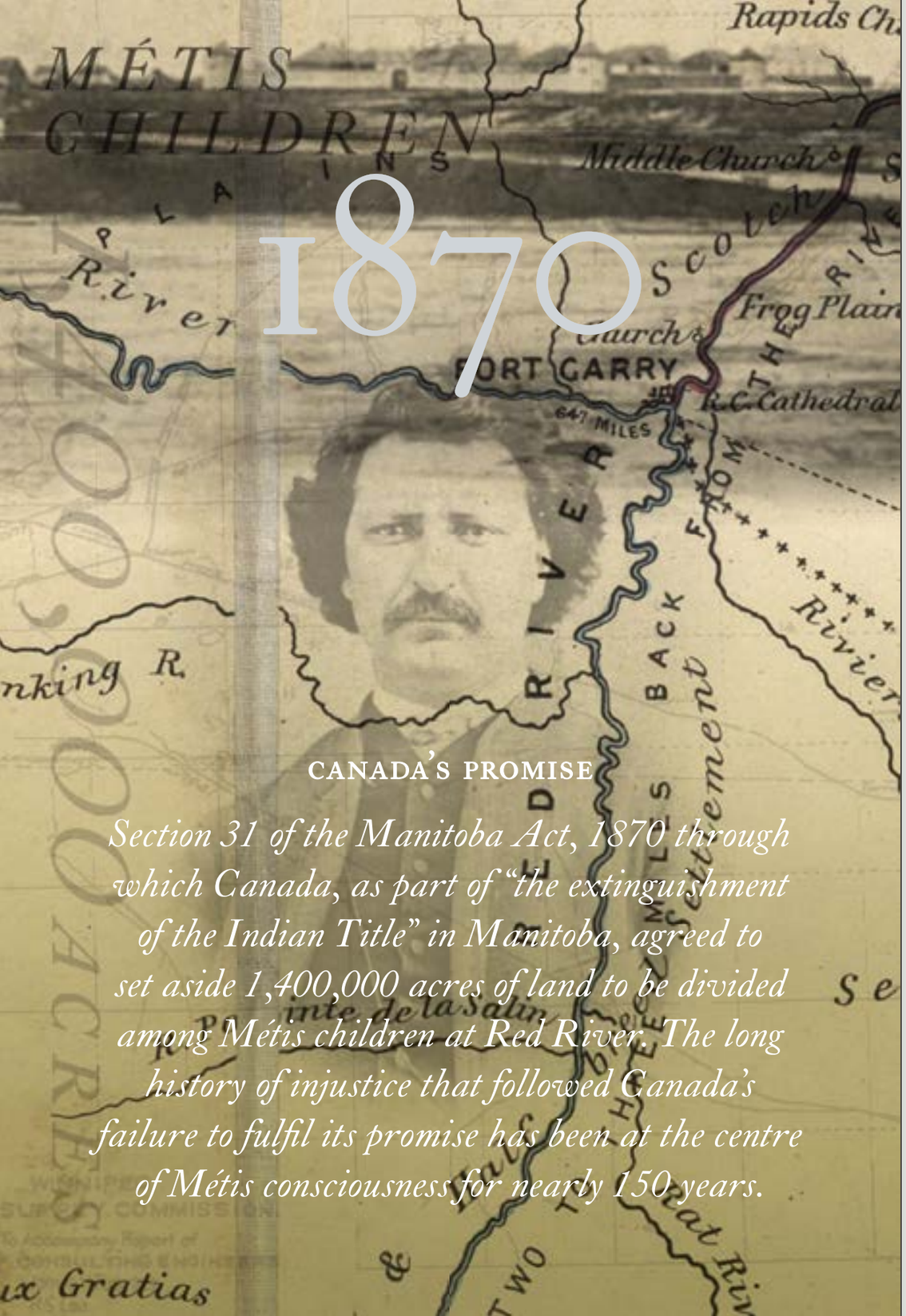
THE MÉTIS



CASE COMMENT

Manitoba Métis Federation v Canada, 2013 SCC 14

MARCH, 2013

A New Legal Remedy for Indigenous People

The Supreme Court of Canada's decision in *Manitoba Métis Federation v. Canada* is a classic example of the Court going off in its own direction instead of following the parties' specific arguments. As a result, we now have a new legal remedy available to all Indigenous people seeking to enforce the Crown's constitutional obligations. How effective this new remedy will be in providing justice is an open question.

What it is about

The case raised numerous historical and legal issues surrounding Canada's promise in 1870 to set aside lands for the Métis at Red River. The main issue was a consideration of section 31 of the *Manitoba Act*, *1870* through which Canada, as part of "the extinguishment of the Indian Title" in Manitoba, agreed to set aside 1,400,000 acres of land to be divided among Métis children. The long history of injustice that followed Canada's failure to fulfil its promise has been at the centre of Métis consciousness for nearly 150 years.

In 2010 the Manitoba Court of Appeal held that, among other things, even if Canada did owe a fiduciary duty to the Métis based on section 31, the duty was not breached, and that any claim for breach of a fiduciary duty was now barred by statutory limitations and the Métis' delay in bringing their claim.

What the Court said

The Supreme Court rejected the Métis' argument that Canada breached a fiduciary duty to the Métis children based on section 31 of the *Manitoba Act, 1870* because the Métis could not meet the requirements for establishing a fiduciary duty. As part of its reasons on this question, the Court held that the Manitoba Métis could not make out a claim for Aboriginal title because theirs was an individual, not a communal, interest in land, and they had historically been willing to sell their interest to others. Both these facts, according to the Court, were contrary to the meaning of Aboriginal title.

But the Court did not stop there. Instead it ultimately found for the Métis based on an argument none of the parties had specifically made. The Court held that while the Métis had not proven that Canada had breached a fiduciary duty, Canada had failed to act honourably in fulfilling its constitutional promise to provide lands for the Métis children. And, because constitutional obligations to Aboriginal people are solemn promises intended to foster reconciliation, the Métis were entitled to a declaration from the Court that Canada had failed to act honourably in providing lands under section 31 of the *Manitoba Act, 1870*.

Finally, the Court held that Manitoba and Canada could not rely on limitations statutes or arguments about delay to stop the Court from issuing a declaration that Canada's conduct was dishonourable. The Court concluded that it is the protector of the constitution and when a constitutional promise to Aboriginal people is at stake, it cannot be muzzled by mere legislation.

Why it matters

After over 100 years of denial by Canada that it had done wrong by the Métis, the importance of the highest court in the country calling Canada to account should not be underestimated. The Court's decision is a powerful vindication of Métis history and an acknowledgement that the outstanding wrong should be remedied, to the extent that it can, through present-day, good faith negotiations.

Of importance to all Indigenous people, the Court has solidified the principle of the honour of the Crown in Canadian common law and has created a new legal remedy available whenever the Crown fails to act diligently to fulfil the purpose of a constitutional promise to Indigenous people. Canada's ongoing failure to live up to the specific promises embedded in the historical treaties is just one area where First Nations are likely to seek declarations from the courts based on this new remedy.

The unanswerable question is how effective this new type of court declaration will prove. In the case of the Métis, the Court obviously expects Canada to enter into negotiations to right the wrong done to them. But the Court's declaration does not demand any particular type of resolution. It may be that negotiations, at least in the eyes of the Métis, will prove unsatisfactory.

Ultimately, a court declaration that Canada has failed to act honourably to fulfil a constitutional promise to Indigenous people may prove most valuable on the international stage. Such a declaration, especially if from the Supreme Court, combined with the United Nations *Declaration on the Rights of Indigenous People*, may ultimately shame Canada into fulfilling outstanding constitutional obligations to Indigenous people.

1874

The Powley test was not designed to favour a highly mobile society with few documentary records.

CASE COMMENT

Enge v. Mandeville et al, 2013 NWTSC 33
and *R. v. Hirsekorn*, 2013 ABCA 242

JULY, 2013

The Duty to Consult —A Second-Best Alternative

Asserting an Aboriginal right and proving an Aboriginal right are very different things and lead to very different legal obligations. Recent court decisions from the Northwest Territories and Alberta on Métis Aboriginal rights demonstrate the differing legal requirements for asserting versus proving an Aboriginal right and why they are important.

The Decisions

Enge v. Mandeville et al, 2013 NWTSC 33

The size of the Northwest Territories' Bathurst caribou herd plummeted between 2006 and 2009. As an emergency conservation measure the Tlicho Government and the Government of the Northwest Territories (GNWT) limited the 2010-2011 harvest to 300 caribou divided between the Tlicho and the Yellowknives Dene First Nation. The North Slave Métis Alliance argued that the GNWT had breached its duty to consult and accommodate by not allocating part of the harvest to the Métis.

In its reasons for decision, the Court emphasized that even dubious or weak claims of Aboriginal rights will trigger the duty to consult. Once the duty is triggered, the Crown must prepare a preliminary assessment of how strong the unproven claim is and the potential impact of the pending decision on asserted Aboriginal rights. This assessment, which should be shared with the Aboriginal people claiming the right, guides the scope

and content of consultation. The Court concluded that the GNWT had breached its obligation to consult with the Métis because even though the Métis had a credible (though as-yet unproven) claim to an Aboriginal right to hunt the Bathurst caribou herd, the GNWT did not prepare the necessary preliminary assessment and did not consult meaningfully and reasonably with the Métis.

R. v. Hirsekorn, 2013 ABCA 242

In 2007 Garry Hirsekorn killed a mule deer near the Cypress Hills in southeastern Alberta. When he was charged by the Province for hunting out of season and without a licence, he defended himself by asserting an Aboriginal right to hunt as a Métis person.

The Alberta Court of Appeal concluded that Hirsekorn did not have to prove the existence of a historic Métis community in the vicinity of the location where he shot his deer or that the specific hunting location was integral to Métis culture. But, the Court held, it wasn't sufficient for Hirsekorn to rely on the fact that historically the Métis had hunted in central and southern Alberta or generally throughout the plains. Instead, Hirsekorn had to prove that his ancestors frequented the Cypress Hills so that it was part of their 'ancestral lands' or 'traditional territory' for hunting before the arrival of the Northwest Mount Police in 1874. Because Hirsekorn had failed to prove this, he could not establish an Aboriginal right to hunt in the Cypress Hills.

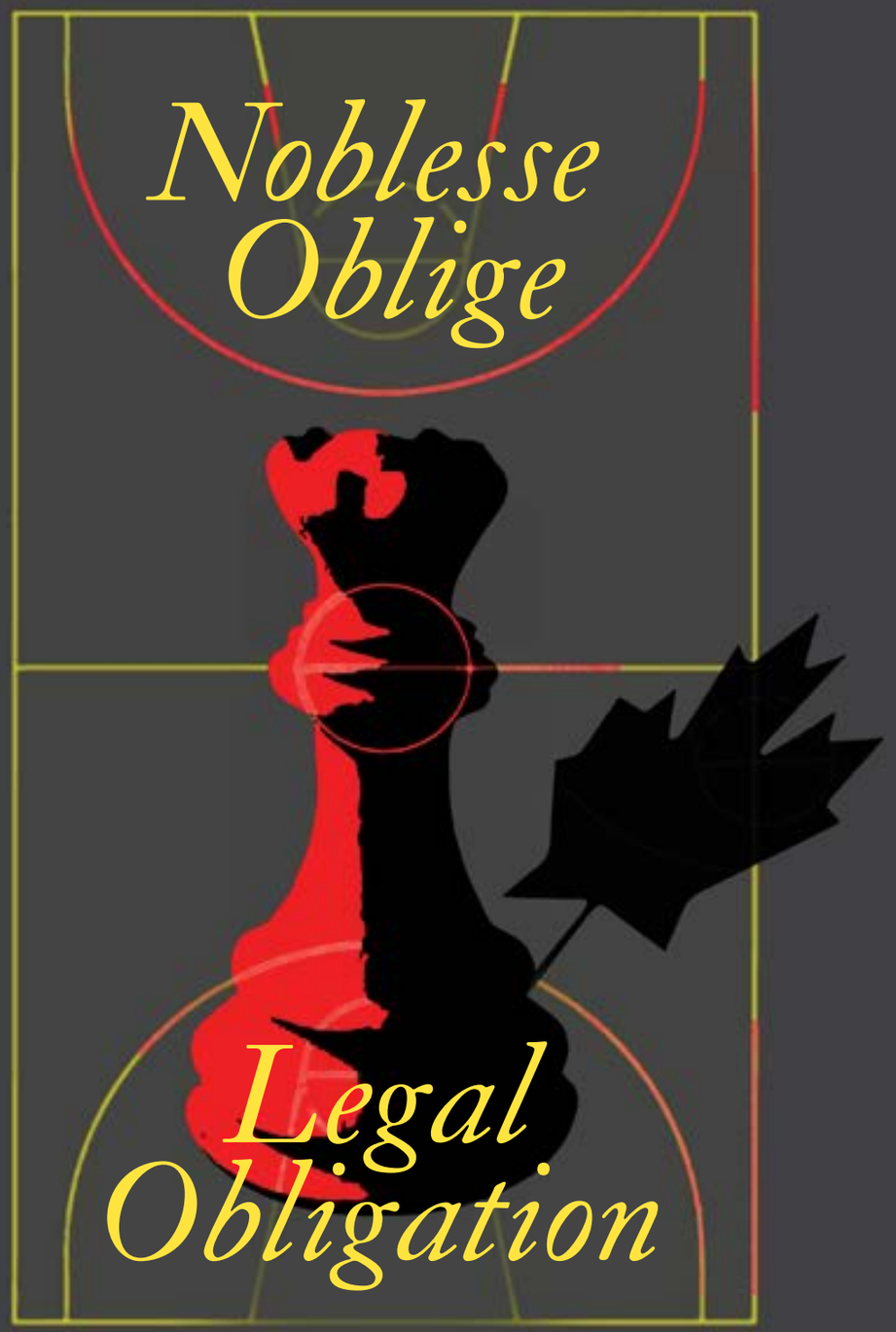
...Indigenous people with recognized Aboriginal and Treaty rights should be cautious about agreeing to processes which require no more than consultation and, perhaps, accommodation.

