Federal Court  Cour fédérale

Date: 20141219

Docket: T-43-13

Citation: 2014 FC 1244

Toronto, Ontario, December 19, 2014

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

CHIEF STEVE COURTOREILLE ON BEHALF OF HIMSELF AND THE MEMBERS OF MIKISEW CREE FIRST NATION

Applicant

and

THE GOVERNOR GENERAL IN COUNCIL, MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT, MINISTER OF FINANCE, MINISTER OF THE ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF TRANSPORT, AND MINISTER OF NATURAL RESOURCES

Respondents

JUDGMENT AND REASONS

[1] The Mikisew Cree First Nation has historically occupied and harvested lands located within the Peace-Athabasca Delta and Lower Athabasca River regions, now forming part of north-eastern Alberta and neighbouring areas. In 1899, the Mikisew and other First Nations

entered into a treaty with Her Majesty, Treaty No. 8, wherein the First Nations ceded to Her Majesty certain lands in exchange for certain guarantees. The rights of the First Nations and guarantees made under Treaty No. 8 have been the subject of several decisions of the Canadian Courts.

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[2] The following is an Index to these Reasons:

I. OVERVIEW

[3] On April 26, 2012, the federal Minister of Finance introduced Bill C-38, often called the first Omnibus Bill, in Parliament. It received Royal Assent on June 29, 2012. A second Omnibus Bill, Bill C-45, was introduced by the Minister of Finance in Parliament on October 18, 2012. It received Royal Assent on December 14, 2012. The Mikisew were not consulted prior to the introduction of either Bill in Parliament.

[4] The Omnibus Bills introduced new and amended legislation, some, but not all, of which dealt with financial matters. For the purpose of this application, the Omnibus Bills made significant changes to Canada's environmental laws. The Omnibus Bills amended the *Fisheries Act*, RSC 1985, c F-14, the *Species At Risk Act*, SC 2002, c 29, the *Navigable Waters Protection Act*, RSC 1985, c N-22, including renaming the latter act as the *Navigation Protection Act*, RSC, 1985, c N-22 and finally. repealing the *Canadian Environmental Assessment Act*, 1992, SC 1992, c 37, and replacing it with the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19. The effect of the amendments to those *Acts* is arguably to reduce the number of bodies of water within Canada which are required to be monitored by federal officials thereby affecting fishing, trapping and navigation. Some of these waters are located within the Mikisew's Treaty No. 8 territory.

[5] Accordingly, the Mikisew, as represented by their Chief, Steve Courtoreille, have instituted these proceedings, seeking various forms of declaratory relief. The relief sought is summarized at paragraph 1 of the Applicant's Reply Memorandum:

> *…this Court is not being asked to intervene in the Process of Parliament, which may engage the separation of powers, but to superintend the duties of the crown and executive before legislation is introduced into Parliament. That is, Mikisew's claim does not seek to impose a duty to consult on Parliament, but on the Crown. Mikisew's claim does not require an inquiry into the conduct of Parliament, but of the executive.*

[6] In particular, the relief requested by the Applicant as set out in his Memorandum of Argument is:

> *a. A declaration that all or certain of the Ministers have a duty to consult with Mikisew regarding the development of the Federal Environmental Laws reflected in the Omnibus Bills;*
>
> *b. A declaration that all or certain of the Ministers had and continue to have a duty to consult with Mikisew regarding the development and introduction of the Omnibus Bills, to the extent that the Bills had the potential to affect Mikisew's treaty rights through changes to the Federal Environmental Laws;*
>
> *c. A declaration that all or certain of the Ministers breached, and continue to breach, their duty to consult Mikisew regarding the Federal Environmental Laws, including those advanced in the Omnibus Bills;*
>
> *d. A declaration that the Ministers and the Governor General in Council are required to consult with Mikisew regarding the matters set out above to ensure that Canada implements whatever measures are necessary to fulfill its obligations under Treaty 8;*
>
> *e. An order that the Ministers not take any further steps or actions that would reduce, remove, or limit Canada's role in any environmental assessment that is being carried out, or that may be carried out in the future, in Mikisew's traditional territory until adequate consultation is complete;*
>
> *f. Any such directions as may be necessary to make this order effective;*
>
> *g. An order that any party may apply to the Court for further directions with respect to the conduct of the consultation as may be necessary;*
>
> *h. An order for costs of and incidental to this application; and*

> *i. Such further and other relief as this Honourable Court deems appropriate and just.*

[7] For the Reasons that follow, I have determined that I will give a Direction in specific terms.

