

Theory and Practice in the Government of Alberta's Consultation Policy

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"Well, it may be all right in practice, but it will never work in theory." — Warren Buffett, on the attitude of the academic community to his approach to investing.

"In theory, there is no difference between theory and practice. But, in practice, there is." — Yogi Berra, on life in general.

Introduction

In this paper, I discuss the Government of Alberta's policy and practice regarding consultation with Aboriginal Albertans regarding resource development, particularly the issuance to third parties of Crown dispositions that may have an impact on Aboriginal or treaty rights. My review of this subject matter is grouped around three conclusions, which are at first glance inconsistent. First, I argue that Alberta's policy statements and the guidelines that it has issued to implement these fall far short of fulfilling—or even acknowledging in any meaningful way—the Province's constitutional obligation to consult with Aboriginal Albertans and accommodate the latter's concerns regarding resource development. However, in keeping with the distinction between theory and practice recognized by Warren Buffett and Yogi Berra, I concede that for reasons that are not reflec-

tive of any inherent merit in Alberta's approach, the development and management of resource development appears to operate smoothly and efficiently, without any serious legal challenges or significant delays in the process. Finally, I suggest that the current practical success of Alberta's approach is artificial and likely time-limited, and that without a more sincere Crown effort to fulfill its constitutional obligations the future of orderly development of natural resources is unlikely.

The first two sections of the paper are purely descriptive, summarizing first the current state of Canadian law regarding consultation and accommodation and second, Alberta's policy and procedures in those areas. The third, fourth, and fifth sections are more analytical, with each section dealing with one of the three arguments described above.

The State of Canadian Law on Consultation and Accommodation

Haida Nation v British Columbia (Minister of Forests)

For the type of consultation discussed herein, the starting point is the decision by the Supreme Court of Canada in *Haida Nation v*

British Columbia (Minister of Forests).¹ In this case, the Haida Nation challenged the validity of the approval by the British Columbia Minister of Forests for the transfer of a Tree Farm Licence on lands to which the Haida Nation had filed an Aboriginal title claim.² Although the case reached the Supreme Court almost fifteen years after consultation was first raised in *R v Sparrow*,³ McLachlin CJC recognized that *Haida* was the first opportunity to consider the issue of consultation with Aboriginal people in the context of the management and disposition of Crown lands and resources in cases where claims to Aboriginal title and rights had been asserted but not proven.⁴

The Chief Justice, who wrote the *Haida* decision on behalf of a unanimous panel, took the opportunity to outline the source, nature, and extent of the Crown's duty to consult Aboriginal people over decisions that could have an impact on the Aboriginal rights. In the most general sense, the Supreme Court of Canada held that the source of the duty to consult is the honour of the Crown:

The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices.⁵

The Court went on to say that the honour of the Crown requires different conduct in different situations,⁶ and the duty to consult arises out of the duty to reconcile "the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people."⁷

It is important to note that McLachlin CJC did not find that the Crown's duty to consult with Aboriginal people arose out of the enactment of section 35(1) of the *Constitution Act, 1982*.⁸ Rather, the duty arose centuries earlier, with the assertion of Crown sovereignty, and continues through the present and into the future.⁹ Despite this finding, the significance of the *Constitution Act, 1982* in the context of the duty

to consult cannot be overlooked. First, the recognition and affirmation of existing Aboriginal rights in section 35(1) means that, since 1982, the Crown cannot, in McLachlin CJC's words, "cavalierly run roughshod" over the rights of Aboriginal people.¹⁰ Second, section 52(1) of the *Constitution Act, 1982*, provides Aboriginal people with a remedy should the Crown's conduct be inconsistent with section 35(1) in that it allows the Court to declare the law authorizing this conduct to be "of no force and effect."¹¹

After finding that the general source of the Crown's duty to consult arose historically, McLachlin CJC then described the specific source of the duty in relation to individual situations. She concluded that the duty arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."¹²

The decision in *Haida*, though, distinguished the Crown's duty to consult on land and resource use decisions that might have an impact on Aboriginal rights such as harvesting, from the corresponding duty to consult regarding the direct infringement of Aboriginal harvesting rights. The latter issue was dealt with by the Supreme Court of Canada in *Sparrow*. In that case, decided in 1990, the Court set out the test for determining whether a provincial regulation on the size of fishing nets infringed the Aboriginal right of the Musqueam Nation to fish for food in accordance with its traditional methods. In other words, the Court assessed whether section 35(1) of the *Constitution Act, 1982*, had been infringed by the regulation. If the Court determined that the regulation did infringe this Aboriginal right, it next addressed whether the government (or Crown) could justify the infringement.¹³ In addressing the issue of justification, one of the relevant questions asked was whether the Crown had consulted with the Musqueam before imposing the limitation.¹⁴ Therefore the *Sparrow* analysis established a sequence where, after a court had concluded that a Crown action was a *prima facie* infringement of section 35, the issue of consultation emerged as a part of a justification analysis.

In the *Haida* case, British Columbia con-

tended that, applying a *Sparrow* analysis, the Province would not be required to consult with the Haida Nation until the latter established that the transfer of the Tree Farm Licence in question was a *prima facie* infringement of the Haida Nation's claim to title over the lands in question. This in turn required the Haida Nation to establish, at least on a *prima facie* basis, its claim to title.¹⁵ In response, the Haida Nation argued that if it were not consulted prior to proving its title in protracted litigation, any ultimate recognition of that title would be rendered meaningless since in the years it would take to win its title claim, "their heritage will be irretrievably despoiled."¹⁶ On this issue, the Supreme Court sided unequivocally with the Haida Nation, with McLachlin CJC writing that British Columbia's arguments "do not withstand scrutiny."¹⁷

Turning to the nature and form of consultation, McLachlin CJC described the requirement as needing to take place on a spectrum or continuum, with the precise nature of the duty in any fact situation being determined by a number of variables, the most obvious of which were the strength of the claim's impact on an Aboriginal right and the magnitude of the potential impact on this right. Thus the actual form of consultation could vary from simple notice accompanied by a willingness to address concerns arising out of that notice to "deep consultation," which could include

the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.¹⁸

McLachlin CJC was careful to caution that the obligation to consult did not extend to a duty to reach an agreement with the affected Aboriginal people.¹⁹ Regarding this issue, she recognized the need to distinguish a previous case in which the Supreme Court of Canada had suggested the opposite. In his majority decision in *Delgamuukw v British Columbia*,²⁰ Lamer CJC had speculated that in some cases, consent of Aboriginal nations might be required. He added that it was most likely that this would oc-

cur when "provinces enact hunting and fishing regulations in relation to aboriginal lands."²¹ McLachlin CJC addressed the reference to "consent" by her predecessor by observing that consent was only appropriate in some cases dealing with "established rights."²²

The *Haida* decision included very little discussion of accommodation. McLachlin CJC limited herself to noting the similarity between the meaning of the words "accommodate" and "accommodation" on the one hand and other terms such as "adapt, harmonize, reconcile" and "compromise" on the other.²³ The only specific form of accommodation to which she made reference was the possible amendment of Crown policy as a result of the consultation process.²⁴

Role of Industry in Consultation

One extremely important section of the *Haida* decision dealt with whether industry has an obligation to consult with Aboriginal people. This issue was not addressed in the decision by the British Columbia Supreme Court judge who first heard the application by the Haida Nation to set aside the Tree Farm Licence. The judge was sympathetic to the situation in which the Haida Nation found itself, but felt compelled to dismiss the application based on the sequence established through the *Sparrow* analysis, in which consultation is only addressed as part of a justification analysis after a *prima facie* infringement of section 35(1) has been established.²⁵

The British Columbia Supreme Court decision was overturned by a unanimous British Columbia Court of Appeal.²⁶ The judgment, written by Lambert JA, concluded that it would be contrary to section 35 of the *Constitution Act, 1982* to force the Haida Nation to prove its rights in a trial before it was entitled to the relief it sought in the action.²⁷ Further, the Court held that British Columbia's obligation to consult was "free-standing" and was not limited to a "justification" analysis as prescribed in *Sparrow*.²⁸ Finally, Lambert JA found that British Columbia's obligation to consult with the Haida Nation was shared by Weyerhaeuser Company Limited, the recipient of the Tree Farm Licence.²⁹

Shortly after the release of the Court of Ap-

peal decision, counsel for Weyerhaeuser wrote the Court, alleging that the question of whether the company had an obligation to consult with the Haida Nation, as stated in the decision, had not properly been before the Court in the appeal.³⁰ As such, the British Columbia Court of Appeal scheduled a second hearing to address this issue. This hearing resulted in three opinions. Finch CJBC concluded that Weyerhaeuser did have an obligation to participate in the consultation process, on the practical ground that once the Tree Farm Licence had been transferred, no effective consultation could take place without Weyerhaeuser's participation.³¹ Lambert JA, the author of the decision after the first hearing, agreed with this analysis and result, but added a second reason for his position. He concluded that the original issuance of a Tree Farm Licence on lands to which the *Haida* Nation asserted title had been a breach of the Crown's fiduciary duty to the Haida Nation regarding its Aboriginal rights and title.³² At the time Weyerhaeuser sought to have the disposition transferred to it, the company had real or constructive knowledge of the Crown's breach, which was ongoing. Accordingly, Weyerhaeuser's conduct came within the equitable concept of "knowing receipt" of a disposition that was flawed by this breach.³³ Under the circumstances, Weyerhaeuser became a constructive trustee of the disposition, with the Haida Nation as beneficiary.³⁴ However, possibly recognizing, the controversial nature of his analysis, Lambert JA announced that he agreed that the disposition of the case would be on the narrower ground cited by Finch CJBC, although he emphasized that he did not resile from any of the views he had expressed.³⁵ The third member of the panel, Low JA, dissented, taking the position that, as Weyerhaeuser's duty to consult had only been argued belatedly, there was no reference to the issue in the pleadings.³⁶

In the Supreme Court of Canada, Weyerhaeuser was as successful as British Columbia was unsuccessful, as the unanimous panel allowed the company's appeal.³⁷ McLachlin CJC rejected Lambert JA's more expansive argument, questioning whether the doctrine of "knowing receipt" could even be applied to Crown dispositions.³⁸ The words used by McLachlin CJC

to dismiss the practical argument for industry consultation made by Finch CJBC are significant enough to be quoted at length:

The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate. Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations.³⁹

One issue on which *Haida* was less than completely clear related to the relevance of the decision in areas of Canada covered by treaties that purported to extinguish Aboriginal title. This uncertainty arose out of McLachlin CJC's use of "reconciliation" in more than one sense in her decision. She stated at one point that reconciliation of Aboriginal and other Canadian interests was the goal of consultation and accommodation⁴⁰ and at another that in parts of Canada treaties had the effect of reconciling the interests of the parties to them.⁴¹ This left open the possibility that the reconciliation sought as part of the consultation process had already taken place where interests had been reconciled through the negotiation of treaties, a position argued by Canada in *Mikisew Cree Nation v Canada (Minister of Canadian Heritage)*.⁴² This argument was rejected forcefully by Binnie J on behalf of a unanimous Supreme Court of Canada. In fact, his conclusion that the honour of

the Crown (the source of the consultation obligation) also “infuses every treaty and the performance of every treaty obligation”⁴³ could be characterized as buttressing the Crown’s obligation to consult in a treaty context.

Alberta’s Consultation Policy

The first reference to an Aboriginal consultation policy is found in Alberta’s 2000-2003 *Business Plan*, which was released on February 24, 2000. The specific commitment was that Alberta would

[W]ork with ... Aboriginal governments and communities and industry to use existing mechanisms, and where necessary develop new ones, to ensure appropriate consultation on resource development and land use management decisions on provincial crown land.⁴⁴

Later that year, Alberta released *Strengthening Relationships: The Government of Alberta’s Aboriginal Policy Framework* (Policy Framework), which set out a plan whereby all ministry business plans would be aligned to support initiatives aimed at, *inter alia*, improving the well-being of Aboriginal Albertans and clarifying the roles of provincial, federal, and Aboriginal governments.⁴⁵ With regard to the role of the provincial government, the document noted that the obligation to consult with Aboriginal peoples had been defined by the courts:

Aboriginal people are concerned about the impacts of natural resource development and land use decisions. Decisions made by courts are defining provincial governments’ obligations to consult with Aboriginal people. Where consultation is required on land and resource issues relating to an infringement of an existing treaty, NRTA or other constitutional right, it is the Government of Alberta’s role to consult affected Aboriginal people. This is not the role of industry.⁴⁶

In 2001, a commitment to develop a consultation policy was included in the initial Business Plan for the new Department of Aboriginal Affairs and Northern Development.⁴⁷

On May 16, 2005, Alberta issued *The Government of Alberta’s First Nations Consultation*

Policy on Land Management and Resource Development (the Policy).⁴⁸ The timing of the release, less than six months after the decision of the Supreme Court of Canada in *Haida*, does not appear to have been coincidental, for the provisions of the Policy reflect the outcome in *Haida*. Two examples of compliance with *Haida* are of particular significance. The first resulted from the Supreme Court’s rejection of British Columbia’s contention that Aboriginal consultation was the responsibility of the federal government because of the operation of section 91(24) of the *Constitution Act, 1867*.⁴⁹ McLachlin CJC’s conclusion that consultation with Aboriginal people was one aspect of the provincial Crown’s mandate to manage natural resources for the benefit of all residents of British Columbia⁵⁰ is quoted almost word for word in the introduction to the Policy.⁵¹ Second, the Policy accepts that consultation is required prior to the proof of infringement of a right protected by section 35(1), acknowledging that Alberta will consult with First Nations where its decisions or dispositions regarding provincial Crown land “may infringe First Nations [sic] *Rights and Traditional Uses*”.⁵²

Further, the decision in *Haida* is reflected throughout the nine “Guiding Principles” set out in the Policy,⁵³ particularly in the requirement that the Crown must consult in good faith⁵⁴ and in the corresponding obligation of First Nations to respond in the same manner,⁵⁵ Alberta’s responsibility to manage the consultation process,⁵⁶ the requirement that consultation take place before decisions are made,⁵⁷ the goal of minimizing infringements that cannot be avoided,⁵⁸ and the use of a spectrum to ensure that consultation is appropriate in individual fact situations.⁵⁹

Drawing upon a single reference in *Haida* that the Crown “may delegate procedural aspects of consultation to industry proponents seeking a particular development,”⁶⁰ Alberta’s policy stipulates that industry is expected to be the party responsible for discussing proposed development activities, recording and responding to First Nation concerns, and for designing ways of mitigating infringement of First Nation *Rights and Traditional Uses* that cannot be

avoided.⁶¹

In cases of “project-specific consultation,” the Policy limits Alberta’s role to an adjudicative one, which involved the determination as to whether industry consultation “has been adequate in the circumstances.”⁶² This decision would be informed by information and documentation, which industry and First Nations must provide to Alberta upon request.⁶³

The Policy commits Alberta to the creation of Consultation Guidelines to address how consultation would take place across the range of issues and for the purposes of this paper, the most important of these issues are the exploration and extraction of natural resources.⁶⁴ The Guideline document that is currently in place was released November 14, 2007,⁶⁵ and contains both Government-Wide and Department-Specific Guidelines (collectively, the Guidelines). The Guidelines are completely consistent with the Policy, acknowledging that the duty to consult “rests with the Crown (Alberta),”⁶⁶ but indicating that as manager of the consultation process, Alberta will delegate some “project-specific” activities to industry.⁶⁷ The Guidelines provide additional detail regarding Alberta’s adjudicative function regarding the consultation process:

- 1 Alberta will determine which projects require consultation,⁶⁸ and, if consultation is required, with whom;⁶⁹
- 2 When appropriate, Alberta will advise industry of the specific consultation procedures the latter must follow;⁷⁰
- 3 Alberta will review industry’s consultation plans and subsequent activities to determine their adequacy and completeness. If additional consultation is required, this task will be assigned to industry;⁷¹
- 4 Alberta’s adjudicative role extends to accommodation. When accommodation is required,

it will be reflected in the regulatory approval process, which will take into account the efforts of project proponents to address First Nation con-

cerns by making changes to plans and adjusting and adapting projects to minimize impacts.⁷²

Alberta’s adjudicative role is reflected in the Department-Specific portion of the Guidelines. This is expressed most clearly in the Guidelines stipulated for Alberta Environment,⁷³ which provide that Environment “will assess project specific information provided by the project proponent to determine if a proposed project requires First Nations consultation,”⁷⁴ and the Guidelines set out in some detail the obligations of the relevant project proponent in conducting consultation with an affected First Nation.⁷⁵ When a project proponent believes its obligation to consult has been satisfied, it reports that to Alberta Environment, which then exercises its responsibility to make a final determination as to whether or not consultation activities undertaken by the project proponent were adequate.⁷⁶

The Department-Specific Guidelines also limit the circumstances in which Alberta recognizes that it has a duty to consult First Nations. The clearest example of this is in the Alberta Energy Guidelines, which indicate that consultation with First Nations is not required prior to the initial disposition of Crown minerals rights because this leasing “does not, in and of itself, adversely impact First Nations *Rights and Traditional Uses*.”⁷⁷

Response to and Analysis of Alberta’s Policy and Guidelines

Alberta’s 2005 First Nations Consultation Policy was released to a less-than-enthusiastic response from First Nations. Symptomatic of this was the Lesser Slave Lake Indian Regional Council’s immediate rejection of the Policy, complaining that Alberta had failed to consider the input of First Nations in its design.⁷⁸ This formal rejection of the Policy did not change with the passage of time, as a September 2009 meeting of Alberta Chiefs from Treaties 6, 7, and 8 reaffirmed an earlier 2006 rejection of the Policy.⁷⁹

Academic critiques of the Policy suggested further shortcomings. Verónica Potes, Monique Passelac-Ross and Nigel Bankes described the

Policy as representing “stakeholder management” rather than a commitment to protect the Aboriginal and Treaty rights of Alberta First Nations.⁸⁰ While they conceded that a stakeholder management approach might prove to be effective, since it “provides practical tools of great value to improve relations with traditionally marginal actors,”⁸¹ they also expressed concern that a stakeholder management approach might lead to the conclusion that the rights of First Nations are on a par with other stakeholders and that this would blunt efforts to capture the “purposive” nature of the affirmation and recognition of existing Aboriginal and Treaty rights in section 35(1).⁸²

Passelac-Ross and Potes later zeroed in on the Crown’s self-appointed adjudicative role as legally problematic. The authors charged that the Policy did not explain how the ultimate purposes of consultation—the protection and reconciliation of Aboriginal and Treaty rights—could be achieved by industry without the involvement of the Crown, the party that bears the obligation to consult.⁸³

In addition to First Nations’ and academic critiques, there are three particularly problematic aspects to Alberta’s approach to Aboriginal consultation. The first is evident in the provisions in the Guidelines stipulating that bureaucrats within the Ministry of Environment and Sustainable Resource Development will be the final arbiters of both the need for consultation and the adequacy of efforts undertaken in response to it.⁸⁴ This decision-making (or adjudicative) function should reside with the judiciary.

The approach taken in the Alberta Environment Guidelines to evaluation of the need for consultation seems to reflect the longstanding British tradition of Parliamentary supremacy where the common law is subordinate to statute law. Historically, advocates of Parliamentary supremacy asserted that

Parliament has ultimate authority to determine what the law shall be. It is the responsibility of judges to declare what the law is, but in doing so, they are bound to accept every Act of Parliament as valid law. They [judges] can change the common law, but because it is subordinate to statute law, their decisions are

always liable to be overturned by Parliament.⁸⁵

However, since the *Constitution Act, 1982*, the Supreme Court of Canada has adopted a different approach to Parliamentary Sovereignty. For example, in the *Sparrow* case that view is that, as a result of the recognition and affirmation of Aboriginal and treaty rights in the *Constitution Act, 1982*, the Crown’s authority to enact regulations infringing Aboriginal rights is subject to constraint:

By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada’s aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.⁸⁶

The Supreme Court’s view is that the constitutional recognition afforded by section 35(1) acts as a strong check on legislative power, but it also extends beyond this to control all government conduct.⁸⁷ The Alberta Guidelines appear to ignore this consideration, and in fact the suggestion that the adjudicative function regarding the adequacy of consultation will be exercised by Crown officials tends to the opposite conclusion.

The second troubling element of the Alberta approach to consultation is that the Crown, the party responsible under Canadian law for Aboriginal consultation, is also the adjudicator of the question as to whether this consultation is adequate in a given situation. This offends the well-established principle of justice that no person can be a judge in his own case.⁸⁸

In *Haida* the Supreme Court of Canada acknowledged that the Crown could delegate to industry certain procedural aspects of consultation and play a role in assessing the outcome,⁸⁹ but it is questionable whether McLachlin CJC

envisioned a wholesale transfer of responsibility such as that implemented by Alberta in its Guidelines. Certainly, the only example of such delegation to industry mentioned by the Chief Justice was the obligation of project proponents to complete environmental assessments.⁹⁰ Further, in rejecting Finch CJBC's suggestion that the Crown lacked the capacity to carry out consultation subsequent to disposing of interests in land to industry, McLachlin CJC made reference to the broad range of options, up to and including legislation, which are at the Crown's disposal to ensure the adequacy of consultation.⁹¹ Indeed, the whole tenor of *Haida* suggests that there is a positive obligation on the Crown to implement adequate consultation measures, and that it is not appropriate for the Crown to be an observer in the process. In the words of one of the critiques of Alberta's approach, "[n]eutrality is what we expect from the courts; accommodation is what the courts expect of government."⁹²

The third problematic element of Alberta's approach to Aboriginal consultation is that it limits the duty to consult to consultation with First Nations, and in doing so excludes Métis. This result is difficult to justify given that section 35(2) includes Métis as well as Indians (and Inuit) within the definition of the Aboriginal peoples whose Aboriginal and treaty rights are recognized and affirmed in the *Constitution Act, 1982*. Indeed, the first references by Alberta to consultation regarding potential infringement of rights protected by section 35(1) were pan-Aboriginal in nature, committing the Province to the development of a policy to consult with all Aboriginal people regarding resource development.⁹³ For some unknown reason, this approach changed between 2001 and 2005, because the 2005 Policy announced by Alberta was limited to First Nations. It is unlikely that this decision was influenced by *Haida*, because although the *Haida* Nation is unquestionably a First Nation, McLachlin CJC uses the phrase "Aboriginal people" throughout her decision.

For a brief period late last decade, it seemed that this situation might change. In its 2008-2011 *Business Plan*, the Ministry of Aboriginal Relations (formerly the Department of Aborigi-

nal Affairs and Northern Development), the ministry responsible for Aboriginal consultation within the Alberta government, indicated that in 2008-2009 it would

[W]ork with Alberta ministries, the Métis Settlements General Council and the Métis Nation of Alberta Association to clarify Alberta's responsibilities with respect to consultation with Métis people.⁹⁴

That commitment has not reappeared in any subsequent *Business Plans*. The only current statement by Alberta regarding consultation and accommodation with respect to Métis people is found in a series of questions and answers on the website maintained by Alberta Aboriginal Relations:

Q. What is Alberta's position on Métis Consultation?

Alberta recognizes the constitutionally protected aboriginal rights of Métis communities and will consult with Métis peoples where there may be potential adverse impacts to credibly-asserted aboriginal rights. The strength of the asserted right, and its potential to be adversely affected, will inform the scope and nature of the consultation undertaken. The province will determine, on a case-by-case basis, whether consultation is necessary with Métis communities who may credibly assert constitutionally protected rights.⁹⁵

As the absence of a Métis consultation policy is beyond the parameters of this paper, the only observation that will be made regarding the Province's position is that Alberta is empowered to determine when consultation is required, while the *Haida* case establishes that the question of whether consultation is required is an objective, not a subjective one.⁹⁶

Despite the manifest shortcomings of Alberta's approach to First Nation consultation, the Policy and both Government-Wide and Department-Specific Guidelines appear to be legally valid. Alberta is under no legal obligation to enact either wise legislation or appropriate policy. Alberta's only obligation is to make sure its laws are consistent with the Constitution. Even if there are legal shortcomings in the Policy and Guidelines, it is highly unlikely that these will result in challenges to their validity per se. Rather, individual decisions may be chal-

lenced on the basis that the Crown has failed to consult adequately with First Nations. Thus the issue will be whether the action (or inaction) of the Crown in a particular situation is or is not consistent with section 35(1).

The Implementation of First Nations Consultation in Alberta

The immediate and continued rejection of the Policy by First Nations, combined with the unprecedented expansion of resource extraction in Alberta on First Nations' lands since the Policy was implemented, would lead one to assume that much litigation, regulatory chaos, and direct action would have followed. Yet in Alberta over the last decade, the experience has been the precise opposite. Alberta has seen none of the confrontations between First Nations and governments that have taken place in British Columbia⁹⁷ and Ontario.⁹⁸

In contrast, Alberta has seen little significant litigation involving the Crown. When the Athabasca Chipewyan First Nation ("ACFN") attempted to challenge the issuance of leases by Alberta Energy without prior consultation with First Nations, Alberta and Shell Canada Inc. were successful in having ACFN's Originating Notice quashed at summary judgment. It failed because the action was brought well after the expiration of the six month limitation period for seeking judicial review.⁹⁹

Alberta was less successful in attempting to strike the "Further Amended Statement of Claim" in *Lameman v Alberta*,¹⁰⁰ succeeding in only eliminating two sub-paragraphs of the prayer for relief.¹⁰¹ In the litigation, the Beaver Lake First Nation alleged, *inter alia*, that both the federal and provincial Crowns breached both Treaty 6 and their fiduciary duty to Beaver Lake by failing to manage the "taking up" of land. This resulted in a situation where the cumulative effects of development in accordance with Crown dispositions threatened the meaningful exercise of Beaver Lake's rights under Treaty 6.¹⁰²

Notwithstanding Beaver Lake's victory in surviving the attempt to strike its pleading, the

case may not continue much longer, as Beaver Lake lacks the resources to pursue litigation. In June 2011, an application to allow solicitors from the United Kingdom to join Beaver Lake's legal team on a completely *pro bono* basis was dismissed because the counsel in question had made no attempt to qualify to practice law in Alberta.¹⁰³ In fact, over the past decade, the only litigation involving consultation in which Alberta First Nations have been successful against the Crown have been in cases involving the federal government,¹⁰⁴ and both of these have involved what can most charitably be described as egregious fact situations.

The level of controversy surrounding Alberta's regulatory processes has been no more heated than that arising out of litigation. Despite well-publicized expressions of concern about statistically unexplainable cancer rates among residents of Fort Chipewyan over the same time period that oil sands development was growing rapidly¹⁰⁵ and the 2007 call by the Mikisew Cree First Nation for a moratorium on all oil sands approvals,¹⁰⁶ Mikisew Cree and the Athabasca Chipewyan First Nation, the two First Nations with reserves at and near Fort Chipewyan reached complete or partial confidential agreements with the proponents of all five oil sands projects for which Energy Resources Conservation Board ("ERCB") had scheduled hearings between 2004 and 2007.¹⁰⁷

To what can this spectacular practical success of Alberta's approach to consultation be attributed? Clearly, the most plausible answer must be that whatever qualms industry and First Nations might have about the legality of having no alternative but to deal with each other with almost complete absence of the Crown as a participant in consultation processes, the remaining parties have achieved what they can, given the reality they face.

Alberta's practice might best be described as a successful example of fortune favouring the brazen. By giving industry and First Nations no alternative but to deal with each other, it appears that Alberta has compelled both parties to confront their greatest shared fear—that they will come to an impasse which will lead to an ERCB hearing. Until recently, the possibility of

a regulatory hearing posed a threat to industry primarily because it could substantially delay a project. This became a real concern when Alberta responded to the decision of the Supreme Court of Canada in *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*¹⁰⁸ by empowering the ERCB to deal with constitutional issues arising out of the operation of section 35(1) but not compelling it to do so.¹⁰⁹ A decision by the ERCB either to make or defer such a decision could lead to significant delay. This would be likely if the ERCB were to refrain from hearing a section 35(1) matter, since that matter would then proceed to the Court of Queen's Bench, and, unless that Court ordered otherwise, the ERCB would have no alternative but to suspend its hearing until the Court of Queen's Bench released its decision.¹¹⁰

But the potential for significant delay exists even if the ERCB elects to consider a section 35(1) matter. The Board's enabling legislation provides for an appeal to the Alberta Court of Appeal on a question of law.¹¹¹ It is likely that in an appeal (by any party) on a question of law related to a section 35(1) issue, there would be little deference by the reviewing court to the ERCB decision. Bastarache J discussed this issue in his majority opinion in *ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*:

the Court is concerned not with the general expertise of the administrative decision maker, but with its expertise in relation to the specific nature of the issue before it. Consequently, while normally one would have assumed that the Board's expertise is far greater than that of a court, the nature of the problem at bar, to adopt the language of the Court of Appeal (para. 35), "neutralizes" this deference.¹¹²

Even if deference were not an issue, the Supreme Court of Canada has held that the standard to be used in reviewing decisions regarding the adequacy of consultation is correctness.¹¹³ That is, a court reviewing the decision of an administrative tribunal such as the ERCB regarding the adequacy of consultation is free to substitute its own decision for that of the ERCB and need not show any deference if it disagrees with the decision.

If prolonged uncertainty and therefore less productivity are the greatest fears of industry, the fears of First Nations are precisely the opposite. For First Nations, the certainty that contested regulatory action will inevitably lead to project approvals creates not only fear but considerable demoralization. Ironically then, both parties are motivated to come to some kind of agreement, but obviously for very different reasons.

Interestingly, recent actions by Alberta may have the effect of lessening the motivation of industry to enter into negotiations with First Nations rather than to take its chances with the regulatory process. To a large extent, industry's willingness to negotiate with First Nations is based on the fear that a failure to reach agreement with them might lead to considerable delay in a project. But the Crown's apparent commitment to ensuring the expansion of oil sands projects is such that while industry's fear of delay can lead to a positive outcome, an actual delay cannot be contemplated. This is particularly true when First Nations or Aboriginal communities allege that a project should not proceed because of a failure by the Crown to meet its constitutional obligations regarding consultation.

Such a threat presented itself in 2011, with the ERCB's consideration of the application by MEG Energy to proceed with an *in situ* oil sands project near Christina Lake. Two First Nations and one Métis community filed statements of objection regarding the project, and when the ERCB responded by calling a hearing, these parties filed Notices of Questions of Constitutional Law (NCQLs) as required by the *Administrative Procedures and Jurisdiction Act*, asserting that the Crown had failed to consult with them regarding the potential impact of the project on their Aboriginal and treaty rights. Alberta replied that the ERCB should decline to exercise its jurisdiction to consider the issues raised in the Notices.

After considering arguments from all parties, the ERCB decided not only to consider the issues raised by the NCQLs but to do so as part of its normal hearing process. This decision was conveyed to all parties in a letter from the

Board's Legal Counsel:

the Board has decided that the Court of Queen's Bench of Alberta is not a more appropriate forum to decide the questions. This is consistent with the comments that were provided by the parties and with the Board's understanding of its role as a quasi-judicial tribunal that has been given authority to determine questions of constitutional law.

With respect to the issue of Crown consultation that is raised in the NQCLs, the Board has determined that it will decide that question following the conclusion of the hearing, in the normal course of its regular decision-making function. In the Board's view, issues relating to consultation are inextricably bound with the other issues for the hearing and therefore are not conducive to a pre-hearing ruling. The Board is not prepared to make its decision on consultation without the benefit of the parties' evidence and argument in the hearing going to the questions of the existence of aboriginal rights and the potential for the project proposed in the application to affect those rights.¹¹⁴

However, as all three interveners withdrew their statements of concerns prior to the scheduled hearing. The MEG project was approved by the ERCB in January 2012.¹¹⁵

The process repeated itself later in 2012 during the ERCB's consideration of application by Osum Oilsands Corp. for approval of its Taiga oil sands project near Cold Lake. After a statement of objection filed by the Cold Lake First Nation resulted in a hearing being called, Cold Lake First Nation (CLFN) filed an NCQL with the Board on June 5, 2012. The constitutional question, as framed by Cold Lake, was:

has the Crown in Right of Alberta discharged its duty to consult and accommodate CLFN with respect to adverse impacts arising from the Osum Taiga Project upon Cold Lake First Nation's Treaty Rights?¹¹⁶

The particular form of relief Cold Lake sought from the ERCB was "a determination and declaration that the Crown had not met its constitutional duty to consult and accommodate CLFN and therefore the Taiga Project was not in the public interest."¹¹⁷ As it had in the MEG

hearing, Alberta requested that before hearing the Osum application, the ERCB make a preliminary decision regarding its jurisdiction to consider the issues raised in the NQCL.¹¹⁸ The ERCB did so, and on July 17, 2012, the Board concluded that it did not have the jurisdiction to consider the "constitutional question put before it in this proceeding." The same day, Alberta advised that it would be taking no further part in the ERCB hearing, and a day later, Cold Lake withdrew its NQCL and the hearing into the Osum application ended.¹¹⁹

In its decision, the ERCB did not explain why its decision regarding the constitutional question differed from the answer to the same question in the MEG case, although the Board suggested that the wording of the relief sought by Cold Lake might have been a factor. The Osum decision indicated that while the ERCB's authority included the capacity to find that the Taiga project was not in the public interest, it did not have the capacity to "make a declaration" that the Crown had fallen short of its duty to consult with and accommodate CLFN.¹²⁰ This is at least arguably an unfair characterization of Cold Lake's NQCL, since even in the ERCB's paraphrase of the relief sought in the NQCL, it is obvious that the Board was being asked to determine that the Taiga Project was not in the public interest and that the Crown's failure to consult was the justification for this conclusion.

Cold Lake First Nation sought leave to appeal the ERCB's decision to the Alberta Court of Appeal, but this application was dismissed.¹²¹

The same issue arose later in 2012 in a Joint Review Panel reviewing Shell Canada Energy's application to expand its Jackpine oil sands mine. The Panel agreed with Alberta and declined to consider the NQCLs filed by Region 1 of the Métis Nation of Alberta and the Athabasca Chipewyan First Nation, and the Alberta Court of Appeal again dismissed an application for leave to appeal the decision.¹²²

As a result of these decisions, the likelihood that an impasse in negotiations between a project proponent and a First Nation might lead to a contested hearing based on First Nation consultation and accommodation issues

has decreased. The ERCB has concluded that, notwithstanding the authority given to it by the *Administrative Procedures and Jurisdiction Act*, the Board will decline to exercise this authority to consider the constitutional question, and this approach has been endorsed by the Alberta Court of Appeal. Any possibility that either the ERCB or the Court of Appeal might reconsider this position has been foreclosed with the recent passage of the *Responsible Energy Development Act*.¹²³ Section 21 of the still-to-be-proclaimed legislation establishing a single energy regulator provides that this body “has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.”¹²⁴

Industry’s Role in Consultation— Practical Considerations

It is too early to tell whether these actions will make industry less inclined to negotiate with First Nations to avoid the regulatory process. Certainly, there is some cause for optimism that this will not necessarily be the case. There is more to the First Nation—industry relationship than simply making the best of an inevitable situation. There are many practical reasons why industry is a more appealing consultation partner than the government for First Nations. The issue of shared motivation to reach agreement has already been discussed. Further, while government makes reference to a “good neighbour” approach to First Nation consultation,¹²⁵ industry and First Nations frequently have no choice but to be good neighbours. The experience of operating in a non-ideological market system may assist industry managers, negotiators, and legal counsel to be more likely than their Crown counterparts to see beyond the zero-sum approach to negotiations and to recognize the business case for partnerships with self-sufficient First Nations. While these considerations neither excuse nor fully compensate for an absent Crown, First Nations could do worse than being forced to deal with industry with regard to consultation issues.

Why Fix What Doesn’t Look Broken?

The answer to this question returns us to where we began, with Warren Buffett and Yogi Berra. The quotes attributed to them deal with two subjects at the very heart of civilization—business and baseball. The important point to be made is that in the fields they are discussing, the “theories” at issue have no normative content. Beyond compliance with society’s laws, there is no “higher law” of business. It is entirely possible that there is no “higher law” of baseball, (although this is less certain). The “theories” of business and baseball are in fact predictions of future events based on the observations of past. Sometimes these are correct and sometimes they are not. For example, bringing in a left-handed pitcher to face a left-handed batter is always the right thing to do—except when it is not.

While it is sufficient to develop an explanation of economics or a theory of baseball that is conceptual, an explanation of law must be both conceptual and normative.¹²⁶ In Canada, the Supreme Court of Canada informed the Crown almost 25 years ago that by incorporating section 35(1) in the *Constitution Act, 1982*, Canada’s political leaders fettered their own discretion and that of their successors to act toward Aboriginal Canadians in a manner that is inconsistent with the honour of the Crown.¹²⁷

As this paper illustrates, the conditions that have allowed Alberta to avoid conflict with respect to consultation with First Nations, are neither permanent nor particularly stable. Those factors that motivate industry and First Nations to make the best of the situation that Alberta has created are subject to change.

For industry, particularly those engaged in oil sands development, the substantial cost of reaching agreements with First Nations is, relatively speaking, such a tiny portion of the total cost of and return from projects that industry has been able to absorb the cost of agreements as a manageable part of doing business. There is no denying that “consultation,” as that word is understood in its broadest possible meaning,

can be addressed with a cheque book. Should shale gas, a continuing “bitumen bubble” or meaningful energy conservation efforts change over the long term, the price structure for bitumen industry’s acquiescence in Alberta’s apparent evasion of its role in consultation and accommodation may come to a quick end.

Somewhat different considerations influence the possible future attitude of First Nations toward consultation. Some analysts may choose to be cynical about the apparent inconsistency of First Nations who oppose oil sands development because of environmental or health concerns and those who suddenly withdraw this apparently vehement opposition because of an agreement reached with a project proponent. But this inconsistency may be an illusion. First Nations are facing serious and growing environmental and health consequences of oil sands development, and they are also facing poverty and the destruction of their way of life. There is nothing unprecedented about a decision to resolve the most urgent and immediate crisis at the cost of ignoring or even adding to the magnitude of other challenges in the future.

In the recent past, few First Nations have pushed the regulatory process for considering oil sands projects to the stage of a contested hearing, choosing instead to enter into confidential agreements with project proponents to secure both environmental and economic commitments. This approach has contributed to the apparent success of the process of First Nation consultation in Alberta. However, it is possible to anticipate a future in which First Nations no longer feel either the need or the inclination to allow resource development on this basis. At that point, the current community of interest between project proponents and First Nations will cease to exist, and both parties will turn their attention to the Crown. It is even possible to conceive a scenario in which resource development has proceeded unchecked to the point at which the opportunity of First Nations to exercise their constitutionally-protected rights within their traditional territories has been rendered meaningless. It is at that point that words like “consent” and “moratorium” start to find their way into the vocabulary of judges. In

short, there is no guarantee that the regulatory peace in Alberta will continue given the (apparent) shortcomings in the Crown’s constitutional obligations with respect to consultation and accommodation.

Notes

- * PhD Student and Sessional Lecturer, Faculty of Law, University of Alberta.
- 1 2004 SCC 73, [2004] 3 SCR 511, 2004 [*Haida* cited to SCC].
- 2 *Ibid* at paras 4-5.
- 3 [1990] 1 SCR 1075 [*Sparrow*].
- 4 *Haida*, *supra* note 1 at para 11.
- 5 *Ibid* at para 16.
- 6 *Ibid* at para 18.
- 7 *Ibid* at para 32.
- 8 *Constitution Act*, 1982 being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35 (1). “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”
- 9 *Haida*, *supra* note 1 at para 32.
- 10 *Ibid* at para 27.
- 11 The full text of the section reads: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”
- 12 *Haida*, *supra* note 1 at para 35.
- 13 *Sparrow*, *supra* note 3 at paras 68-71.
- 14 *Ibid* at para 82.
- 15 *Haida*, *supra* note 1 at paras 28-30.
- 16 *Ibid* at para 7.
- 17 *Ibid* at para 31.
- 18 *Ibid* at para 44.
- 19 *Ibid* at para 48.
- 20 [1997] 3 SCR 1010, 1997 CarswellBC 2358 (SCC). [*Delgamuukw* cited to SCR].
- 21 *Ibid* at para 168.
- 22 *Haida*, *supra* note 1 at para 48.
- 23 *Ibid* at para 49.
- 24 *Ibid* at para 47.
- 25 *Haida Nation v British Columbia (Minister of Forests)*, 2000 BCSC 1280, at paras 23, 27-29 [*Haida BCSC*, cited to BCSC].
- 26 *Haida Nation v British Columbia (Minister of Forests)*, 2002 BCCA 147. [*Haida BCCA*].
- 27 *Ibid* at para 37.
- 28 *Ibid* at para 55.
- 29 *Ibid* at para 48.
- 30 *Haida Nation v British Columbia (Minister of Forests)*, 2002 BCCA 462, at para 17 (per Lambert

- JA) (BCCA) [*Haida BCCA No 2*].
- 31 *Ibid* at paras 119-121, 123 (per Finch CJBC).
- 32 *Ibid* at para 64 (per Lambert JA).
- 33 *Ibid* at para 65 (per Lambert JA).
- 34 *Ibid* at para 73 (per Lambert JA).
- 35 *Ibid* at para 103 (per Lambert JA).
- 36 *Ibid* at para 131 (per Low JA).
- 37 *Haida*, *supra* note 1 at para 10.
- 38 *Ibid* at para 54.
- 39 *Ibid* at para 55 [citations omitted].
- 40 *Ibid* at para 32.
- 41 *Ibid* at para 25.
- 42 2005 SCC 69, [2005] 3 SCR 388, at para 36 (SCC) [*Mikisew* cited to SCC].
- 43 *Ibid* at para 57.
- 44 Alberta Treasury, *Government of Alberta Business Plan, 2000-2003*, (24 February 2000) at 204, online: <<http://www.finance.alberta.ca/publications/budget/budget1997-2000/2000/inter.pdf>>.
- 45 *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework*, September 2000 at 1 online: <http://www.aboriginal.alberta.ca/documents/final_strengthrelations.pdf>.
- 46 *Ibid* at 15.
- 47 The new Ministry committed to work with "other Ministries, First Nations and industry to develop appropriate procedures for consultation regarding development on public lands." Alberta Finance, *Government of Alberta Business Plan, 2001-2004*, (24 April 2001) at 44 online: <<http://www.finance.alberta.ca/publications/budget/budget2001/aborig.pdf>>.
- 48 Online: <<http://www.aboriginal.alberta.ca/documents/GOAFirstNationsConsultation-Policy-May-2005.pdf>> [*The Policy*].
- 49 *Haida*, *supra* note 1 at paras 57-58.
- 50 *Ibid* at para 8.
- 51 *The Policy*, *Supra* note 48 at 2.
- 52 *Ibid* at 2. *Rights and Traditional Uses* is a term of art within the Policy. It is defined as adding the use of public lands as burial grounds, gathering sites and historic or ceremonial locations to already recognized constitutionally-protected rights to hunt, fish, and trap. However, the definition excludes any proprietary interest in public lands.
- 53 *Ibid* at 3-4.
- 54 *Haida*, *supra* note 1 at paras 10, 41, 42, 47, and 49.
- 55 *Ibid* at para 42.
- 56 *Ibid* at para 53.
- 57 *Ibid* at para 46.
- 58 *Ibid* at para 47.
- 59 *Ibid* at paras 43-45.
- 60 *Ibid* at para 53.
- 61 *The Policy*, *Supra* note 48 at 5-6.
- 62 *Ibid* at 5.
- 63 *Ibid* at 6.
- 64 *Ibid* at 3. The other scenarios referenced are the management of forests, fish, and wildlife.
- 65 *Alberta's First Nations Consultation Guidelines on Land Management and Resource Development*, (14 November 2007). Online: <http://www.aboriginal.alberta.ca/documents/First_Nations_and_Metis_Relations/First_Nations_Consultation_Guidelines_LM_RD.pdf>
- 66 *Ibid* at 2.
- 67 *Ibid* at 3.
- 68 *Ibid* at 4.
- 69 *Ibid* at 4-5.
- 70 *Ibid* at 5.
- 71 *Ibid* at 6.
- 72 *Ibid* at 2.
- 73 The Guidelines reflect the fact that in 2007, Alberta Environment and Alberta Sustainable Resource Development, which have since been combined in a single Ministry, were separate, with each having its own department-specific guidelines specified in the document.
- 74 *Guidelines*, *supra* note 65, Part III at 2.
- 75 *Ibid* Part III at 2-4.
- 76 *Ibid* Part III at 4.
- 77 *Ibid* Part II at 1 [emphasis in original].
- 78 Debora Steel, "Treaty 8 First Nations reject Alberta's consultation policy," *Alberta Sweetgrass* 12:3 (1 February 2005) 1 online: <<http://www.ammsa.com/publications/alberta-sweetgrass/treaty-8-first-nations-reject-albertas-consultation-policy>>.
- 79 Assembly of Treaty Chiefs, Resolution 02-09-2009/#002 R, (3 September 2009). <<http://www.treaty7.org/files/2009-09-R2%20Reaffirmation%20of%20Rejection.pdf>>.
- 80 Verónica Potes, Monique Passelac-Ross, & Nigel Bankes, *Oil and Gas Development and the Crown's Duty to Consult: A Critical Analysis of Alberta's Consultation Policy and Practice* (Calgary: The Institute for Sustainable Energy, Environment and Economy, 2006) at 34. Online: <<http://www.ucalgary.ca/files/iseee/ABEnergyFutures-14.pdf>>.
- 81 *Ibid* at 35.
- 82 *Ibid*.
- 83 Monique M Passelac-Ross & Verónica Potes, *Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate? Is it Legal?* (Calgary: Canadian Institute of Resources Law, 2007) at 34 online: <<http://dspace.ucalgary.ca/bitstream/1880/47190/1/OP19AboriginalOil-sands.pdf>>.

- 84 *Supra* notes 67-77 and accompanying text.
- 85 Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999) at 4.
- 86 *Sparrow*, *supra* note 3 at para 64.
- 87 *Ibid* at para 65.
- 88 John Locke, *Two Treatises of Government*, edited by Peter Laslett, 2d ed (Cambridge: Cambridge University Press, 1967), Book II, Chapter 2, § 13.
- 89 *Haida*, *supra* note 1 at para 53.
- 90 *Ibid*.
- 91 *Ibid* at para 55.
- 92 Potes, Passelac-Ross & Bankes, *supra* note 83 at 35.
- 93 *Supra* notes 80 and accompanying text.
- 94 Alberta Finance, *Government of Alberta's Strategic Business Plan, 2008-2011*, April 2008 at 11 online: http://www.finance.alberta.ca/publications/budget/budget2008/busplans_complete.pdf.
- 95 <http://www.aboriginal.alberta.ca/573.cfm>.
- 96 *Haida*, *supra* note 1 at para 35.
- 97 In *Canadian Forest Products v Sam* 2011 BCSC 676, 2011 CarswellBC 1261, rev'd 2013 BCCA 58 the Government of British Columbia and Canadian Forest Products ("Canfor") are dealing with a road blockade that began in November 2009, which denies Canfor access to an area to which it has had received a Cutting Permit for over two years.
- 98 In Ontario, Platinex Inc. ("Platinex"), a junior mining exploration company that had held more than 200 contiguous mining claims since 1999, became embroiled in the first years of this century in a protracted conflict with Kitchenuhmaykoosib Inninuwug ("Big Trout Lake") First Nation as a result of plans by Platinex to drill on some of its claims near Big Trout Lake. *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, 272 DLR (4th) 727, 2006 CanLII 26171 (ONSC). By the time the matter ended, the Big Trout Lake Chief and other leaders of the First Nation had been sentenced to six months in jail for contempt of court, although the sentences were set aside on appeal. *Platinex Inc. v Kitchenuhmaykoosib Inninuwug First Nation*, [2008] 2 CNLR 301, 2008 CarswellOnt 1421 (WL Can) at paras. 1, 54 (ONSC), var'd 2008 ONCA 533, 2008 CarswellOnt 3876 (WL Can) (ONCA). The crisis was not resolved until late 2009, when Platinex accepted five million dollars and partial reimbursement of its costs from Ontario in return for abandoning its mining claims near Big Trout Lake. Liezel Hill, "Platinex, Ontario, First Nation settle dispute," *Mining Weekly* (14 December 2009) online: <http://www.miningweekly.com/article/platinex-ontario-first-nation-settle-disputes-2009-12-14>.
- 99 *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2009 ABQB 576, 2009 CarswellAlta 1640 (Alta QB), aff'd 2011 ABCA 29 2012 CarswellAlta 317 (Alta CA), leave to appeal denied, 2012 CanLII 8359 (SCC).
- 100 2012 ABQB 195, 2012 CarswellAlta 542 (Alta QB). [*Lameman* cited to ABQA].
- 101 *Ibid* at para 84.
- 102 *Ibid* at paras 4-9.
- 103 *Lameman v Alberta*, 2011 ABQB 396 at paras 1-4, 40, 43, 2011 CarswellAlta 2287 (Alta QB).
- 104 *Mikisew*, *supra* note 42; *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, 2006 CarswellNat 3642 (FC), aff'd *Canada v Imperial Oil Resources Ventures Ltd*, 2008 FCA 20, 2008 CarswellNat 687 (FCA).
- 105 Ian Urquhart, "Between the Sands and a Hard Place? Aboriginal Peoples and Oil Sands" (2010) [unpublished, archived at (Chicago: The Roberta Buffett Center for International and Comparative Studies, Northwestern, University, 2010) at 8-132. online: <http://www.bcics.northwestern.edu/documents/workingpapers/Energy_10-005_Urquhart.pdf>.
- 106 *Ibid* at 76-78.
- 107 *Ibid* at 16-18.
- 108 2002 SCC 31, [2002] 2 SCR 146, 2002 CarswellBC 617 (SCC).
- 109 This involved a two-step process. First, section 16 of the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, s 16 [*Administrative Procedures and Jurisdiction Act*] authorized Cabinet to designate those regulatory bodies empowered to determine questions of constitutional law. Then, Schedule 1 of the *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, Schedule 1 authorized the ERCB to determine all questions of constitutional law (*Charter of Rights and Freedoms*, division of powers, and section 35(1)).
- 110 *Administrative Procedures and Jurisdiction Act*, *supra* note 109, s 13(3).
- 111 *Energy Resources Conservation Act*, RSA 2000, c E-10, s 41(1).
- 112 2006 SCC 4, [2006] 1 SCR 140 at para 27 [cited to SCC].
- 113 *Little Salmon/Carmacks First Nation v Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, 2010 CarswellYukon 140 (SCC) at para 48 [cited to SCC].

- 114 Letter from Sean C Sexton, Counsel, Energy Resources Conservation Board to MEG Energy Corp *et al*, (25 November 2011). ERCB Application 1571384.
- 115 *Re Application for an Amendment to Christina Lake Regional Project, Athabasca Oil Sands* (31 January 2012), 1571384. online: ERCB <<http://www.ercb.ca/decisions/2012/2012-ABERCB-001.pdf>>.
- 116 Letter from the ERCB to Witten LLP, Norton Rose Canada LLP, Alberta Justice Aboriginal Law (24 August 2012) at 1. online: <http://ablawg.ca/wp-content/uploads/2012/09/Application-1636580-ERCB-Reasons-NQCL1.pdf> [ERCB Letter].
- 117 *Ibid* at 2.
- 118 *Ibid*.
- 119 *Ibid* at 1-2.
- 120 *Ibid* at 8.
- 121 *Cold Lake First Nations v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304.
- 122 *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).
- 123 SA 2012, c R-17.3.
- 124 *Ibid* at section 21.
- 125 *Strengthening Relationships*, *supra* note 45 at 15.
- 126 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1978) at vii.
- 127 *Sparrow*, *supra* note 3 at paras 64-65.