Why it matters

As the decision in *Enge* exemplifies, the threshold for triggering the Crown's duty to consult is relatively low. While the Métis have to point to evidence that fits the Aboriginal rights test laid down by the Supreme Court in *Powley* to trigger the Crown's duty, a credible claim will do, even if it might be unlikely to succeed in court. In contrast, the decision in *Hirsekorn* demonstrates how difficult it can be to establish an Aboriginal right in court, especially for the Métis of the prairies. The *Powley* test was not designed to favour a highly mobile society with few documentary records.

One reason it is much more difficult to prove an Aboriginal right than it is to trigger the duty to consult is that the legal consequences are very different. Once triggered, the duty to consult doesn't necessarily lead to accommodation. If a claim is weak or the potential effects minimal, the legal obligation on the Crown may not be particularly onerous. But if an Aboriginal right is proven in court or otherwise recognized, or a First Nation has established Treaty rights, governments may be required to do more than simply consult and perhaps accommodate. Depending on the circumstances, they may have to show that there is a valid reason to infringe the right, that they have infringed the right as little as necessary and that they have given priority to the Indigenous people in exercising their right.

The differing requirements for triggering the duty to consult and for proving an Aboriginal right, and the different legal obligations on government that flow from each, underscore why Indigenous people with recognized Aboriginal and Treaty rights should be cautious about agreeing to processes which require no more than consultation and, perhaps, accommodation. Recognized Aboriginal and Treaty rights deserve respect—governments shouldn't diminish them by treating them the same as unrecognized or unproven Aboriginal rights.



CASE COMMENT

Daniels v. Canada (Indian Affairs and Northern Development), 2016 SCC 12

APRIL, 2016

What Does the *Daniels* Decision Mean?

The *Daniels* decision is likely one of the most misunderstood decisions ever released by the Supreme Court of Canada.

What it is about

The Supreme Court was asked to made three declarations:

- that the Métis and non-status Indians are 'Indians' under s. 91(24) of the Constitution;
- that the federal government owes a fiduciary duty to the Métis and non-status Indians; and
- that the Métis and non-status Indians have a right to be consulted and negotiated with in good faith by the federal government on a collective basis through representatives of their choice, respecting all rights, interests and needs as Aboriginal peoples.

The first declaration required the Court to interpret s. 91(24) of the Constitution.

A Short Primer on the Division of Powers

Sections 91 and 92 of the Constitution identify subjects which either the federal government or the provincial governments have the exclusive jurisdiction to make laws about.

For example, the federal government has the exclusive jurisdiction to make laws about the postal service. On the provincial side of the ledger, the provinces have exclusive authority to make laws about the management and sale of public lands.

This doesn't mean that one level of government can't make laws that affect topics under the jurisdiction of the other level of government. They can and often do.

What it means is that they can't pass a law that intentionally affects a subject under the exclusive jurisdiction of the other level of government or indirectly affects its 'core', whatever that might be.

This is why the provinces can't pass a law specifically about Indian reserves—Indian reserves are 'lands reserved for the Indians' under s. 91(24) and, therefore, only the federal government can pass laws about them.

THE DECISION DOES NOT OBLIGATE THE FEDERAL GOVERNMENT TO NEGOTIATE TREATIES WITH THE MÉTIS.

Importantly, just because a subject matter isn't listed under either section 91 (federal powers) or section 92 (provincial powers) doesn't mean neither level of government can pass a law relating to that subject. By default, the federal government has the legislative authority for any subject not mentioned. This is why the federal government's argument that it couldn't legislate regarding the Métis was always self-serving and disingenuous.

What the Court said

The Court made the first declaration. Based on the findings of fact of the trial judge, the Court held that when used in s. 91(24) of the Constitution, 'Indians' was intended to include the Métis and non-status Indians.

The Court declined to make the second and third declarations. The existence of a fiduciary relationship and the possibility of a duty to consult was already settled law. A declaration of an overarching, non-specific fiduciary duty to the Métis or duty to consult the Métis would have been a significant change in the law.

What the Court did not say

The Court did not order the federal government to do anything.

The decision doesn't make Métis and non-status Indians 'Indians' under the Indian Act.

The Court's declaration does not affect any specific individuals or groups of Métis or non-status Indians. The specifics of who the declaration might apply to is a matter for a future court decision.

The Court's decision is not about Métis constitutional rights. These rights are protected under a different section of the constitution (section 35). The test for establishing them was set out in the Court's *Powley* decision—the test has not changed.

The decision does not mean provincial laws don't apply to the Métis and non-status Indians. The application of provincial laws is a different question for a different day.

The decision does not obligate the federal government to negotiate treaties with the Métis. This was always and remains a possibility. The argument that the federal government couldn't because of s. 91(24) was a red herring.

The decision does not mean the Métis have an additional argument for revenue sharing. Section 91(24) is not about rights or interests. It's about the federal government's exclusive legislative powers.

Why it matters

Courts aren't in the business of making declarations. They only do so when they believe a declaration will have the practical effect of settling a 'live controversy'.

In this case, the Court concluded that granting a declaration assigning constitutional authority to make laws affecting the Métis and non-status Indians to the federal government would have "enormous practical utility" for the two groups who until now had been left to rely on government's noblesse oblige.

According to the Court, the federal government's and the provinces' disagreement over legislative authority over the Métis and non-status Indians had resulted in them being deprived of much needed programs and services.

The Court acknowledged that its declaration would not force the federal government to pass any laws directly affecting the Métis and non-status Indians.

Instead, the Court concluded that granting the declaration would create certainty and accountability as to which level of government the Métis and non-status Indians should turn to for policies to address their historical disadvantages—they should turn to the federal government.

What does the *Daniels* decision mean? Put simply, the Métis and non-status Indians should look to the federal government in the hopes of negotiating improved programs and services, but there's no legal obligation on the federal government to do anything specific.

What I think

Hopefully the decision will lead to better programs and services for the Métis and non-status Indians. If so, it will prove to be an important victory.

Personally, the decision leaves me cold.

Historically, s. 91(24) was understood as a shield—it was intended to stop the provinces from passing laws that directly interfere with 'Indians and lands reserved for the Indians'. The benefit of the Métis and non-status Indians now being granted this 'protection' is likely a lot less than it once would have been because in 2014 the Supreme Court in *Tsilhqot'in* and *Grassy Narrows* significantly narrowed the scope of the protection.

In *Daniels* the Court emphasized a different purpose for s. 91(24)—the control of Aboriginal people.

As the Court explained, assigning the Crown's law-making authority to the federal government facilitated Canada's westward expansion, including the development of laws and policies intended to stop Aboriginal people, including the Métis, from resisting non-Indigenous settlement of their lands.

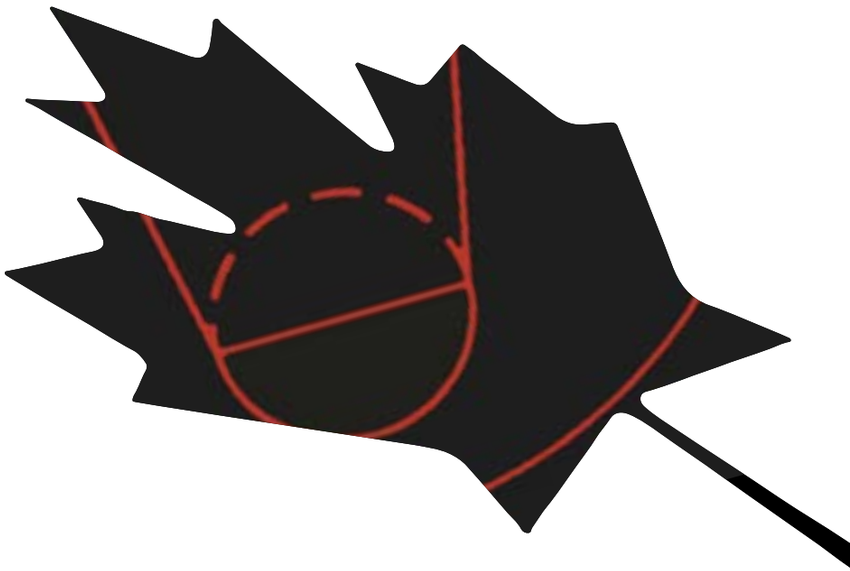
Section 91(24) was, and is, an instrument of colonization.

As a Métis person whose ancestors were deprived of their land at Red River I take no satisfaction in the Supreme Court confirming the federal government's exclusive authority to make laws about me, my children or the Red River Métis.

At a wider level, the decision is out of step with the aspirations of most Indigenous Peoples in Canada and around the world. Rather than seeking confirmation of the Crown's jurisdiction over them, Indigenous Peoples are striving to achieve recognition of their own jurisdiction.

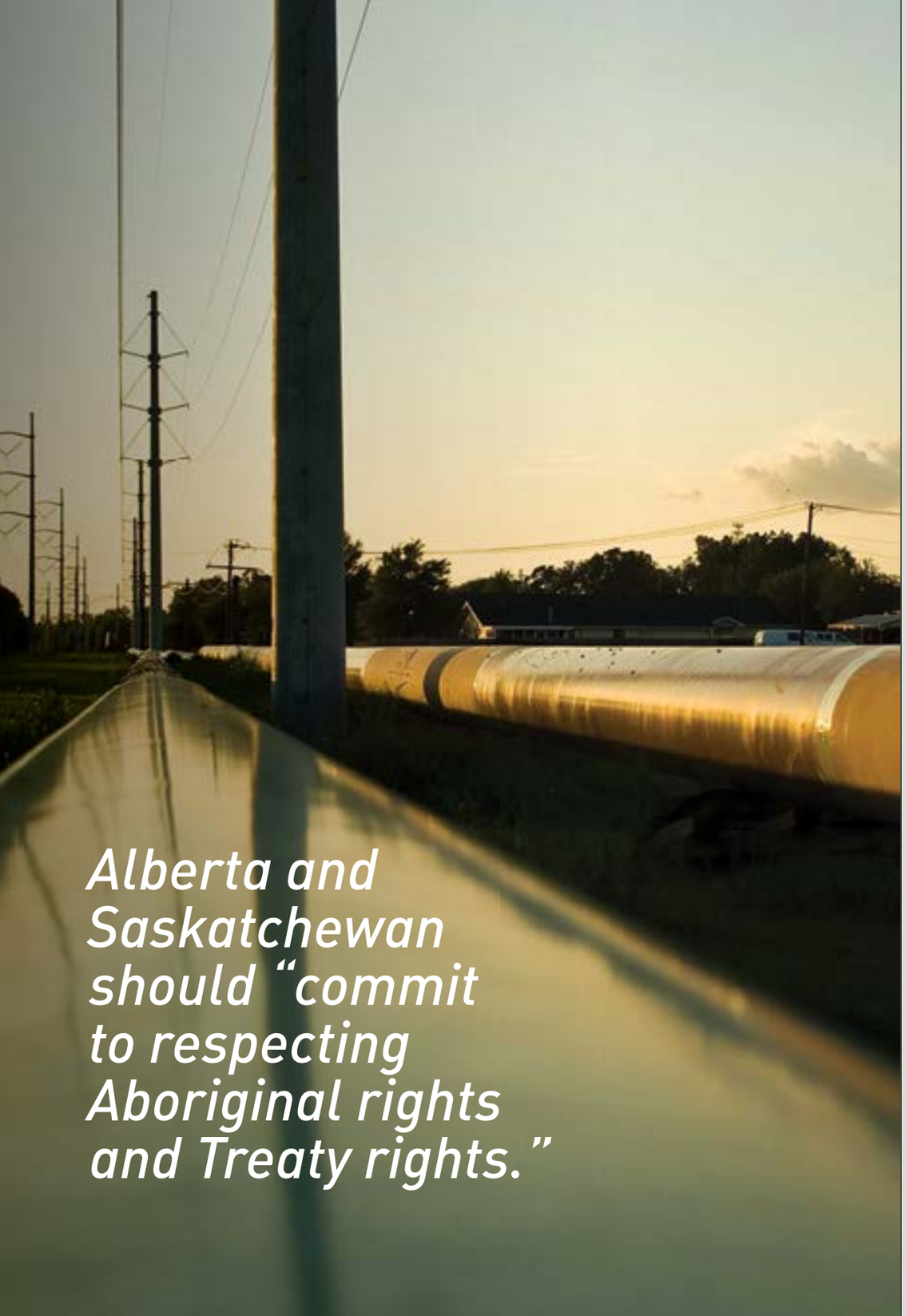
In the end, I'm left wondering what the Métis who fought and died resisting Canada's exercise of jurisdiction over them would make of the *Daniels* decision.