II. THE PARTIES

[8] The Applicant, Chief Steve Courtoreille, represents himself and the members of the Mikisew Cree First Nation. I will sometimes refer to the Applicant as the Mikisew.

[9] The Respondents are the Governor General in Council and various Ministers of the federal government. They are represented collectively by Counsel from the Deputy Attorney General's office of the Department of Justice. The Mikisew's Counsel stated that they named the various Respondents in their Notice of Application in order to capture those persons in government who develop the policy behind the relevant legislation before it is formulated and introduced into Parliament. The Respondents argue that, in the law-making process, these Ministers were acting in their legislative capacity and, as such, their actions or decisions are excluded from judicial review. In the alternative, the Respondents argue that if the Court has jurisdiction over the issues brought before it, the Applicant failed to meet the test set out by the Supreme Court of Canada in *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 and explained in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650 to establish the existence of a duty to consult in this case. The Respondents' Counsel suggested that they could be referred to collectively as the Crown.

III. THE EVIDENCE

[10] Since this is an application, the evidence was provided in the form of affidavits with exhibits. There was cross-examination on some of these affidavits and the transcripts were filed in the record.

[11] The Applicant provided the affidavit evidence of:

- Arthur J. Ray, Fellow of the Royal Society of Canada and professor emeritus of history, University of British Columbia, who provided a report as to the negotiations leading up to Treaty No. 8.

- Donald J. Savoie, Canada Research Chair in Public Administration and Governance, Université de Moncton. He provided a Report on Public Consultation in the law-making process in Canada. He was cross-examined.

- Rita Marten, former chief of the Mikisew. She provided history and background for the Mikisew claim.

- Keith Stewart, an employee of Greenpeace Canada as co-ordinator of its climate and energy campaign. Only his cross-examination is in the record. Counsel for the parties agreed that they are not relying upon his evidence.

- Steve Courtoreille, Chief of Mikisew First Nation and the named Applicant. He provided two affidavits setting out the history of the Mikisew and the basis for their claim in these proceedings. He was cross-examined.

- Trish Merrithew-Mercredi, who has worked with the Mikisew in various capacities for more than 20 years. She provided history and background respecting the Mikisew and their claim.

- Rachel Sara Forbes, staff counsel for West Coast Environmental Law Association. She provided evidence as to environmental impact of the Bills and legislation at issue. She was cross-examined.

[12] The Respondents filed the affidavit evidence of:

- Terrence Hubbard, Director General of Strategic Policy and Planning at the Major Projects Management Office of the federal government. He provided background as to the various statutes at issue. He was cross-examined.

- Douglas Nevison, General Director of the Economic and Fiscal Policy Branch of the Department of Finance Canada. He gave evidence as to Canada's budget process and other economic and financial matters. He was cross-examined.

- Stephen Chapman, Associate Director, Regional Operations with the Canadian Environmental Agency. He gave background evidence as to environmental assessments. He was cross-examined.

- Kevin Stringer, Acting Senior Assistant Deputy Minister with the Ecosystems and Fisheries Management Sector of the Department of Fisheries and Oceans. He gave evidence as to fisheries management by the federal government. He was cross-examined.

- Teresa Martin, paralegal with the Department of Justice Canada, Edmonton Regional Office who provided information about the current state of Alberta's consultation policy as well as its environmental assessment and regulatory process.

- Lauren Kirk: Counsel have agreed that neither party will rely on her evidence. The same agreement is made in respect of the evidence of Gillian Cantello.

IV. THE FACTS

[13] Despite the volume of evidence, the underlying facts necessary in considering the issues are few and not in dispute. I will go into more detail in respect of some of these facts later in these Reasons. For the moment, these are some of the facts:

1. The Mikisew are a First Nations Aboriginal band whose traditional lands are located within the Peace-Athabasca Delta and Lower Athabasca River regions located in north eastern Alberta and neighbouring regions.

2. These traditional lands are well watered with rivers and lakes which have provided the Mikisew with abundant fishing, trapping and navigation.

3. The Mikisew, along with other First Nations, entered into a treaty with Her Majesty in 1899, whereby land claims to the territory by those First Nations were ceded to the Crown in exchange for certain guarantees from the Crown.

4. This treaty, called Treaty No. 8, included the following provision:

> *And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.*

5. Since the 1900's, the Mikisew lands have been subjected to changes caused by non-Mikisew persons, including those caused by the construction of the W.A.C. Bennett Dam in British Columbia, and those caused by oil exploration.

6. Over the past several decades, Canada has, through its various environmental laws and agencies, done much to protect fishing, trapping and navigation in the Mikisew's traditional territory.

7. Canada has, from time to time, consulted with the Mikisew about proposed development in the Mikisew's territory.

8. Canada has developed and published the *Aboriginal Consultation and Accommodation, updated Guidelines for Federal Officials to Fulfill the Duty to Consult (March 2011)*, which is to be followed in respect of consultation by federal departments with Aboriginal communities.

9. Canada has also developed and published the *Cabinet Directive on Law-making* setting out Cabinet's expectations of Ministers, departments and public servants with respect to the legislative process.

10. Canada has also developed and published the *Guide to Making Federal Acts and Regulations* issued by the Privy Council's Office providing detailed guidance to implement the above-referenced Cabinet Directive as to Canada's law-making process. That *Guide* includes a schematic map which sets out the steps involved in law-making.

11. On April 26, 2012, the federal Minister of Finance introduced Bill C-38 *(Jobs, Growth and Long Term Prosperity Act)*, which was given Royal Assent on June 29, 2012. The Minister introduced a further bill, Bill C-45 *(Jobs and Growth Act)*, on October 18, 2012, which received Royal Assent on December 14, 2012. These Bills are referred to in these proceedings as the Omnibus Bills and, as enacted, as the *Acts*.

12. The Omnibus Bills introduced and amended various federal statutes – some, but not all of which, dealt with financial matters. Among the statutes affected were the *Fisheries Act*, RSC 1985, c F-14 and the *Navigable Waters Protection Act*, RSC 1985, c N-22, renamed as the *Navigation Protection Act*, RSC 1985, c N-22 which, among other things, implemented a reduction in the inland waterways monitored by federal agencies. I discuss the relevant provisions of the Omnibus Bills later in these Reasons.

13. The Mikisew were not consulted prior to the introduction of either of the Omnibus Bills in Parliament, nor during the process in Parliament resulting in the Bills receiving Royal Assent.

14. The Mikisew fear that the reduction of monitoring by federal agencies of several waterways within their territory will have a serious impact on fishing, trapping and navigation.

15. The Respondents dispute the Mikisew's fears, saying that they are speculative and that, in fact, in some respects the *Acts* provide benefits not previously enjoyed.

V. ISSUES

[14] The Applicant has raised the following issues:

1. Whether there is a duty to consult in respect of the development of the changes to the Federal Environmental Laws introduced through the Omnibus Bills;

2. If so, whether the duty to consult was breached; and

3. If so, what is the appropriate remedy?

[15] The Respondents have cast their issues somewhat differently:

1. Is this a proper judicial review with respect to:

   a) The constitutional role of the Courts in the law-making process?

   b) The judicial review jurisdiction of the Federal Court pursuant to the *Federal Courts Act*, RSC 1985, c F-7?

2. If the answer to both questions is yes, did the law-making process that culminated in the *Acts* trigger the duty to consult?

3. If the duty to consult has been triggered by the law-making process and the Court finds a breach of said duty, what is the appropriate remedy?

VI. NATURE OF THE PROCEEDINGS

[16] This is an application brought under the provisions of Sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. This is not a review of any decision or order of a federal board, etc., rather, it is an application for declaratory relief and an injunction against the various Ministers of the Crown and Governor General in Council respecting legislation and proposed legislation.

[17] As stated by Stratas JA in *Air Canada v Toronto Port Authority* (2011), [2013] 3 FCR 605 (CA), Sections 18 and 18.1 of the *Federal Courts Act* go beyond simply reviews of decisions or orders of a federal board, and extend to anything that triggers a right to a judicial review. I repeat what he wrote at paras 24 to 30:

> *24 Subsection 18.1(1) of the Federal Courts Act provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the Federal Courts Act: Krause v. Canada, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the Federal Courts Rules.*
>
> *25 As far as "decisions" or "orders" are concerned, the only requirement is that any application for judicial review of them*

> *must be made within 30 days after they were first communicated: subsection 18.1(2) of the Federal Courts Act.*
>
> *26 Although the parties and the Federal Court judge focused on whether a "decision" or "order" was present, in substance they were addressing something more basic: whether, in issuing the bulletins and in engaging in the conduct described in the bulletins, the Toronto Port Authority had done anything that triggered any rights on the part of Air Canada to bring a judicial review.*
>
> *27 On this, I agree with the respondents' submissions and the Federal Court judge's holding: in issuing the bulletins and in engaging in the conduct described in the bulletins, the Toronto Port Authority did nothing to trigger rights on the part of Air Canada to bring a judicial review.*
>
> *28 The jurisprudence recognizes many situations where, by its nature or substance, an administrative body's conduct does not trigger rights to bring a judicial review.*
>
> *29 One such situation is where the conduct attacked in an application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects: Irving Shipbuilding Inc. v. Canada (Attorney General), 2009 FCA 116, [2010] 2 F.C.R. 488; Democracy Watch v. Conflict of Interest and Ethics Commission, 2009 FCA 15, (2009), 86 Admin. L.R. (4th) 149.*
>
> *30 The decided cases offer many illustrations of this situation: e.g., 1099065 Ontario Inc. v. Canada (Minister of Public Safety and Emergency Preparedness), 2008 FCA 47, 375 N.R. 368 (an official's letter proposing dates for a meeting); Philipps v. Canada (Librarian and Archivist), 2006 FC 1378, [2007] 4 F.C.R. 11 (a courtesy letter written in reply to an application for reconsideration); Rothmans, Benson & Hedges Inc. v. Minister of National Revenue, [1998] 2 C.T.C. 176, 148 F.T.R. 3 (T.D.) (an advance ruling that constitutes nothing more than a non-binding opinion).*

[18] Counsel for the Applicant suggested that these proceedings can be considered as if they were questions of law, since there are few facts in controversy.

[19] The issue is not one of a standard of review of a decision, rather, it is a *de novo* consideration of the circumstances and applicable law in this particular case.

VII. DOES SUBSECTION 2(2) OF THE *FEDERAL COURTS ACT* PRECLUDE THESE PROCEEDINGS?

[20] Subsection 2(1) of the *Federal Courts Act*, RSC 1985, c F-7, provides a definition of "federal board", commission or other tribunal" and subsection 2(2) qualifies that definition:

2. (1) In this Act,	*2. (1) Les définitions qui suivent s'appliquent à la présente loi.*
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867 ;	*« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi constitutionnelle de 1867.*
2. (2) For greater certainty, the expression "federal board, commission or other tribunal", as defined in subsection (1), does not include the Senate, the House of Commons, any committee or member of either House, the Senate Ethics Officer or the Conflict of Interest and Ethics Commissioner with respect to	*(2) Il est entendu que sont également exclus de la définition de « office fédéral » le Sénat, la Chambre des communes, tout comité ou membre de l'une ou l'autre chambre, le conseiller sénatorial en éthique et le commissaire aux conflits d'intérêts et à l'éthique à*

the exercise of the jurisdiction or powers referred to in sections 41.1 to 41.5 and 86 of the Parliament of Canada Act.	*l'égard de l'exercice de sa compétence et de ses attributions visées aux articles 41.1 à 41.5 et 86 de la Loi sur le Parlement du Canada.*

[21] To the extent that these proceedings could be said to engage the Parliamentary process engaged in by the Respondents, the parties are agreed that subsection 2(2) of the *Federal Courts Act* would be preclusive. However, Applicant's Counsel argues that it is not the legislative duties of the Respondents that are at issue, rather, it is the policy consideration, formation and proposal to undertake the legislative functions of the Respondents that are at issue.

[22] While I take issue with the Applicant's characterization of the decisions as executive rather than legislative in nature later in these Reasons, the Applicant does not seek judicial review of (1) the content of the Omnibus Bills before they became law, (2) any decision of a Member of Parliament or Parliamentary committee upon the Omnibus Bills' introduction into Parliament or (3) any particular decision of a Minister or Minister's officials in implementing legislation. The Applicant is seeking to engage the process that Ministers of the Crown undertake before legislation has been drafted and presented to Parliament. As such, I conclude that these proceedings are not precluded by subsection 2(2) of the *Federal Courts Act*.

VIII. DO THESE PROCEEDINGS PRESENT A JUSTICIABLE ISSUE?

[23] The Courts have been assiduous in respecting the different roles of the legislative, executive and judicial roles of government. Justice Karakatsanis, of the Supreme Court of Canada, in *Ontario v Criminal Lawyers' Association of Ontario*, [2013] 3 SCR 3, clearly

distinguished between these separate executive, legislative and judicial functions stating that one branch should not unduly interfere with another branch of government. She explained the principle of separation of powers at paragraphs 26 to 30:

> *26 [T]he powers recognized as part of the courts' inherent jurisdiction are limited by the separation of powers that exists among the various players in our constitutional order and by the particular institutional capacities that have evolved from that separation.*
>
> *27 This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches (see Fraser v. Public Service Staff Relations Board, 1985 CanLII 14 (SCC), [1985] 2 S.C.R. 455, at pp. 469-70). The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order (see Reference re Secession of Quebec, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at paras. 49-52).*
>
> *(2) Separation of Powers*
>
> *28 Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent [page20] and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the Charter.*
>
> *29 All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. In New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, McLachlin J. affirmed the importance of respecting the separate roles and institutional*

> *capacities of Canada's branches of government for our constitutional order, holding that "[i]t is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other" (p. 389).3*
>
> *30 Accordingly, the limits of the court's inherent jurisdiction must be responsive to the proper function of the separate branches of government, lest it upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries.*

[24] Thus respect for the principle of separation of powers ensures the preservation of the integrity of Canada's constitutional order. Disrespect for this principle can upset the constitutional balance of these roles.

[25] The question as to whether an issue was justiciable so as to give the Court jurisdiction to address the matter was considered earlier by the Supreme Court of Canada in *Reference re Canada Assistance Plan*, [1991] 2 SCR 525. Sopinka J wrote the Reasons of the Court.

[26] The issues before the Court in that case were two questions put by way of a reference to the British Columbia Court of Appeal. Sopinka J set these questions out at page 534 of the reported version:

> *On February 27, 1990, Order in Council No. 287 was approved and ordered by the Lieutenant Governor of British Columbia. Via this Order, the Government of British Columbia referred the following questions to the British Columbia Court of Appeal:*
>
> *(1) Has the Government of Canada any statutory, prerogative or contractual authority to limit its obligation under the Canada Assistance Plan Act [sic], R.S.C. 1970, c. C-1 and its Agreement with the Government of British Columbia dated March 23, 1967, to contribute 50 per cent of the cost to British Columbia of assistance and welfare services?*

> *(2) Do the terms of the Agreement dated March 23, 1967 between the Governments of Canada and British Columbia, the subsequent conduct of the Government of Canada pursuant to the Agreement and the provisions of the Canada Assistance Plan act [sic], R.S.C. 1970, c. C-1, give rise to a legitimate expectation that the Government of Canada would introduce no bill into Parliament to limit its obligation under the Agreement or the Act without the consent of British Columbia?*

[27] Sopinka J wrote at page 545 to 546 that the Court must determine whether the question is purely political or whether it has a sufficient legal component to warrant judicial intervention:

> *While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. See Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49, at pp. 90-91, and Borowski v. Canada (Attorney General), [1989] 1 S.C.R. 342, at p. 362. In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.*
>
> ...
>
> *Applying the foregoing to this appeal, I am of the view that both of the questions posed have a significant legal component. The first question requires the interpretation of a statute of Canada and an agreement. The second raises the question of the applicability of the legal doctrine of legitimate expectations to the process involved in the enactment of a money bill. Both these matters are in contention between the so-called "have provinces" and the federal government. A decision on these questions will have the practical effect of settling the legal issues in contention and will assist in resolving the controversy. Indeed, there is no other forum in which these legal questions could be determined in an authoritative manner. In my opinion, the questions raise matters that are justiciable and should be answered.*

[28] Recently, the Federal Court of Appeal in *Coldwater Indian Band v Canada (Minister of Indian and Northern Development)*, 2014 FCA 277, has cautioned against the Court intervening in a process where the Minister has yet to make a determination. Nadon JA for the Court wrote at paragraphs 8 to 12:

> *[8] We are of the view that the judicial review application is premature and that there is no basis for the Federal Court or for this court to interfere with the administrative process which requires the Minister to decide whether he should consent to the two assignments sought by Kinder Morgan.*
>
> *[9] In Canada (Border Services Agency) v. C.B. Powell Ltd., 2010 FCA 61, [2011] 2 F.C.R. 332 and 400 N.R. 367 (C.B. Powell), our Court at paragraphs 30 to 33 made it clear that we were not to interfere with an ongoing administrative process until all adequate remedial recourses in the administrative process had been exhausted unless there were "exceptional circumstances". We went on to say in C.B. Powell that such exceptional circumstances were few and that the threshold for "exceptional" was high. In particular, Stratas J.A., writing for the Court, said at paragraph 33:*
>
> > *Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high: see, generally, D.J.M. Brown and J.M. Evans, Judicial Review of Administrative Action in Canada (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:2200, 3:2300 and 3:4000 and David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001) at pages 485-494. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an*

> *important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: see Harelkin, supra; Okwuobi, supra at paragraphs 38-55; University of Toronto v. C.U.E.W, Local 2 (1988), 52 D.L.R. (4th) 128 (Ont. Div. Ct.). As I shall soon demonstrate, the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.*
>
> *[10] Coldwater argues that its application was justified in the circumstances as the Minister will be acting contrary to his fiduciary duty and thus outside his jurisdiction. Moreover, the constitutional nature of the Minister's fiduciary obligations make this Court's intervention appropriate. Coldwater also says that the Minister's consent would function as a waiver of Terasen Inc.'s failure to have the indentures properly signed, that it may "invigorate the potentially expired [second] indenture" and that it may grant to Kinder Morgan a legal interest in the reserve that could not later be undone.*
>
> *[11] Mr. Kirchner, counsel for Coldwater, was quite candid before us when he said that he was, in effect, seeking a remedy akin to a directed verdict in a jury trial. In his view, the Minister could not, in law, decide the consent issue other than in the way proposed by Coldwater.*
>
> *[12] In our view, the circumstances put forward by Coldwater to justify its pre-emptive strike are not exceptional circumstances. Further we cannot see any irreparable harm or prejudice arising from having the Minister decide the question which is before him. To this we would add that we are satisfied that the Minister can provide the remedy sought by Coldwater, i.e. that the indentures not be assigned to Kinder Morgan.*

[29] I conclude that, in the circumstances of this case, there is a sufficient legal basis for the Court to review the matter judicially: namely, whether the legal and enforceable duty to consult applies to the decisions at issue. I will address these matters subsequently in these Reasons. It is not premature to consider the matter.

IX. FEDERAL LAW – MAKING PROCESS AND ASSOCIATED SUPPORT ACTIVITIES

[30] The federal law making process and associated support activities are not something that is fixed in stone, whether by legislature or jurisprudence. It is a fluid political process that is continually adapting to the particular circumstances of the moment.

[31] The Canadian Privy Council Office has published a *Guide to Making Federal Acts and Regulations*, the second edition of which was published in 2001. Hubbard, in his cross-examination at page 17, said that this was strong policy statement. Nevison provided a copy with his affidavit. In part, this document said at pages 7 and 8:

> *Deciding Whether a Law is Needed*
>
> *Making a new law, whether by obtaining Parliament's assent to a bill or by making regulations, is just one of several ways of achieving governmental policy objectives. Others include agreements and guidelines or, more generally, programs for providing services, benefits, or information. In addition, a law may include many different kinds of provisions, ranging from simple prohibitions through a wide variety of regulatory requirements such as licensing or compliance monitoring. Law should be used only when it is the most appropriate. When a legislative proposal is made to the Cabinet, it is up to the sponsoring Minister to show that this principle has been met, and there are no other ways to achieve the policy objectives effectively.*
>
> *The decision to address a matter through a bill or regulation is made by Cabinet on the basis of information developed by a Minister's departmental officials. The information must be accurate, timely and complete. To provide it, a department should:*
>
> - *analyze the matter and its alternative solutions;*
> - *engage in consultation with those who have an interest in the matter, including other departments that may be affected by the proposed solution;*
> - *analyze the impact of the proposed solution; and*

- *analyze the resources that the proposed solution would require, including those needed to implement or enforce it.*

In the case of a bill, the principal means for conveying this information is a Memorandum to Cabinet, which a minister must present to obtain Cabinet approval for the bill to be drafted by the Legislation Section of the Department of Justice.

When a legislative initiative is being considered, and where it is appropriate and consistent with legislative drafting principles, related matters should be combined in one bill, rather than being divided among several bills on similar subjects. A single bill allows parliamentarians to make the most effective and efficient use of their time for debate and study in committee.

Finally, caution should be taken when considering whether to include a "sunset" or expiration provision in a bill, or a provision for mandatory review of the Act within a particular time or by a particular committee. Alternatives to these provisions should be fully explored before proposing to include them in a bill.

[32] On pages 67 and 68, the *Guide* states:

Summary of the Cabinet Policy Approval Process

Memorandum to Cabinet and drafting instructions

After a proposed bill is included in the Government's legislative program, the next step is to prepare a submission to Cabinet to seek policy approval and authority to draft the bill. This is done by way of a Memorandum to Cabinet (MC), prepared in accordance with the guidance documents issued by the Privy Council Office. MC drafters should refer to Memoranda to Cabinet: A Drafter's Guide, the Good Governance Guidelines and the MC Preparation Planning Calendar. When a bill is being proposed, the MC includes an annex of drafting instructions, which provides the framework for drafting the bill. This is a critical component of the MC that demands much care and attention (see also Preparing Bill-drafting Instructions for a Memorandum to Cabinet in this chapter).

Main Steps in Cabinet Approval Process

The main steps in preparing an MC are:

- *The sponsoring department writes the MC, including the drafting instructions, in cooperation with departmental legal advisers. The Privy Council Office (PCO) should be consulted as early as possible in the process. As set out in the MC Preparation Planning Calendar, the sponsoring department must alert PCO to the draft MC at least 6 weeks before the Cabinet Committee meeting at which it is to be presented. Other departments and central agencies should be consulted as issues arise during the preparation of the MC.*

- *The sponsoring department hosts a substantive interdepartmental meeting at least 3 weeks before the Cabinet committee meeting to discuss the policy implications of the MC. The meeting includes PCO and the other central agencies as well as all departments whose ministers sit on the Cabinet policy committee that will consider the MC, and other interested departments. The sponsoring department then revises the MC taking into account comments from departments and ensures that it has the support of central agencies and other departments.*

- *As the central agency that serves as the secretariat to the Cabinet and its committees, PCO performs a challenge function on matters of process, most notably on what consultations are appropriate and on how public interest is determined. It also looks at issues of horizontality and the appropriate level of government intervention, particularly in terms of efficiency, affordability, federalism and partnerships.*

- *Once finalized, the sponsoring minister signs the MC and it is sent to PCO. PCO is responsible for distributing the MC to deputy ministers and ministers, for scheduling the item on the agenda of the appropriate Cabinet policy committee and for briefing the committee chair.*

- *The Cabinet policy committee considers the MC.*

- *If approved, PCO issues a Cabinet Committee Report (CR), which is then considered by the full Cabinet.*

- *If there are financial implications, a source of funds must be identified before full Cabinet considers the CR. If the CR is ratified, PCO issues a Record of Decision (RD). Both the CR and the RD are based on the*

> *recommendations and drafting instructions contained in the original MC.*
>
> - *The policy committee or full Cabinet may require changes to the proposal. In such cases, the sponsoring minister may be asked to return with a revised MC, depending on the nature and scope of the changes. A revised CR and RD may also be issued to reflect the changes.*
>
> - *Once the RD is issued, PCO sends copies to all ministers and deputy ministers (in practice usually to the departments' cabinet affairs units) and to the Legislation Section of the Department of Justice.*
>
> - *At this stage, drafting may begin.*
>
> *In exceptional circumstances, where it is necessary to meet the priorities of the Government, drafting may begin before the Cabinet authorization has been formally obtained if the Leader of the Government in the House of Commons so authorizes. This authorization is granted on the advice of the Director of the Legislation Section and the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel) in consultation with the relevant PCO policy secretariat.*
>
> *Who does what in the Cabinet Approval Process?*
>
> *The Cabinet makes policy decisions, including decisions about how policies will be implemented in legislation. These decisions are communicated through the Cabinet's approval of drafting instructions in a memorandum to Cabinet.*

[33] A useful but very large chart is available to be printed by checking on the appropriate version at page 64 of the *Guide* if one is looking at the electronic version. It is too large to reproduce in these Reasons. By way of highlight, the chart divides the law-making process into six major categories, in sequence:

- Policy Development;
- Cabinet Approval of Policy;
- Drafting;

- Cabinet Approval of Bill;
- House of Commons (where the appropriate Minister first gives notice of introduction of a Bill and subsequently takes the Bill for first reading);
- Senate.

[34] In relying on this *Guide,* the Applicant, in its written submissions, organized the law-making process into five steps:

> **Step 1**: Policy development, including the decision to make laws.
>
> **Step 2**: Subsequent to the decision to make a law, the responsible department develops a legislative proposal and submits the same to Cabinet for approval.
>
> **Step 3**: Drafting the Bill: upon cabinet approval of the legislative proposal, it forms part of the Government's legislative program, the responsible department prepares a memorandum to Cabinet seeking authorization to draft the bill.
>
> **Step 4**: Parliamentary Process: upon drafting the Bill, Cabinet approves the latter and introduces the same into Parliament for debate and three readings in the House of Commons and Senate.
>
> **Step 5**: Royal Assent gives the act the force of law unless it provides otherwise.

[35] At question 230 of the cross-examination of the witness Hubbard, Counsel for the Applicant suggested that the further one goes along in the process, it becomes harder and harder to change the policy recommendations. In his answers to questions 237 to 241, Hubbard agreed with that proposition:

> 237 Q. But all I want to get at is this, is that if we compare the earlier stages to the later stages, at the later stages we have steps that are being implemented with the approval and direction of Cabinet; correct?

A. Yes.

238 Q. And to change direction at that point would actually require direction from Cabinet; correct?

A. Typically, yes.

239 Q. Right. Whereas if we were at the left-hand side of the process, so the process before it's gone through Ministerial approval, committee approval, PCO approval, Cabinet approval, changes can be made -- subject to whatever larger policy direction has been given -- without, for example, the approval of Cabinet.

MS. YURKA: On policy? Changes on policy?

MR. JANES: Changes on the policy that's being

THE DEPONENT: On the policy advice and recommendations?

BY MR. JANES:

240 Q. Right.

A. Those are fairly fluid until they're approved, yes.

241 Q. Right. And so all I'm getting at is that as we move further to the right on the process described in Exhibit 1 before the introduction in the House of Commons, you require -- to implement significant changes in the policy direction that's been approved, you need more and more approvals. So if something's been approved by Cabinet, lower level officials cannot just ignore that direction because they would like to go in a different direction, for example.

A. Once Cabinet has approved something and public service will follow direction, yes.

[36] In oral argument, the Applicant's Counsel submitted that, at the very least, a duty to consult arises during the Policy Development and Cabinet Approval of Policy stages of the law-making process in this case, and at the very least, the duty to consult could attach to all steps up to the review and sign off of the sponsoring Minister. This means that the duty to consult would

arise before Cabinet provides notice to Parliament, and thus before the introduction of the Omnibus Bills into Parliament.

X. JURISPRUDENCE AS TO THE POINT AT WHICH THE COURT MAY ORDER INTERVENTION IN THE LAW-MAKING PROCESS

[37] A classic position as to Court intervention in the law-making process was stated by Major J in his decision for the Supreme Court of Canada in *Authorson v Canada (Attorney General)*, [2003] 2 SCR 40 at paragraph 37.

> *37 The respondent claimed a right to notice and hearing to contest the passage of s. 5.1(4) of the Department of Veterans Affairs Act. However, in 1960, and today, no such right exists. Long-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent. Once that process is completed, legislation within Parliament's competence is unassailable.*

[38] This classic position however may not apply when aboriginal rights, whether created by treaty or not, and the Crown's responsibilities related to the same are concerned. Section 35 of the *Constitution Act, 1982* provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	*35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.*
(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.	*Définition de « peuples autochtones du Canada »* *(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des*
(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist	

by way of land claims agreements or may be so acquired.	*Métis du Canada.*
	Note marginale :Accords sur des revendications territoriales
(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.	*(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.*
	Note marginale :Égalité de garantie des droits pour les deux sexes
	(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

[39] The Supreme Court of Canada found that the constitutional principle of the honour of the Crown informs the purposive interpretation of section 35 of the *Constitution Act, 1982* and gives rise to the binding and enforceable constitutional duty to consult when Crown conduct has the potential to adversely affect an Aboriginal claim or right of which the Crown has actual or constructive knowledge (*Manitoba Metis Federation Inc v Canada (Attorney General)*, [2013] 1 SCR 623 at paras 66, 73; *R v Kapp*, [2008] 2 SCR 483 at para 6; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 103 at paras 31, 51, 63 and *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103 at para 42).

[40] Therefore, the question as to whether the Courts should intervene into law-making process without upsetting Canada's constitutional order of government, is bound up with the constitutional duty to consult.

[41] In *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, the Supreme Court of Canada held that there was a duty to consult even in the absence of a treaty where a land claim was involved, in which case the Court could intervene, if appropriate. In that case, the duty arose at the strategic planning stage for resource utilization. The Chief Justice wrote at paragraph 76:

> *76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut ("A.A.C.") for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.*

[42] The Supreme Court of Canada, in *Misikew Cree First Nation v. Canada*, [2005] 3 SCR 388 considered the duty to consult in the treaty context. Binnie J., for the Court, wrote that the duty to consult would be triggered at variable points and that duty could be exercised in various ways such as simply giving notice:

> *34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. Haida Nation and Taku River set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (Haida Nation, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.*
>
> ...
>
> *55 The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (Delgamuukw, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in Haida Nation, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.*

[43] Thus, where duty is triggered and breached, the Court could presumably intervene to enforce or make declarations as to that duty. