2000, c A-3 [APJA]. The legislation in British Columbia defines constitutional law more narrowly, potentially excluding the duty to consult: *Administrative Tribunals Act*, SBC 2004, c 45, s 1 and *Constitutional Questions Act*, RSBC 1996, c 68, s 8. See discussion in *Carrier Sekani*, *supra* note 6 at paras 28, 71-72. The same is true of s 10(d) of the APJA.
- 71 APJA, s 14.
- 72 Taiga Project NQCL decision, *supra* note 63 at 8.
- 73 This avoidance that may find its inspiration from the Supreme Court's description of the duty to consult in *Carrier Sekani* as a "distinct and often complex constitutional process" as opposed to a question of law (*Carrier Sekani*, *supra* note 6 at para 60). However, this description was specific to *carrying out* consultations in contrast to the questions of the existence the duty or the adequacy of consultations to date, which the Supreme Court has treated as questions of law. See, e.g., *Little Salmon/Carmacks*, *supra* note 5 at para 48, where the majority applied the correctness standard to the question of the adequacy of consultation, stating that "[a] decision maker who proceeds on the basis of inadequate consultation errs in law."
- 74 *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006. See also the *Administrative Tribunals Act*, SBC 2004, c 45, ss 44-46.
- 75 *Métis Nation of Alberta Region 1 v Joint Review Panel*, 2012 ABCA 352, leave to appeal to SCC refused, *Athabasca Chipewyan First Nation v Joint Review Panel*, 35193 (April 11, 2013). [Métis Nation].
- 76 Bill 2, *Responsible Energy Development Act*, 1st Sess, 28th Leg, Alberta, (as passed by the Legislative Assembly 21 November 2012). This Act has not yet been proclaimed at the time of writing. Alberta Energy anticipates phasing in the new energy regulator starting from June 2013: Alberta Energy, online: <<http://www.energy.alberta.ca/initiatives/regulatoryenhancement.asp>>.
- 77 *Ibid*, s 21.
- 78 Alberta has recently issued a consultation paper proposing greater oversight of delegation of consultation obligations through a centralized consultation office that would include the determination of adequacy: online < [http://www.Aboriginal.alberta.ca/documents/2012\\_ConsultationDiscussionPaper.pdf](http://www.Aboriginal.alberta.ca/documents/2012_ConsultationDiscussionPaper.pdf) >. While this may resolve the access issue, a government office assessing the adequacy of its own consultation is unlikely to be satisfactory for Aboriginal groups who are seeking negotiated protocols and involvement in strategic planning regarding land and resource management; see, e.g., the Treaty 8 Alberta Chiefs' Position Paper on Consultation (30 September 2010), online: < <http://www.treaty8.ca/documents/FINAL%20TREATY%208%20CONSULTATION%20PAPER%20SENT%20TO%20GOVERNMENT%20ET%20AL.pdf> >.
- 79 *Supra* note 6 at para 62.

- 80 *Ibid* at para 63.
- 81 It is worth noting that the text of s 35 does not delineate the scope of its application; there is no text parallel to s 32 of the *Charter*. Nevertheless, in *Sparrow* the Supreme Court read in the possibility of “infringement and justification” into the Aboriginal rights guarantees parallel to s 1 of the *Charter* without concern for the absence of any similar text in s 35. This precedent suggests that we might similarly extend the *Charter* discussion under s 32 to the Aboriginal rights context. On the other hand, it seems that the Court prefers to align carrying out of the duty to consult with the s 24 jurisprudence and *Conway*, as I explain below.
- 82 See, e.g., *Gardner v Williams Lake (City)*, 2006 BCCA 307 (comments made in the context of a non-Aboriginal consultation issue); *Adams Lake Indian Band v British Columbia* 2011 BCSC 266 at para 142, rev’d on appeal, *supra* note 31 (at trial, the lack of a municipal duty to consult was relied on in the finding of an adverse impact on claimed Aboriginal rights as a result of the incorporation of a new municipality); *City of Brantford v Montour*, 2010 ONSC 6253 at para 58 (avoidance of the issue); and *Paul First Nation v Parkland (County)*, 2006 ABCA 128 at paras 11-12 [*Paul First Nation*] (the Subdivision and Development Appeal Board (SDAB) was found not to have a s 35 duty nor was it required to review the adequacy of consultation because it lacked jurisdiction over general questions of law. The former finding appears to have been based on the consideration that the SDAB did not have “the ability” to consult). Interestingly, some provincial government policies have been more forthcoming, treating municipalities as having a duty to consult in relation to decision-making functions when the duty is triggered. See, e.g., Saskatchewan (online: <<http://www.municipal.gov.sk.ca/Community-Planning/Duty-To-Consult-FAQs>>); Ontario, Ministry of Municipal Affairs and Housing (online: <<http://www.mah.gov.on.ca/Page6054.aspx>>).
- 83 2012 BCCA 379 [*Neskonlith*].
- 84 RSBC 1996, c 323.
- 85 [1997] 3 SCR 844; see especially paras 48 and 50-56. LaForest J’s reasons were not the majority but have since been widely adopted by Courts across the country; see, e.g., *Prigden*, *supra* note 56 at para 81 and *Canadian Federation of Students v Greater Vancouver Transport Authority*, 2006 BCCA 529 at para 62, 275 DLR (4th) 221, aff’d 2009 SCC 31, [2009] 2 SCR 265.
- 86 *Haida Nation*, *supra* 1 at para 53.
- 87 *Neskonlith*, *supra* note 83 at 66.
- 88 Fox-Decent & Pless, *supra* note 49 at 444.
- 89 *Neskonlith*, *supra* note 83 at para 68.
- 90 *Ibid* at para 71 [emphasis removed].
- 91 *Ibid* at para 72.
- 92 See, e.g., *Brokenhead Ojibway First Nation v Canada (AG)*, 2009 FC 484 at paras 25-29 (*Brokenhead*) (regarding the National Energy Board process and noting that it “may not be a substitute for the Crown’s duty to consult” at para 29).
- 93 *Ibid* at paras 26-28.
- 94 See discussion in Part II regarding the limitations of the scope of a given consultation.
- 95 *Taku Tlingit First Nation*, *supra* note 4.
- 96 One difference that is sometimes raised is that municipal lands are often privately held. Although there is some dispute in the law, the duty has been found to apply in relation to activities on private lands; see *Hupacasath First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 1712; *Paul First Nation*, *supra* note 82 at para 14 (restricting the duty to consult in relation to activities on private land to those involving significant government involvement, as in *Hupacasath*, *ibid*); and, *John Voortman & Associates Ltd v Haudenosaunee Confederacy Chiefs Council*, 2009 CanLII 14797 at paras 63-68 (ON SC). It is also important to note that treaty rights may be exercised on private lands where there is no visible, incompatible use of those lands: *R v Badger*, [1996] 1 SCR 771 at para 66.
- 97 The Court’s concern for the remedial competence to carry out the duty to consult may be the ability to compensate for infringements of rights.
- 98 *Haida Nation*, *supra* note 1 at para 53.
- 99 *Little Salmon/Carmacks*, *supra* note 5 at para 44.
- 100 It is also clear that the Court considered that consultations in relation to the impugned permit had occurred and were adequate, as the Court went on to consider these matters in spite of its finding that there was no duty to consult owed by the municipality.
- 101 *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14 at para 37, leave to appeal to the SCC pending. It should be noted that the Court did not find it necessary to invalidate the Yukon *Quartz Mining Act*, SY 2003, c 14 given that the Act permitted the exclusion of quartz mining claims where such exploration activities would prejudice claimed Aboriginal rights (*ibid* at para 52).