... MÉTIS AND NON-STATUS INDIANS SHOULD LOOK TO THE FEDERAL GOVERNMENT IN THE HOPES OF NEGOTIATING IMPROVED PROGRAMS AND SERVICES...



... but there's no legal obligation on the federal government to do anything specific.

THE DUTY TO CONSULT



Alberta and Saskatchewan should "commit to respecting Aboriginal rights and Treaty rights."

DECEMBER, 2014

Provinces Have Every Right to Set Conditions on Pipelines

Beginning with the British Columbia government's position on Enbridge's Northern Gateway project, provincial governments have announced conditions, including meaningful consultation with First Nations, which must be met before they will allow pipelines carrying petroleum products from western Canada to be built in their provinces. Ontario and Quebec recently announced similar conditions for Transcanada's proposed Energy East Pipeline.

In an essay in the Toronto *Globe and Mail*, Prof. Dwight Newman of the University of Saskatchewan argues that, like the transcontinental railways of the 19th century, these pipelines are projects of national importance within the federal government's exclusive jurisdiction. According to Newman, Ontario's and Quebec's conditions on the Energy East Pipeline are "shameful" and "unconstitutional". The other provinces, he says, have no right to impose conditions on pipelines which will allow Alberta and Saskatchewan to get their products to foreign markets.

Newman's argument is surprisingly out of touch with the legal and political reality of modern Canada. It is based on the discredited 'watertight compartments' theory of federalism where the federal and provincial governments exercise their legislative powers without regard for each other's interests. Rather than this imperial version of Canada

where projects of supposedly national importance override minority rights and local concerns, the Supreme Court has endorsed cooperative federalism where the federal and provincial governments work to reconcile differences for the common good.

Newman's attack on provincial powers is particularly ironic given that at the Supreme Court Alberta and Saskatchewan have led the legal charge against federal monopolies and in support of cooperative federalism. The most recent examples are the Supreme Court's *Tsilhqot'in* and *Grassy Narrows* decisions. With urging from the provinces, including Alberta and Saskatchewan, the Court decided that provincial laws can apply to Aboriginal title lands and Treaty rights, which up until then had been understood to be under exclusive federal jurisdiction.

The *Grassy Narrows* decision is particularly relevant in the context of the Energy East Pipeline. In *Grassy Narrows* the Supreme Court confirmed that the provinces are fully responsible for ensuring that Treaty rights are respected and constitutional obligations to Aboriginal peoples, including the duty to consult, are fulfilled. By insisting on meaningful consultation with First Nations as a condition of the Energy East Pipeline proceeding, Quebec Premier Couillard and Ontario Premier Wynne are not, as Newman accuses them, "playing a dangerous game"—they are hopefully signalling their governments' intention to fulfil their constitutional obligations to Aboriginal peoples.

Instead of being led astray by Newman's anachronistic vision of a federal government overriding local interests and minority rights to build projects of national importance, Alberta Premier Jim Prentice and Saskatchewan Premier Brad Wall should follow Ontario's and Quebec's example and commit to respecting Aboriginal rights and Treaty rights.

JANUARY, 2017

A Pipeline Too Far: How to Stop Kinder Morgan

Despite a wealth of smarts and determination, it's going to be difficult for Indigenous people to stop the Kinder Morgan pipeline.

Ever since the 2004 *Haida Nation* decision, the duty to consult and accommodate has proven a powerful tool in the struggle for greater respect for Aboriginal rights and title. Courts have handed Indigenous Peoples numerous significant victories—they have also created a blueprint for overriding Indigenous Peoples' inherent and constitutional rights.

The 2016 *Gitxaala* decision is a case in point. While the Federal Court of Appeal quashed the decisions authorizing the Enbridge pipeline, it also provided the federal government with a simple recipe for approving it—discuss new information with First Nations, consider further conditions and provide reasons for its decision.

The *Gitxaala* decision, and the federal government's justification for approving the Kinder Morgan pipeline, underscores the limitations of the duty to consult and accommodate as the basis for reconciliation. All too often, the courts' message to government has been that as long as you follow the script and your decision is within the realm of possible outcomes, we'll defer to your decision.

Kinder Morgan is an opportunity for a different ending. It's an opportunity for the courts to acknowledge the duty to consult's downward spiral towards procedural oblivion and to take a stand in the name of recognition and respect.

There are two basic elements to stopping the Kinder Morgan pipeline. First, there's a requirement for the courts to acknowledge the obvious. The pipeline will exponentially increase tanker traffic through the Salish Sea. The risk of an oil spill will increase.

However remote the possibility, a major spill will have catastrophic effects on the Indigenous Peoples of the Salish Sea. A major spill runs the risk of extinguishing the very basis for their recognition as distinct Aboriginal Peoples under the constitution.

Second, the courts must acknowledge that in some cases deference, procedural consultation and a 'balancing of interests' simply will not do. The very core of Indigenous Peoples' identity as distinct nations protected by section 35 of the constitution is at stake. There is a limit to government's authority to endanger the continued existence of Indigenous Peoples. There is a line that cannot be crossed.

The Supreme Court confirmed the underlying principle in 1997 in *Delgamuukw* and restated it in 2014 in *Tsilhqot'in*. The importance of an Aboriginal right combined with the potential serious impact of the government decision on the right creates circumstances where a project cannot proceed without Indigenous consent.

The Ktunaxa ski-hill case, heard in December 2016 by the Supreme Court, is based on the same principle in the context of the constitutional protection for religious freedom. A project that would destroy an Indigenous People's identity attracts more than a duty to consult. Such a project cannot be countenanced because it would breach the Crown's fiduciary obligations to Aboriginal people and the fundamental promise of section 35 to protect and perpetuate distinct Aboriginal Peoples into the future and forever.

Kinder Morgan can be stopped through an act of affirmation. The pending legal challenges provide the courts with an opportunity to confirm that while constitutional rights may not be absolute, the promise of section 35 is inviolate. There are interests that cannot be balanced, risks that cannot be mitigated and lines that cannot be crossed—there are promises that cannot be broken.

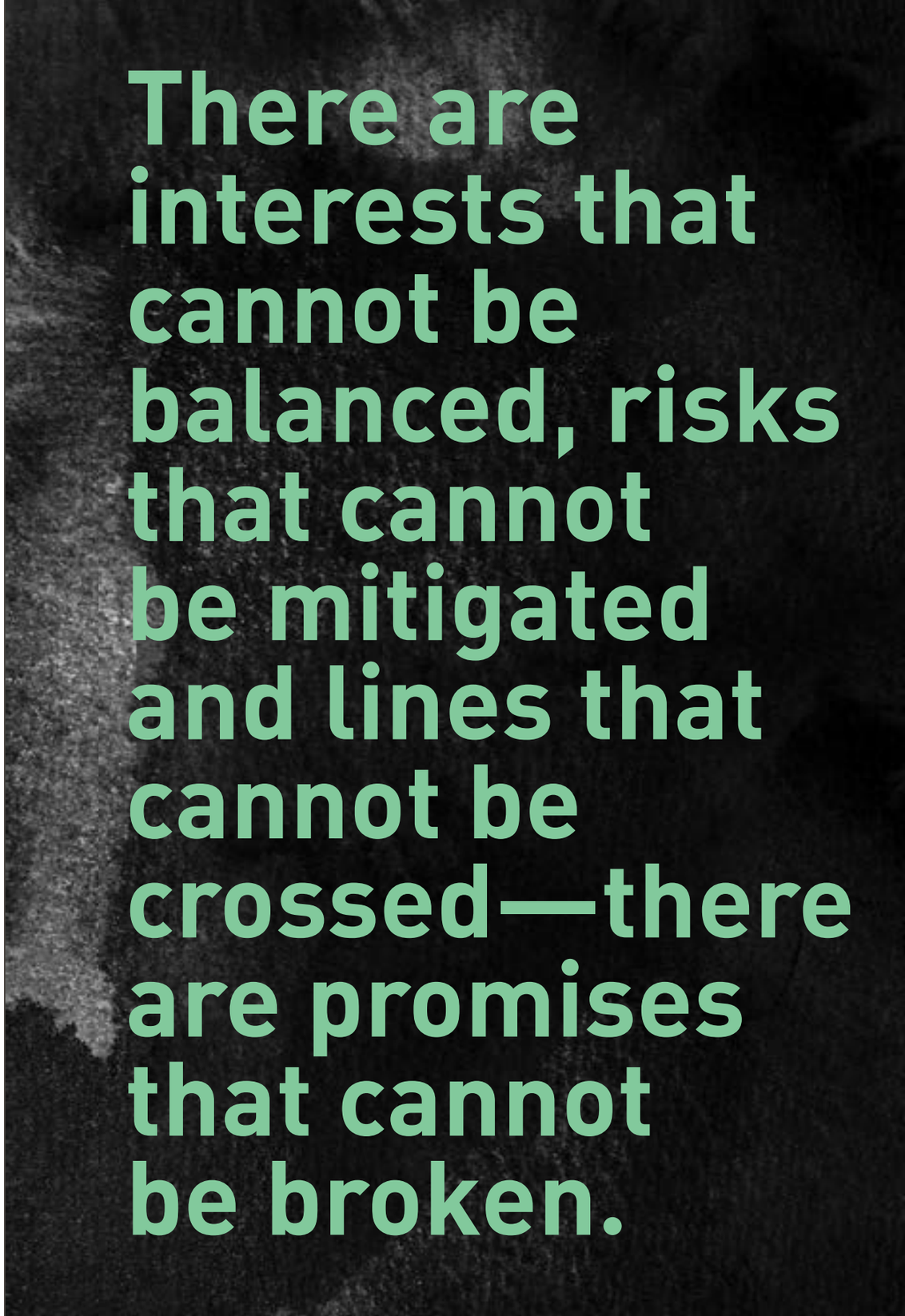


PHOTO: STAN WILLIAMS

MAY, 2013

The Inadequacy of Environmental Assessments

The federal government's attempts to narrow its legal obligations to consult Aboriginal people continue apace. Canada's most recent move is to significantly reduce the number of projects requiring a federal environmental assessment (EA) and, therefore, a government decision requiring consultation and accommodation. This latest step towards the federal government's apparent goal of eviscerating the environmental assessment process is another example of why it is important for First Nations to insist that governments fulfill their consultation obligations whether or not environmental assessments are required.

What it is about

The primary reason a major development project requires a federal environmental assessment is because it is a "designated project" under the *Canadian Environmental Assessment Act, 2012*. The definition of a designated project is determined by regulations. The federal government has issued new draft regulations redefining designated projects to exclude many projects currently subject to an environmental assessment. The government's justification is that it wants to restrict EAs to 'major projects' with the greatest potential to cause significant environmental effects.

Some projects will be excluded from the EA process under the new regulations by virtue of the increased project size threshold. For example, the threshold for liquefied natural gas storage (LNG) facilities will increase by 10%. Similarly, expansion projects will now only require an EA if the existing project is being expanded by at least 50% of its current size.

Other types of projects, including groundwater extraction projects, heavy oil and oil sands processing facilities, potash mines, pulp and paper mills, and smelters will now be excluded all together, regardless of their size. Many projects First Nations might expect to require an EA will continue to fall outside the scope of the regulations, including diamond mines, offshore drilling, wind power projects, bridges, fish farms, and oil and gas fracking projects.

Why it matters

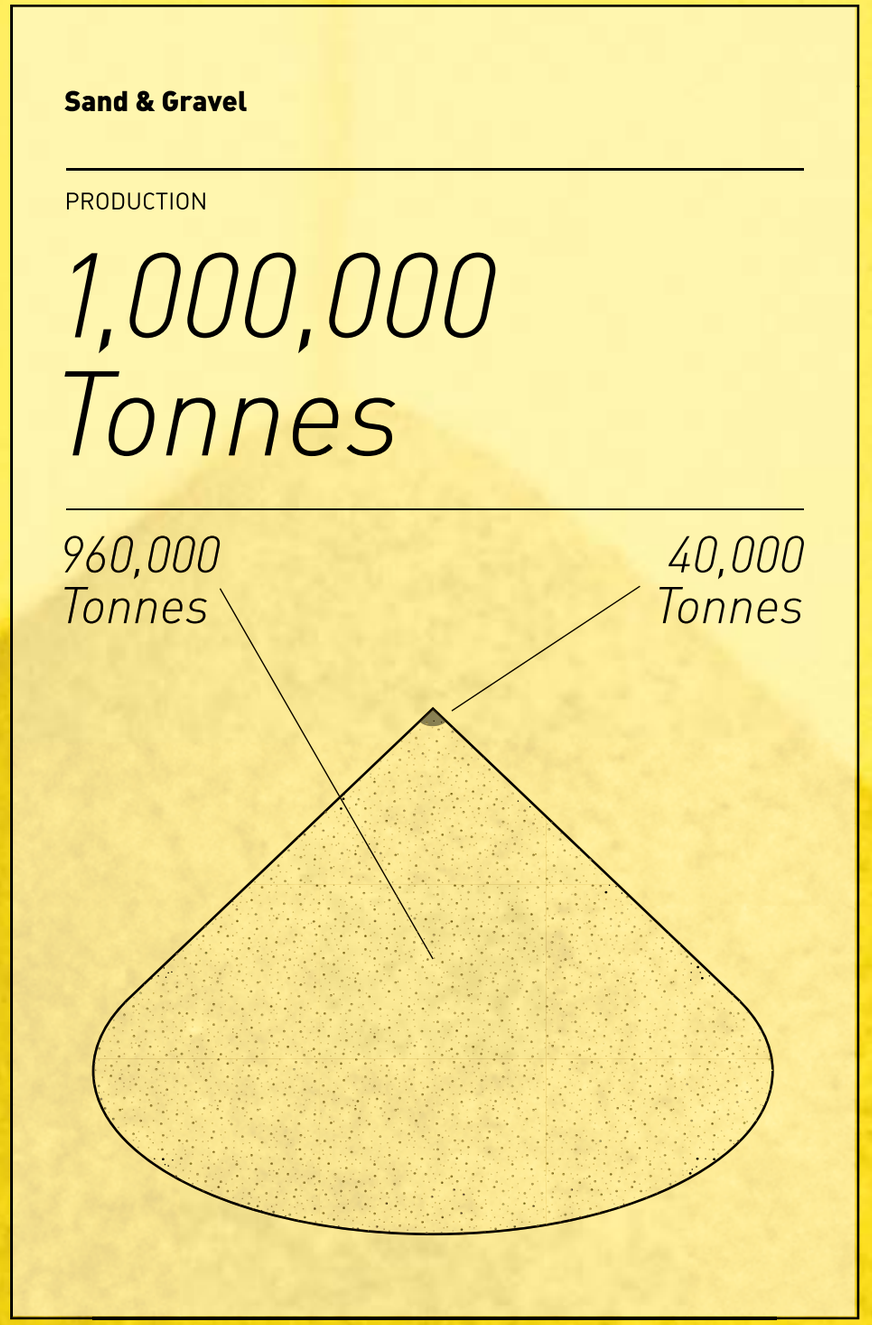
Environmental assessments have always been an inadequate method for fulfilling the Crown's duty to consult and accommodate Aboriginal people. The federal government's narrowing of the range of projects requiring an EA highlights one of the underlying problems. EAs are triggered by a project's potential to cause significant environmental effects—not a project's potential effects on Aboriginal title, rights and treaty rights—and it is all too easy for government to avoid consultation on a project by simply reducing the number of projects requiring an EA. While consultation may still occur for specific permits required for a project that does not trigger an EA, it cannot substitute for consultation on the project as a whole.

There is no easy answer to the overarching problem of the Crown using the EA process as a vehicle for consultation and accommodation. Other than challenging the new regulations themselves for having been enacted without proper consultation and accommodation, First Nations may want to consider focusing on the wide discretion the Minister has to order an EA regardless of whether a project qualifies as a designated project under the regulations.

If a First Nation were to demonstrate that a project that falls below the regulations' threshold for triggering an EA has the potential to infringe its Aboriginal title, rights or treaty rights, it might have an argument that the Minister's decision whether or not to exercise his or her discretion to order an EA attracts the duty to consult. In the case of recognized rights, the First Nation might be able to argue that the Minister's unfettered discretion is in and of itself an infringement of their Aboriginal or treaty rights.

Whether the new regulations are upheld or not by the courts, they stand as a stark reminder to First Nations of the inherent danger in allowing EAs to substitute for a meaningful, First Nation endorsed process, specifically designed to ensure that governments fulfill their constitutional obligations to consult and accommodate.

PHOTO: BOBBY BINGUIS



CASE COMMENT

Fort Nelson First Nation v. British Columbia (Environmental Assessment Office), 2015 BCSC 1180

JULY, 2015

Environmental Assessments and the Duty to Consult

With the approval of the courts, federal and provincial governments often shoehorn the duty to consult and accommodate First Nations into environmental assessment processes. These processes are ill-suited for First Nations' needs and expectations. The recent decision from the B.C. Supreme Court in *Fort Nelson First Nation* exemplifies some of the key shortcomings in relying on environmental assessment processes to fulfil the duty to consult Indigenous Peoples.

What it is about

A proponent sought provincial government approval to develop the Komie North Mine near the City of Fort Nelson as a sand and gravel pit to supply fracking sand to the local oil and gas industry. There were indications that the proponent had plans to develop five more sand and gravel pits. All of these pits would be in the territory of the Fort Nelson First Nation, a member of Treaty 8.

Under the B.C. *Environmental Assessment Act* a new sand and gravel pit requires an environmental assessment if 500,000 tonnes or more of sand and gravel are excavated during one year or if over a 4-year period a total of 1,000,000 tonnes or more are excavated.

The Court concluded that when constitutional rights are involved, the province must be held to a higher standard to protect those rights than when it is considering general issues of environmental protection.

By either setting higher triggering thresholds or favouring industry when deciding on whether a threshold has been met, governments can virtually scope out the duty to consult.

The proponent was planning to excavate much more than 1,000,000 tonnes of sand and gravel over four years from the Komie North Mine. But, according to the proponent, it only intended to sell a small portion of the sand and gravel excavated. The rest would be waste. Therefore the proponent informed the province that the Komie North Mine would have a production capacity of not more than 960,000 tonnes of sand and gravel over a four-year period—40,000 tonnes less than the threshold to trigger a provincial environmental assessment.

Based on the proponent's estimate, and without consulting the Fort Nelson First Nation, the province decided the Komie North Mine proposal did not meet the threshold under the *Environmental Assessment Act* to trigger an environmental assessment.

The Fort Nelson First Nation applied for judicial review of the provincial government's decision on the basis that it was unreasonable and that the province had failed to consult and accommodate.

What the court said

Based on a B.C. Court of Appeal decision which had described provincial environmental assessments as 'proponent driven', the province argued that it was right to accept the proponent's production capacity estimate for Komie North Mine and was not required to look behind the numbers to determine if they were reasonable.

The Court rejected the province's uncritical acceptance of a proponent-driven approach to the issue of whether environmental assessments are triggered. According to the Court, such an approach ran the risk of allowing projects that interfered with Aboriginal and Treaty rights to proceed without environmental assessments. The possibility that a First Nation might subsequently succeed in having a proponent penalized would be of little or no benefit to a First Nation after its Aboriginal and Treaty rights had been infringed or extinguished.

According to the Court, it was unreasonable for the province to interpret its legislation to restrict the calculation of production for new sand and gravel pits to only that portion of the extracted sand and gravel the proponent intended to sell or use.

The Court concluded that when constitutional rights are involved, the province must be held to a higher standard to protect those rights than when it is considering general issues of environmental protection.

The Court also rejected the Province's arguments that the duty to consult was not triggered because the effects on Treaty rights were speculative and because the interpretation of the legislation was a matter of general application and not a strategic, high level decision that would trigger the duty to consult.

The Court noted that by accepting the proponent's limitation on the calculation of the mine's production capacity, the province had set the stage for more mines to proceed without environmental assessments. Consequently, the decision potentially affected all areas in the Fort Nelson First Nation's territory with the potential for fracking sand mining.

The Court held that the province did not meaningfully consult with the Fort Nelson First Nation in good faith and seek to accommodate the First Nation's Treaty rights. It set aside the decision and ordered the province to make a new decision as to whether an environmental assessment was triggered.

Why it matters

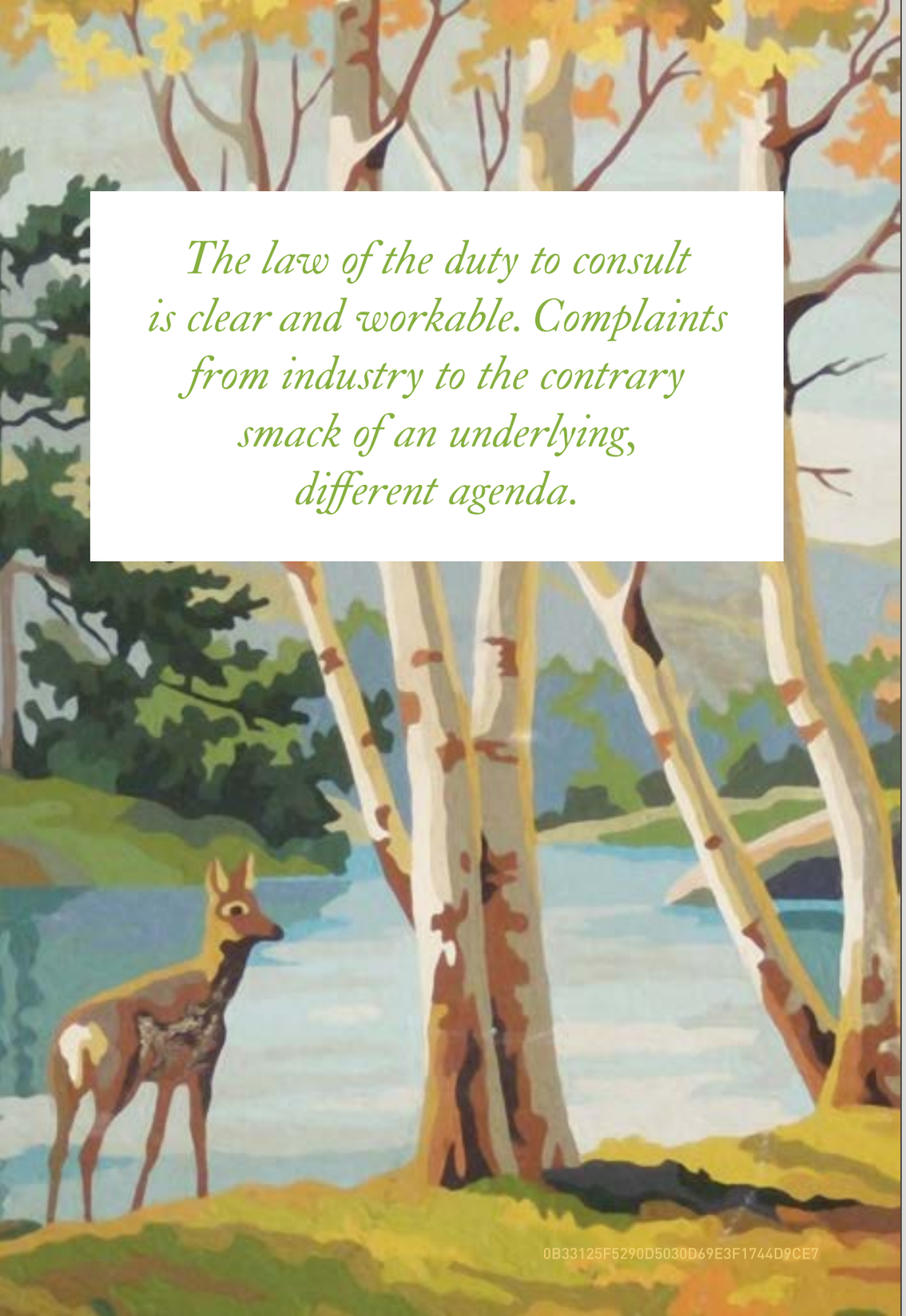
The decision is of general importance for three reasons. First, it is another defeat for government and industry in their ongoing attempts to limit the application of the duty to consult by arguing a decision is not a strategic, high level decision and therefore the duty is not triggered.

Second, the decision is another example of the courts rejecting government's narrow vision of the duty to consult. The fact that there were possibly five more similar sand and gravel pit authorizations in the offing obviously influenced the Court's reasoning. It did not accept that the province could consider one authorization in isolation from the wider context and impacts.

Third, and most importantly, the decision highlights one of the central problems with conflating the duty to consult with environmental assessments. By either setting higher triggering thresholds or favouring industry when deciding on whether a threshold has been met, governments can virtually scope out the duty to consult. The decision is an important example of the courts grappling with the issue and holding governments to a higher, principled standard.

ADDENDUM

On appeal, the decision of the B.C. Supreme court was subsequently set aside.
See *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2016 BCCA 500



The law of the duty to consult is clear and workable. Complaints from industry to the contrary smack of an underlying, different agenda.

NOVEMBER, 2015

Is the Duty to Consult Clear as Mud?

Industry and its supporters complain that the duty to consult and accommodate is a murky mess with the courts failing to provide clarity. If only, they lament, the rules of engagement were clear and stable.

Their complaints are out of touch with reality.

Over ten years ago the Supreme Court set down the principles underpinning the duty to consult in simple and clear language in *Haida Nation*. At the same time, and for the benefit of First Nations, governments and industry, the Court evaluated a specific consultation process in Taku River as an example of what was required to fulfil the duty to consult.

The Court's subsequent decisions have simply clarified when the duty to consult applies. Ten years ago in *Mikisew* the Court explained when it applies to so-called historical treaties. Five years ago, in its last major duty to consult decisions, the Court extended the duty to consult to modern treaties (Beckman) and clarified when and how the duty to consult applies to administrative tribunals and existing infringements (Rio Tinto).

For more than a decade the Supreme Court's requirements for meaningful consultation and accommodation have been clear, known and consistent.

In *Haida Nation* the Supreme Court described its task as "establishing a general framework for the duty to consult and accommodate." It was up to lower courts to "fill in the details."

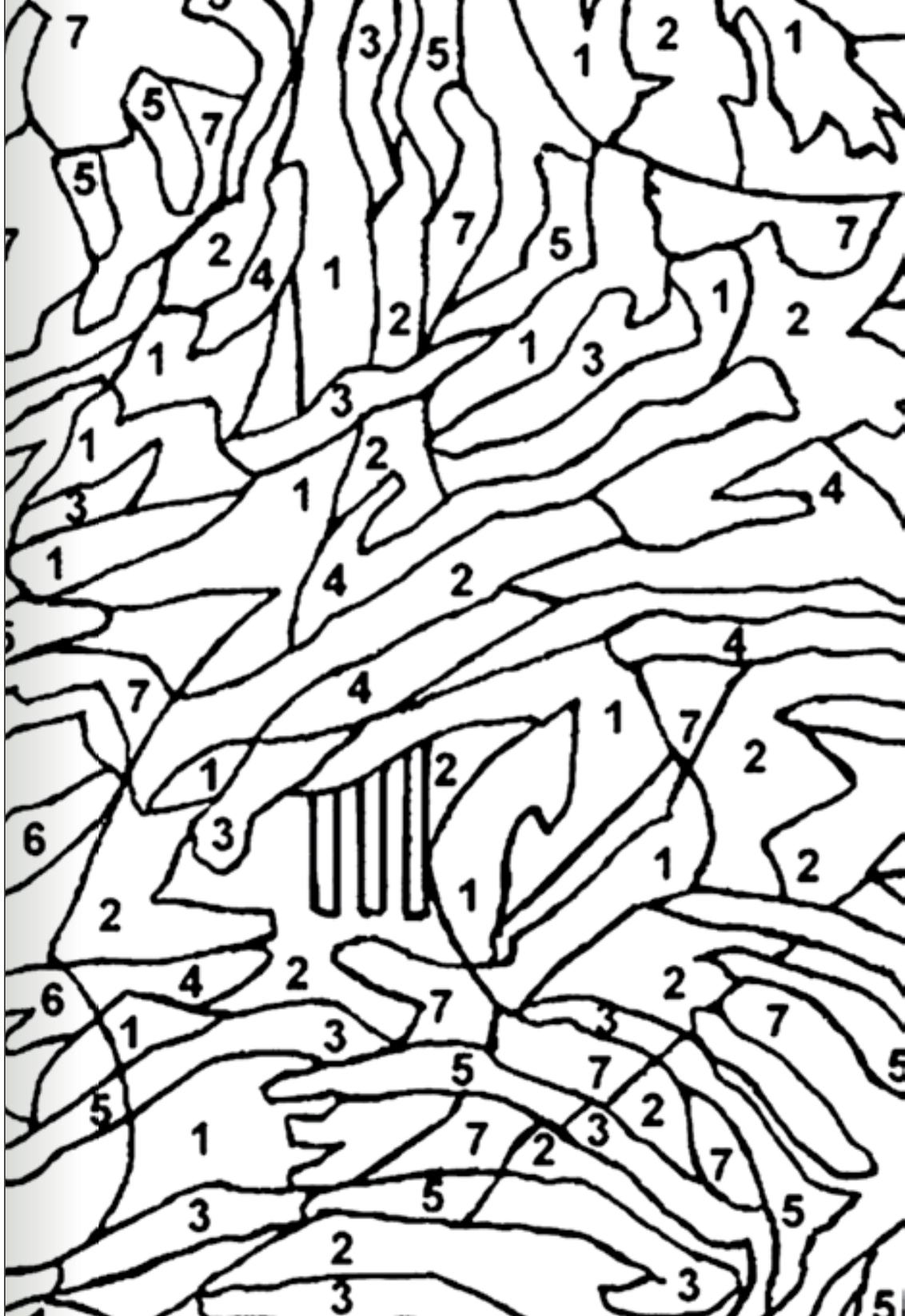
The lower courts have done their work. With literally hundreds of duty to consult court decisions since *Haida Nation*, there is little room left on the canvas for anything new. The picture has been filled in, clarified and sharpened in detail over and over again.

Anyone still unsure when and how the duty to consult is intended to apply has not done their homework.

Importantly, First Nations have borne the disproportionate burden of clarifying the law around the duty to consult and accommodate. Faced with governments that ignore the Supreme Court's clear directions, First Nations have been forced to expend their energy and limited resources on litigation to defend their Aboriginal title, rights and treaty rights. In court they are opposed by governments and companies with comparatively unlimited resources derived in large part from exploiting Indigenous lands.

The law of the duty to consult is clear and workable. Complaints from industry to the contrary smack of an underlying, different agenda. Similar to industry lobbyists' complaints of too much 'red tape', those who grumble that the law of the duty to consult has too much uncertainty likely mean there is just too much of the duty to consult.

Instead of blowing smoke in our eyes with complaints about a lack of clarity surrounding the duty to consult, industry and its sympathizers should be pressing governments to live up to the spirit and intent of their constitutional obligations to Indigenous Peoples.



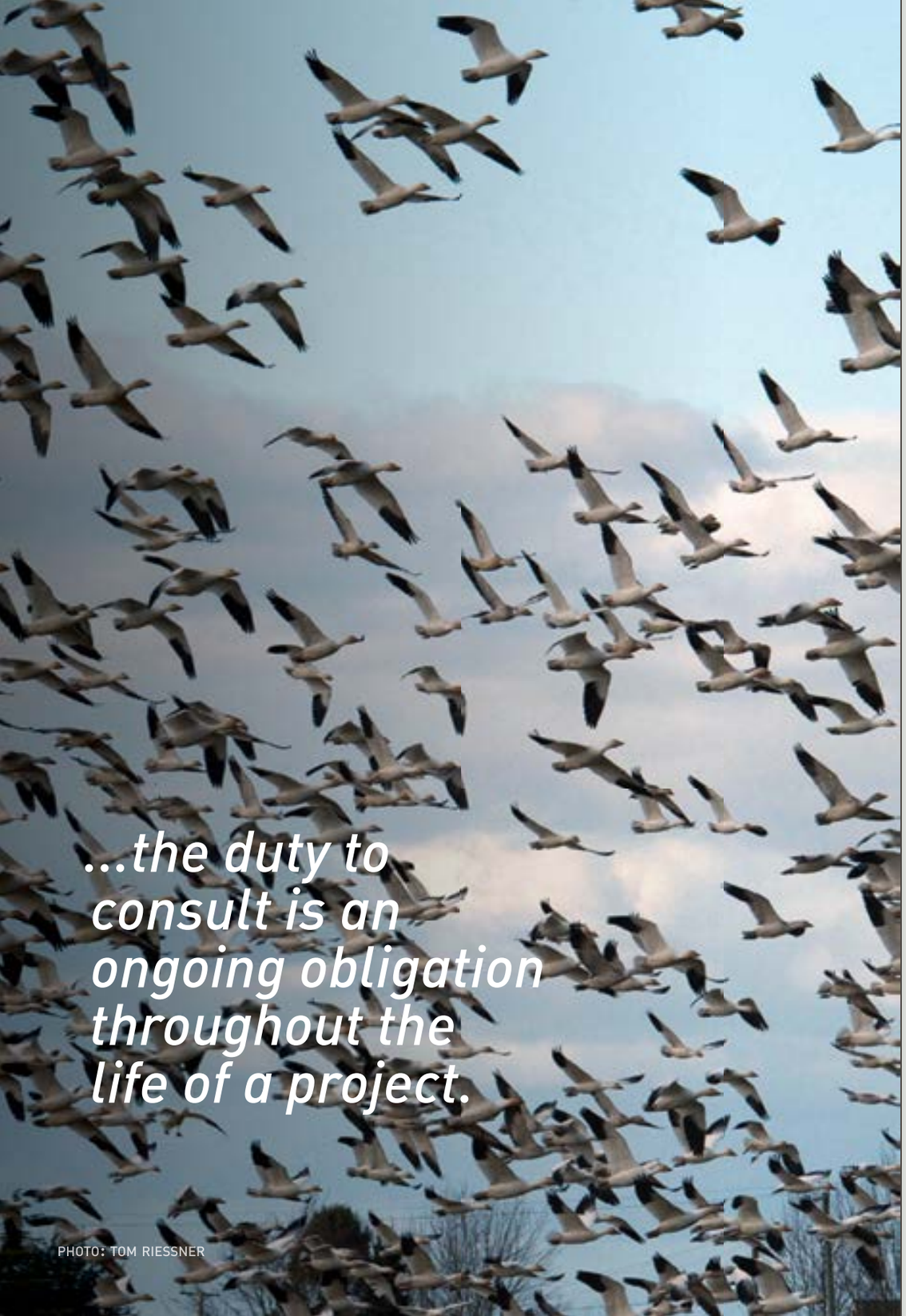


PHOTO: TOM RIESSNER

CASE COMMENT

Taku River Tlingit First Nation v. British Columbia (Minister of Environment), 2014 BCSC 1278

OCTOBER, 2014

The Duty to Consult as an Ongoing Obligation

The B.C. Supreme Court's decision in *Taku* is another example of the courts rejecting attempts by government and companies to narrow the applicability of the duty to consult and accommodate.

What it is about

In 2004 the Supreme Court of Canada in *Taku* (the companion case to *Haida*) held that the Province had adequately consulted the Taku River Tlingit First Nation (TRTFN) before issuing an environmental assessment certificate (EAC) for the Tulsequah Chief Mine in northwestern B.C. Importantly, the Supreme Court assured TRTFN that, as part of the Crown's ongoing duty to consult, they could expect to be consulted throughout the permitting, approval and licensing process for the proposed mine.

Skip ahead six years. By 2010 Redfern, the mine proponent, had gone into receivership and the property had been acquired by Chieftan Metals. The EAC had been renewed for a second and final five-year term and was set to expire in 2012 unless the Province decided the project had been 'substantially started' as required under the provincial *Environmental Assessment Act*. If the project was deemed to have been substantially started, the EAC would be in effect for the life of the project unless cancelled or suspended.

In 2012 Chieftan applied for a determination that the project had been substantially started. Despite the fact that the bulk of the work done on the site consisted of tree clearing and completing a gravel airstrip, the Province agreed with Chieftan. TRTFN filed for judicial review of the Province's decision.

What the Court said

The Court concluded that 'project' under the provincial *Environmental Assessment Act* means physical activities affecting the land environmentally. To be substantially started, a project needs to have been started in its essentials, i.e. in a real and tangible way. In deciding whether a project has been substantially started, the decision-maker should focus on what has been done since the EAC was first issued and especially on whether there have been physical activities that have a long-term effect on the site.

The Court then considered whether the Province had breached its constitutional duty to consult TRTFN. The Province had not consulted TRTFN—in fact, it had not even given TRTFN notice of the pending decision. TRTFN had only found out about the decision by accident months after it had been made.

The Court rejected the Province's argument that the duty to consult had not been triggered because the decision would have no new physical effects. The Court concluded that the decision would directly affect what would happen at the project site. A negative decision would mean that the project would not be built. A positive decision meant the EAC would be in effect for the life of the project, subject only to the Province's supervisory powers. Consequently, the Court concluded that the duty to consult had been triggered and that the Province had breached the duty by not consulting TRTFN.

Finally, the Court also considered TRTFN's natural justice argument and concluded that because of the Province's long history of consulting with TRTFN before decisions were made that might affect their constitutional rights, the Province had violated the doctrine of legitimate expectations by failing to consult about the EAC.

The Court ordered that the decision be made again and that TRTFN have 45-days notice to present whatever written submissions it wanted on the issue of whether the project had been substantially started.

The Court rejected the Province's argument that the duty to consult had not been triggered because the decision would have no new physical effects.

Why it matters

The decision is important for two main reasons. First, it is another example of the courts rejecting the Crown's attempts to evade its constitutional obligations by arguing that a decision was made long ago and there is nothing new to consider. As the Supreme Court of Canada stated in *Taku*, the duty to consult is an ongoing obligation throughout the life of a project. When there is a new decision or conduct that may affect Aboriginal title and rights, the duty to consult is triggered.

Second, ever since the Supreme Court's decision in *Rio Tinto*, governments and proponents have argued that the government decision in question must result in specific physical impacts on the ground. The B.C. Supreme Court's recent decision in *Taku* is another example of the courts rejecting this interpretation of *Rio Tinto*.

CASE COMMENT

Chartrand v. British Columbia, 2015 BCCA 345

AUGUST, 2015

Breathing Life Back into the Duty to Consult

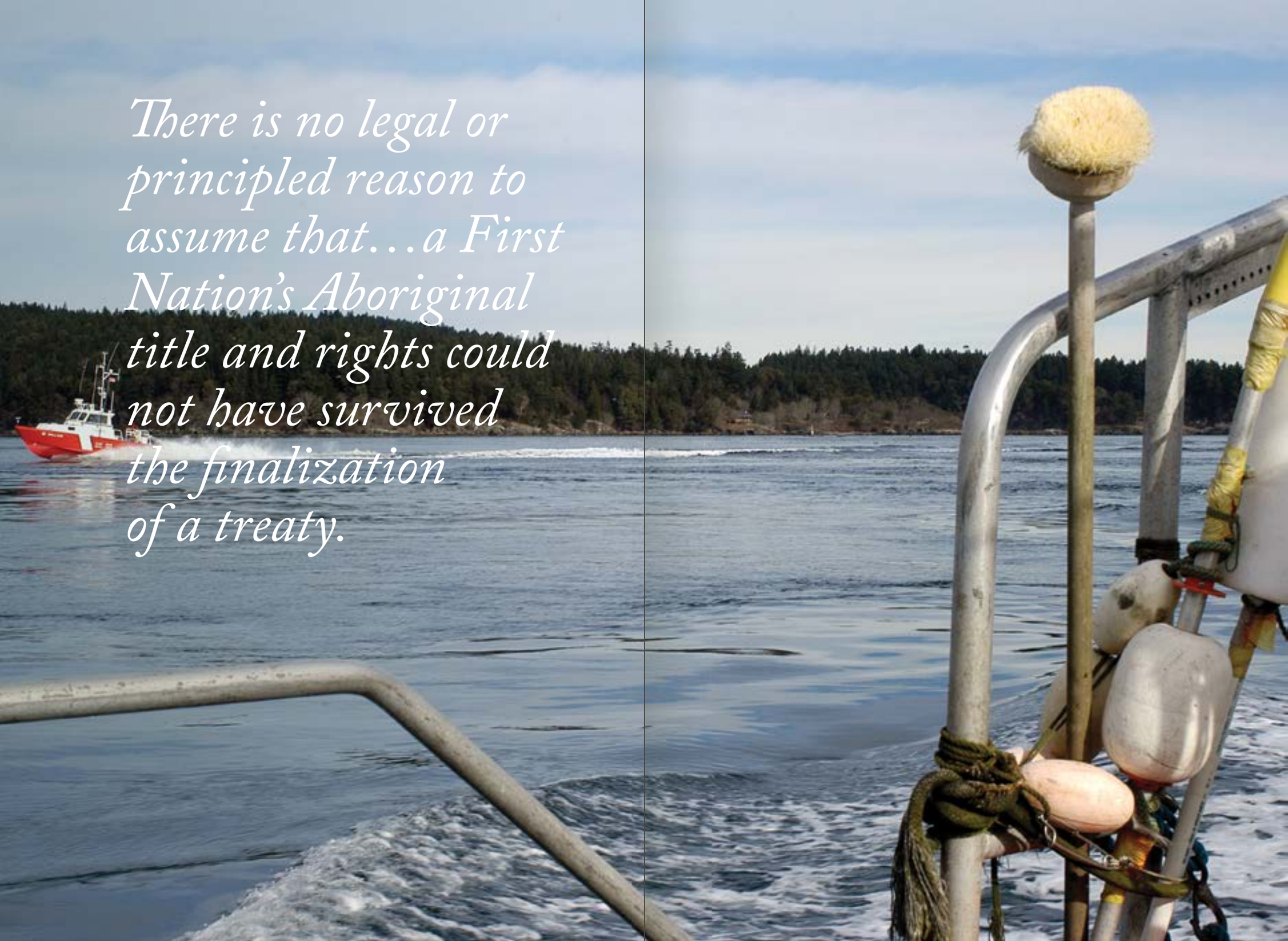
Since the Supreme Court of Canada's *Rio Tinto* decision in 2010 a growing number of court decisions have relied on a narrow interpretation of governments' obligations to consult and accommodate First Nations. In *Chartrand*, the British Columbia Court of Appeal pointedly rejects this approach by reminding everyone of some of the most important duty to consult decisions to come out of British Columbia over the last fifteen years.

What it is about

In the early 1850s Hudson's Bay Company fur traders, on behalf of Britain, negotiated treaties with Indigenous Peoples on Vancouver Island. Two of the treaties were with the predecessors of the Kwakiutl First Nation. They agreed to grant the HBC certain rights to a strip of land extending inland for two miles from the coast excluding their village sites and enclosed fields. They were also guaranteed the right to hunt on unoccupied lands and to carry on their fisheries as formerly.

For over 150 years the Kwakiutl have struggled for recognition of their treaty rights and of their Aboriginal title and rights outside the two-mile wide strip of land covered by their treaties.

In 2007 British Columbia removed private lands owned by Western Forest Products from the company's tree farm licence and approved a new forest stewardship plan in Kwakiutl territory. In 2012 the forest stewardship plan was extended for an additional 5 years.



There is no legal or principled reason to assume that…a First Nation's Aboriginal title and rights could not have survived the finalization of a treaty.

While the province consulted with the Kwakiutl about the effect of the decisions on the First Nation's treaty rights, it refused to consult in regards to the Kwakiutl's claims to Aboriginal title and rights outside the two-mile wide treaty area.

The Kwakiutl filed a judicial review of the decisions on the basis that British Columbia had not properly consulted and accommodated them for the effect of the decisions on their Aboriginal title, rights and treaty rights.

In 2013 the British Columbia Supreme Court decided against the Kwakiutl, concluding that the province's efforts to consult in relation to the forestry decisions had been adequate and that, therefore, it had fulfilled its legal obligations. However, the Court did grant the Kwakiutl a declaration that the province was under an ongoing duty to consult with them in regards to their Aboriginal title and rights.

Both parties appealed to the B.C. Court of Appeal. The Province's position was that the lower court erred in granting the declaration of an ongoing duty to consult in regards to asserted Aboriginal title and rights. The Kwakiutl argued that the lower court erred in not concluding that the province had breached the duty to consult and in not ordering the province to involve the federal government in decisions affecting their Aboriginal title, rights and treaty rights.

What the Court said

On the issue of the declaration granted by the lower court, the Court of Appeal agreed with the province. The Court concluded that the lower court had gone too far in granting the declaration. The Court held that the declaration inappropriately and unnecessarily sought to describe the duty to consult and address issues that were not before the court.

On the question of the adequacy of consultation, the Court agreed with the Kwakiutl. The Court held that the lower court had taken an overly narrow and technical approach to evaluating the adequacy of the province's consultation.

Importantly, the Court differentiated between judicial reviews of run-of-the mill government decisions and judicial reviews of government decisions that trigger the duty to consult Aboriginal peoples. The latter must be informed by the honour of the Crown and the importance of promoting reconciliation. In those situations the courts should not simply ask whether a decision was fair but more fundamentally whether the Crown's constitutional duty to consult and accommodate Aboriginal peoples had been fulfilled.

As an example of the lower court's problematic approach, the Court of Appeal concluded the judge had taken an overly narrow view of the type of impacts required to demonstrate an adverse effect on the Kwakiutl's interests. It was sufficient for the Kwakiutl to demonstrate that the province's decisions affected their ability to participate in decision-making and their ongoing ability to influence government policy that affected their lands and resources.

Similarly, the Court of Appeal held that the lower court erred in concluding that the Kwakiutl were not entitled to 'deep consultation' because there was a shortage of evidence of specific effects on their rights. The Court held that high-level effects on decision-making can be sufficient to trigger government obligations for deep consultation.

Finally, the Court held that the Kwakiutl could not be faulted for failing to participate in a consultation process premised on the erroneous assumption that their interests were limited to their treaty rights because fundamentally inadequate consultation processes do not preserve the honour of the Crown.

Why it matters

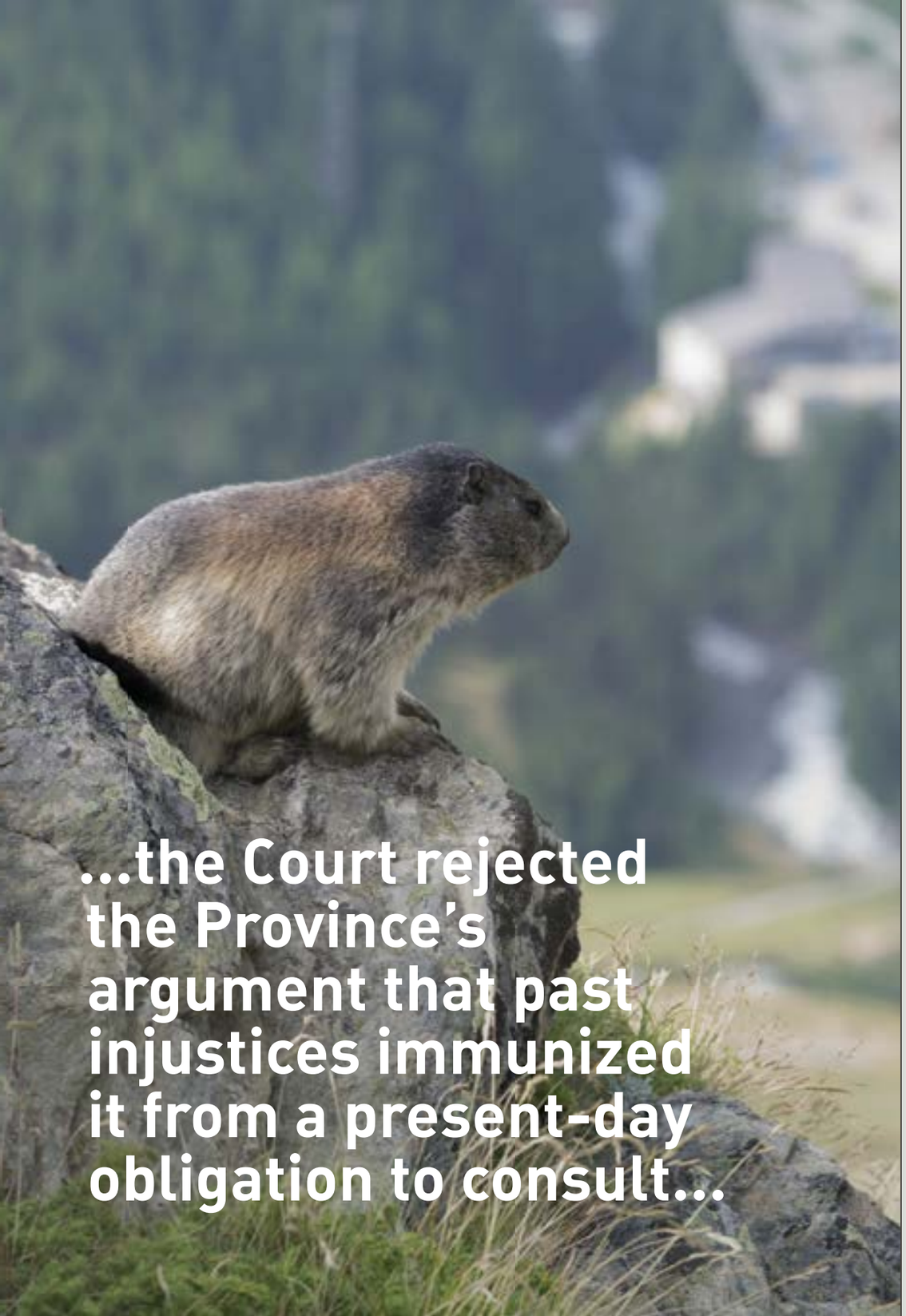
The Court of Appeal's decision is important for several reasons. First, it dispenses with the dubious argument that it is impossible for Treaty First Nations to also claim Aboriginal title and rights. The so-called 'historical treaties' were negotiated at different times, in different places, for different reasons and with different outcomes. There is no legal or principled reason to assume that, given the circumstances, a First Nation's Aboriginal title and rights could not have survived the finalization of a treaty.

Second, the decision is another example of the courts rejecting a site-specific assessment of impacts on Aboriginal title, rights and Treaty rights. The Court confirmed that high-level, strategic decisions can not only trigger the duty to consult but can also necessitate deep consultation.

Third, the decision speaks to First Nation jurisdiction over their lands. The duty to consult includes First Nation participation in decision-making and policy development.

Fourth, the decision is a welcome reminder that when it comes to the duty to consult, not just any consultation process will do. Consultation processes must proceed from the correct basis and must include the possibility of accommodating legitimate Aboriginal concerns. First Nations cannot be faulted for refusing to participate in a bankrupt consultation process.

Last, and perhaps most importantly, the decision is a much needed check to a growing tendency by some courts to take a narrow view of governments' obligations to consult and accommodate Aboriginal peoples. Relying on earlier decisions from British Columbia, the Court reiterated that because the duty to consult is a constitutional obligation, governments must be held to a high standard.



...the Court rejected the Province's argument that past injustices immunized it from a present-day obligation to consult...

CASE COMMENT

Adams Lake Indian Band v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations), 2013 BCSC 877

JUNE, 2013

The Duty to Consult —The Groundhog Day Conundrum

If government had its way, the duty to consult would suffer the plight of Bill Murray in *Groundhog Day*—devoid of a past and a future, doomed to the confines of the present.

With its decision in *Adams Lake*, the BC Supreme Court has made a further contribution to the developing law on whether there are past and future components to the duty to consult with mixed results for government and First Nations.

What it is about

In the 1960s Tod Mountain, an hour northeast of Kamloops, BC, was a local ski hill with one ski run and a rickety lift. In the early 1990s, encouraged by the provincial government's dreams of a series of Whistler-like ski resorts across the province, the Nippon Cable Company took control of the ski hill.

In 1993 the Province approved a Master Development Agreement (MDA) for a phased development over a 4,140 hectare area including numerous ski lifts and runs, a golf course, hiking and mountain biking trails and a 'village' centre with condos, hotels, restaurants and shops—the Sun Peaks Resort was born.

At the time the MDA was approved, the provincial government's position was that Aboriginal title had long ago been extinguished through provincial legislation and that Aboriginal rights were of little consequence until proven in court. Given the Province's position, it is unsurprising that it gave no regard to the Secwepemc Nation's Aboriginal title and rights at the time it approved the MDA.

For nearly 15 years Secwepemc opposition to Sun Peaks, largely led by the Adams Lake Indian Band, has been in and out of the news and the courts. The BC Supreme Court's most recent decision is in regards to a challenge to the Province's decision to allow new ski runs and a ski lift to be built on Mount Morrisey.

What the Court said

The duty to consult arises when the government contemplates conduct or a decision that will potentially affect Aboriginal title and rights. The first issue the Court had to deal with was the Province's argument that there was no duty to consult because the approval of the new ski lift and runs was not really a 'decision'. Instead, the Province was simply issuing approvals it had committed to back in 1993 through its decision to approve the MDA. According to the Province, the Supreme Court of Canada in *Rio Tinto* held that there is no requirement to consult about past decisions (e.g. the 1993 MDA decision), and therefore there was no need to consult about further approvals to expand Sun Peaks.

The Court rejected this argument. The Court held that the 1993 MDA had not authorized Sun Peaks to actually build anything—it still needed further operational approvals. The Court reasoned that while subsequent operational decisions may have a lesser effect on Aboriginal title and rights, and so attract a lower level of consultation, this did not eliminate the requirement for consultation.

The Court also reasoned that since the MDA required Sun Peaks to comply with all laws in force at the time a specific phase of the development proceeded, it now had to comply with the common law duty to consult, even if the duty had not yet been recognized in 1993. The Province could not shield itself from its obligation to consult based on its earlier, long-held assumption that it could issue authorizations to Sun Peaks regardless of First Nation interests.

The Court also concluded that given that there was no substantial consultation with Adams Lake when the MDA was approved in 1993, it would not be consistent with the honour of the Crown to allow the Province to now avoid consultation on operational decisions.

Although the Court rejected the Province's argument that past injustices immunized it from a present-day obligation to consult, it also rejected Adams Lake's argument that consultation had to include possible future impacts of the continued development of Sun Peaks. The Court reasoned that the authorizations for the ski lift and runs were an end in themselves. Any further future impacts would require additional authorizations. Consequently, it was reasonable and correct for the Province to restrict consultation to the effects of the current decisions.

Based on the specific facts of the level of consultation required and the adequacy of the Province's consultation and accommodation efforts, ultimately the Court rejected Adams Lake's argument that the Province had failed to discharge its obligation to consult and accommodate before issuing the authorizations to develop Mount Morrisey.

Why it matters

In the last several years 'past infringements' and cumulative effects have been at the forefront of the unresolved issues surrounding the duty to consult. Governments and companies have read the Supreme Court of Canada's decision in *Rio Tinto* as closing the door on the issue of past infringements. First Nations, supported by Chief Justice Finch's reasons in *West Moberly*, have read *Rio Tinto* as leaving open the possibility of consultation including the effects of past decisions. Likewise, the law remains unsettled as to if and when the cumulative effects of a proposed project must be considered as part of the duty to consult.

The BC Supreme Court's decision in *Adams Lake* does not settle either of these questions. But it does make it more difficult for government to simply ignore the effect of past decisions while also increasing the challenge First Nations face when seeking consultation on the cumulative effects of a series of interrelated government decisions.

PHOTO: STAN WILLIAMS

CASE COMMENT

Louis v. British Columbia (Minister of Energy, Mines, and Petroleum Resources), 2013 BCCA 412

OCTOBER, 2013

Columbus' Ghost: Past Infringements and the Duty to Consult

When it comes to upholding the honour of the Crown, there is no clean slate. As much as governments may wish otherwise, Indigenous peoples throughout Canada continue to demand recognition of and redress for past wrongs. The B.C. Court of Appeal's decision in Louis exemplifies the continuing uncertainty over whether and when the duty to consult and accommodate is the proper forum for addressing unresolved infringements of Aboriginal rights, title and Treaty rights.

What it is about

In 1965 British Columbia authorized an open-pit molybdenum mine in Stellat'en territory about 200 kilometres west of Prince George for an indefinite period. In 2003 the mine operator, Thompson Creek Metals, estimated the mine would close in approximately 10 years. However, in 2007 Thompson Creek Metals decided to extend the life of the mine by expanding and modernizing its operations. Its plans required amendments to its primary mining permit as well as a series of other authorizations.

The Province restricted its consultation efforts with the Stellat'en to the specific new effects of each individual amendment and authorization required for the expansion. The Stellat'en insisted on consultation on the proposed mine expansion as a whole and that it include the effects of the mine's 40-plus year history of operations. The BC Supreme Court endorsed the Province's approach and the Stellat'en appealed.

Whether the duty to consult applies to past, existing and ongoing infringements of these

What the Court said

The Court of Appeal concluded that because there was no high-level or strategic Provincial decision requiring consultation on the project as a whole, the Province was correct to consult with the Stellat'en on a piecemeal basis, considering each permit or amendment application separately. Importantly, the Stellat'en did not identify any potential adverse effects due to the individual authorizations. Therefore, according to the Court, the Province had fulfilled its legal obligation to consult.

While it acknowledged that the practical, cumulative effect of the Province's authorizations was to extend the life of the mine, the Court held that this was not a new adverse impact on Stellat'en Aboriginal title and rights because the mining company had long ago acquired from the Province title to the land and the minerals.

Why it matters

Across Canada, Indigenous peoples endure the accumulated history of the denial of their Aboriginal rights, title and Treaty rights. Whether the duty to consult applies to past, existing and ongoing infringements of these rights is one of the most important outstanding questions in Aboriginal law.

For over a hundred years mines were dug, dams built and roads pushed through without serious consideration for the rights of Indigenous people. Following the Supreme Court's 2004 Haida decision, Indigenous people began to consider whether the duty to consult and accommodate might open the door for addressing these past, existing and ongoing failures to consult and accommodate.

For some, the Supreme Court's 2010 *Rio Tinto* decision appeared to slam shut that door. The decision can and has been read to exclude past, existing and ongoing infringements from the duty to consult and accommodate. But, as the BC Court of Appeal observed in *West Moberly*, this is likely a misreading of the decision.

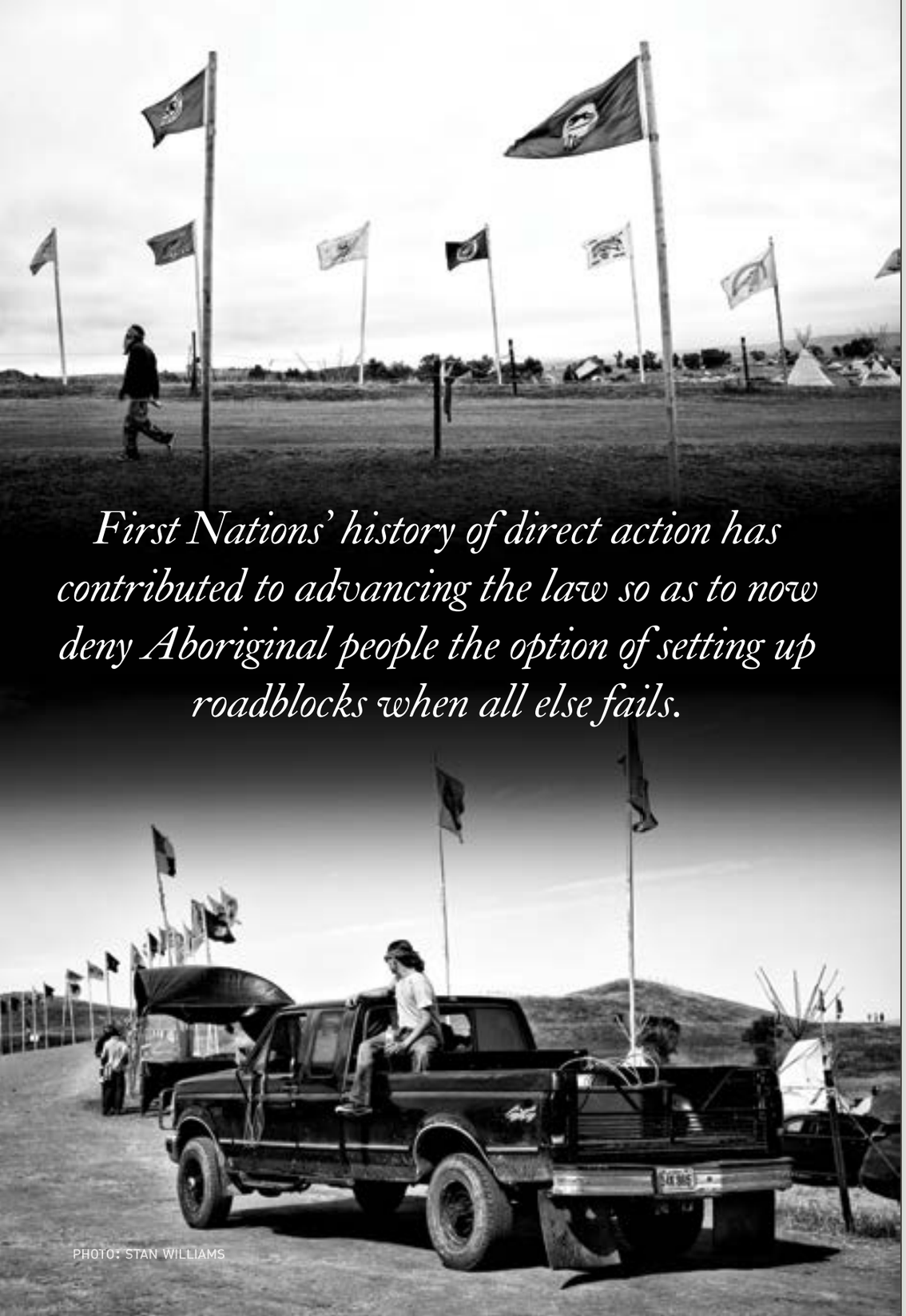
The Supreme Court in *Rio Tinto* was focused on the question of when the duty to consult arises, not the content of consultation once the duty is triggered. The Court held that historic or past infringements, on their own, do not give rise to a fresh duty to consult. For those wrongs, Indigenous peoples' only viable legal option is to sue the government for damages.

But the Court in *Rio Tinto* left the door open on two important issues. First, the Court clarified that it was not answering the question of whether continuing and ongoing infringements might trigger the duty to consult—that was an issue for another day. Second, the Court indicated that if new adverse effects did trigger the duty to consult, a prior or continuing breach of the duty might be part of consultation and accommodation discussions.

Where does this leave the B.C. Court of Appeal's recent decision in *Louis*? The only way to read the decision consistent with *Rio Tinto* and *West Moberly* is to understand it is another case, like *Rio Tinto*, primarily about whether there were new adverse effects on Stellat'en Aboriginal title and rights sufficient to trigger the duty to consult. The Court concluded there were not. When the Court in *Louis* commented that the Province did not have to include past infringements in the consultation process, it must have meant that this was because a fresh duty to consult had not been triggered. Otherwise, the decision is out of line with *Rio Tinto* and *West Moberly*.

The wrongs of colonization are written on the lands of the Indigenous Peoples of Canada. Indigenous people witness and endure them on a daily basis. Whether the duty to consult and accommodate is capable of addressing these wrongs remains an open question.

rights is one of the most important outstanding questions in Aboriginal law.



First Nations' history of direct action has contributed to advancing the law so as to now deny Aboriginal people the option of setting up roadblocks when all else fails.

PHOTO: STAN WILLIAMS

CASE COMMENT

Behn v. Moulton Contracting Ltd., 2013 SCC 26

MAY, 2013

The Duty to Consult —A Roadblock to Direct Action

In British Columbia, civil disobedience and the advancement of Indigenous peoples' legal rights have gone hand in hand. There is a long history of Indigenous people, frustrated with government and business running roughshod over their Aboriginal rights and title, setting up roadblocks to stop resource development, especially logging.

In a bitter twist of irony, First Nations' history of direct action has contributed to advancing the law so as to now deny Indigenous people the option of setting up roadblocks when all else fails.

What it is about

The Behn family of the Fort Nelson First Nation in Treaty 8 have a trapline. The British Columbia provincial government issued forestry licences and a road permit to Moulton Contracting to log trees within the Behns' trapline. In the fall of 2006, the Behns set up a camp on the road to the proposed logging area, effectively stopping Moulton from logging.

Moulton filed a lawsuit against the Behns and the Fort Nelson First Nation seeking damages for interference with its logging operations. In defence to the lawsuit, the Behns wanted to argue that they were not properly consulted about the proposed logging and that it would infringe their Treaty 8 rights to hunt and trap.

The Court's decision raises the possibility, in specific circumstances, of individual First Nation members opposing government activity based on an infringement or breach of their treaty rights.

Moulton successfully argued at the B.C. Supreme Court and the B.C. Court of Appeal that the duty to consult and treaty rights are collective rights of a First Nation and that individual members, such as the Behns, cannot rely on them as a defence when being sued for setting up a roadblock.

What the Court said

The Supreme Court of Canada ruled against the Behns. The Court held that the Crown's duty to consult is owed to a First Nation as a whole, not to individual members. Unless individual members are authorized to represent a First Nation, there is no obligation on government to consult with them.

However, the Supreme Court did leave open the possibility of individuals acting on their own to protect their treaty rights. The Court noted that in certain situations an individual First Nation member might have a special connection to exercising a treaty right in a particular part of a First Nation's territory. On this basis, individual members might be able to demand that government deal with them directly if there is a breach of treaty or infringement of treaty rights.

But in the case of the Behns, the Supreme Court held that even if they could have, as individuals, sought to enforce their treaty rights to hunt and trap, they should have done so by launching their own legal challenge to the forestry licences and road permit issued to Moulton, not through direct action. The Court would not countenance the Behns setting up a roadblock and then defending themselves by relying on their treaty rights because, according to the Court, that would endorse the type of 'self-help remedy' that brings the administration of justice into disrepute.

Why it matters

The decision will cause Indigenous people across the country to think twice before taking the law into their hands to protect their lands and culture by blocking access to resource companies and others who have government authorization to undertake development activities on their lands. But at the same time, the Court's decision starts to open a door that up until now has appeared closed to Indigenous people.

The Court's repeated description of Aboriginal and treaty rights as collective, not individual rights, has created a presumption that individual First Nation members cannot seek to enforce Aboriginal and treaty rights—this could only be done by a representative of the First Nation as a whole. The Court's decision raises the possibility, in specific circumstances, of individual First Nation members opposing government activity based on an infringement or breach of their treaty rights. While it is unclear how many individual First Nation members have both the motivation and the means to act on their own to defend their treaty rights, they now have a legal argument for doing so.

But for the Behn family, and especially patriarch George Behn, the Court's decision must be a cruel irony. Now in his late 80s, George continues to hunt and trap as his ancestors did before him. As the former Chief of the Fort Nelson First Nation, George was part of a generation of First Nation leaders who protested while government and industry refused to respect Aboriginal and treaty rights. These leaders often stood alongside First Nation members who, out of desperation and commitment to principles, erected roadblocks to protest government inaction. This on-the-ground activism played an important role in developing Aboriginal law, including the Crown's obligations to consult and accommodate. Now, the presence of those new legal obligations, and the opportunity for Indigenous people to insist in court that they are enforced, has undermined the Behn family's efforts to defend George's trapline from logging.

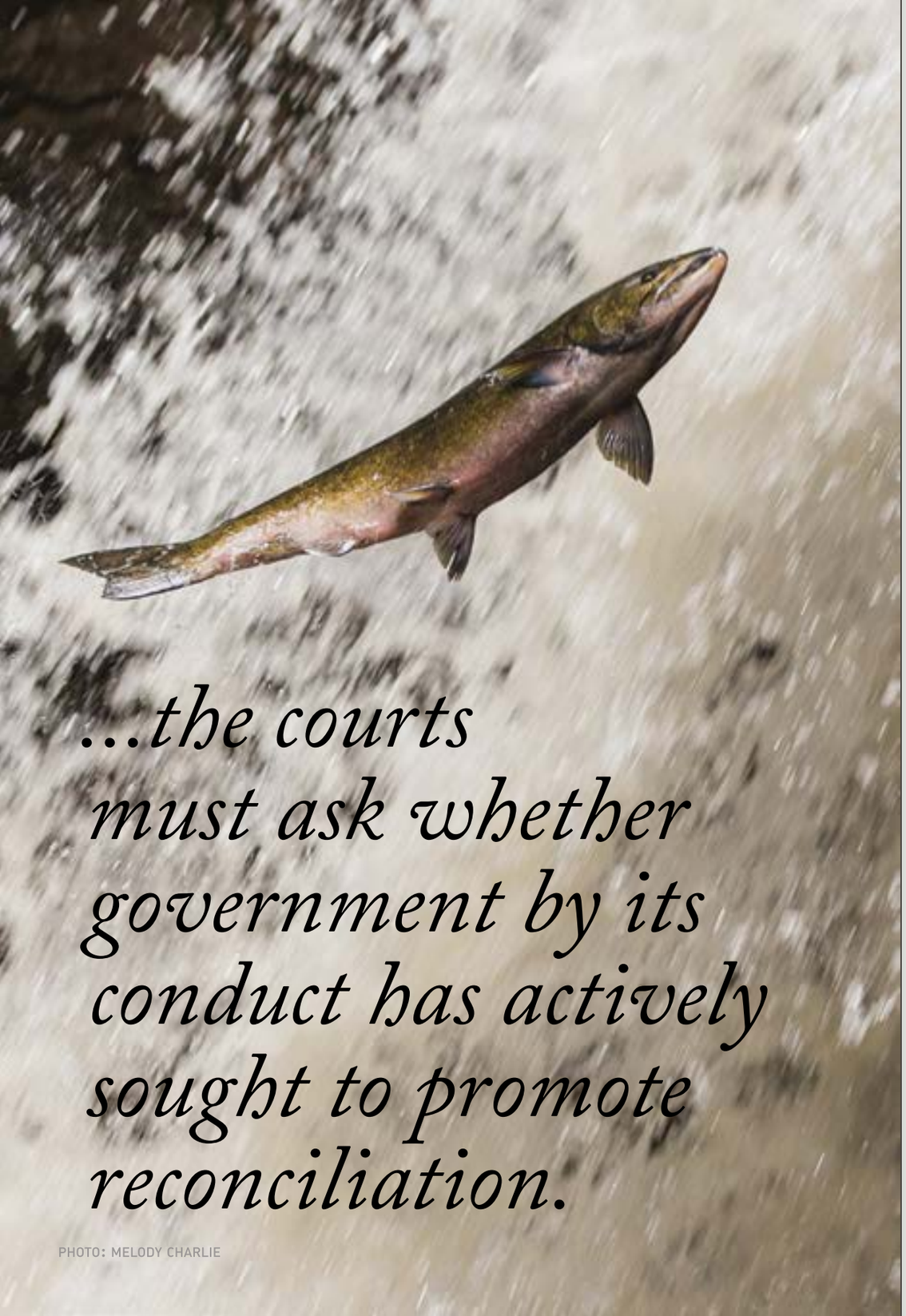


PHOTO: MELODY CHARLIE

NOVEMBER, 2015

Good News for the Duty to Consult

The duty to consult and accommodate isn't a blunt instrument.

For it to work First Nations and government must be willing to participate in an open process of information sharing and honest listening. They must make good faith attempts to negotiate effective and responsive agreements.

Too often governments fail to live up to their end of the bargain.

Instead of meaningful engagement, they smother First Nations with hollow procedural niceties. Rather than work on solutions, they work on developing their consultation logs.

Most First Nations caught in a duty-to-consult house of mirrors have little recourse. They lack the resources to take governments to court. Those that manage to muster a legal challenge often face another obstacle—judges with a restricted view of government's obligations to consult and accommodate First Nations.

Several recent court decisions have offered a welcomed corrective to governments' and judges' often narrow vision of the duty to consult. This can be seen most clearly in decisions focused on the question of what specific government action or decision making triggers the duty.

Skip Ahead if Case Law Bores You

In *Huron-Wendat Nation*, the Federal Court was faced with a challenge to an agreement-in-principle (AIP) between Canada and Innu First Nations. Applying a generous and purposive approach to the question of whether the duty to consult had been triggered by the AIP, the Court concluded it was obvious the AIP had an inevitable impact on the Huron-Wendat and therefore Canada should have consulted them before it was signed.

Similarly, in *Courtoreille*, Mikisew Cree First Nation's challenge to the Harper government's first and second omnibus bills, the Federal Court held that while Mikisew Cree had not demonstrated any actual on-the-ground harm to Aboriginal rights due to the legislation, a reasonable person would recognize the potential risk. This was sufficient to trigger the duty to consult and accommodate.

While the Federal Court of Appeal in *Hupacasath* dismissed a challenge to Canada's foreign investment promotion and protection agreement (FIPA) with China, it endorsed a generous and purposive approach to the question of when the duty to consult arises. The Court emphasized that the duty is intended to prevent a present, real possibility of harm caused by government's dishonourable conduct. If a government agreement, such as a FIPA, raised the prospect of a future decision and it was possible to estimate the probability of that decision adversely affecting Aboriginal rights, the agreement would trigger the duty to consult.

The most pointed recent rejection of a narrow view of the duty consult is found in the British Columbia Court of Appeal's *Chartrand* decision. Faced with the lower court's approval of the provincial government's refusal to consult with the Kwakiutl First Nation about its unrecognized Aboriginal title and rights on Vancouver Island, the Court of Appeal went back to well established principles. It faulted the lower court for taking a restricted view of the duty to consult and reminded the province that to uphold the honour of the Crown its processes must demonstrably promote reconciliation.

The Quebec Court of Appeal's criticism in *Corporation Makivik* of the provincial government's failure to adhere to the spirt and intent of the James Bay Agreement similarly emphasized that the duty to consult cannot be reduced to mindless procedures. For it to be meaningful, government must engage with First Nations with a "sufficiently open mindset."

The Federal Court of Appeal struck a similar note in *Long Plain*, its review of the federal government's process for selling the Kapyong Barracks in Winnipeg. The Court criticized Canada for taking an overly narrow, technical review of its obligations. Government consultation, said the Court, must be imbued by honour, reconciliation and fair dealing.

...the duty to consult

Back to the Interesting Stuff

Too often governments and the courts lose sight of the special place of the duty to consult in Canadian law. Recent court decisions reminding us all of the broader principles and purpose of the duty to consult and accommodate are an important corrective.

As the British Columbia Court of Appeal noted in *Chartrand*, when a government decision is challenged on the basis of the duty to consult, the courts should not simply ask whether the decision was fair. More importantly, the courts must ask whether government by its conduct has actively sought to promote reconciliation.

This demanding standard is necessary because the duty to consult is not simply an administrative requirement—it is a constitutional imperative. The more often government decision-makers recognize this higher obligation, and courts enforce it, the closer we will come to recognizing and respecting Indigenous Peoples' central legal, historical and future place in Canadian society.

COURT DECISIONS REFERRED TO:

Canada v. Long Plain First Nation, 2015 FCA 177

Chartrand v. British Columbia, 2015 BCCA 345

Corporation Makivik c. Québec (Procureure générale), 2014 QCCA 1455

Courtoreille v. Canada, 2014 FC 1244

Hupacasath First Nation v. Canada, 2015 FCA 4

Huron-Wendat Nation of Wendake v. Canada, 2014 FC 1154

...is not simply an administrative requirement—it is a constitutional imperative...

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Negotiate or Litigate?

While Indigenous Peoples across Canada vary widely in their challenges and opportunities, they all have two fundamental objectives in common: to benefit from and exercise jurisdiction over their lands.

With governments often unwilling to address First Nations' real concerns, achieving these objectives increasingly depends on making agreements with industry to share benefits from development and to participate in ongoing decision-making about how these developments will proceed.

Certain proposed developments are simply beyond the pale and the affected First Nation will never consent to them proceeding, regardless of what benefits and decision-making powers are on offer. More often a First Nation will be open to discussing how and on what terms a proposed development might proceed in its territory.

Typically, a First Nation reviews the project with community members and hires consultants to advise on the environmental, social and economic impacts of a proposed development. At the same time, they work on negotiating the best agreement possible with government or the company (or both), one that includes not just financial benefits but also many other provisions including processes for environmental monitoring and protection.

If negotiations are successful, leadership takes the tentative agreement, and all the other information that has been gathered, to the community. They explain how the project is likely to negatively affect the First Nation and its lands, how it will hopefully benefit current and future generations and how the First Nation will be involved in its ongoing operation. It is then up to the community to decide whether or not to give its consent for the project to proceed.

But sometimes First Nations, government and industry are unable to reach a negotiated agreement. That's when the question arises for many First Nations: negotiate or litigate?

The decision to litigate is most often taken because government has failed to meet its obligations to respect Aboriginal title, rights and Treaty rights and the First Nation and the company cannot agree on how to resolve the issues between themselves. First Nations are left with few options. They either grit their teeth and continue to accept the status quo or a subpar agreement, or they go to court.

As much as war analogies proliferate in litigation circles, they are rarely applicable when a First Nation goes to court. This is because even when they win a legal battle, First Nations are not simply handed solutions by the court—as I often explain to my clients, judges are not Santa Claus.

At best, and especially when First Nations are seeking to enforce their Aboriginal title, rights or Treaty rights, the courts will make orders or declarations that will hopefully set the table for negotiated agreements with either government or industry, but they do not mandate an agreement or its terms. For First Nations success in court usually leads to more negotiations.

Ironically, it's not just successful court challenges that result in negotiated settlements. When a First Nation loses at the first level of court it often appeals. Before the appeal is heard, government and/or the company often reach a negotiated settlement with the First Nation and the appeal is dropped. This can happen for a variety of reasons.

First, government and the company might worry that the appeal judges will disagree with the lower court's decision. It might be better to reach a settlement and avoid the possibility of a First Nation win on appeal that sets a wider precedent .

Second, even though the First Nation lost the first round, by pursuing the case to court and then filing an appeal it has demonstrated it is in the fight for the long haul. Some governments and many companies decide they do not want the negatives that come with drawn-out litigation, including uncertainty around permits, difficulty raising capital and delays in construction.

The reality is that negotiation and litigation are not mutually exclusive. While most First Nations prefer a negotiated agreement based on their consent to a project that will affect their Aboriginal title, rights and Treaty rights, they also realize that government and industry might simply have a different understanding of what is required.

If the government response is unsatisfactory and it reaches an impasse with the company, a First Nation hopefully has access to other options to defend its constitutional rights. Litigation is often the last recourse to achieving successful negotiations.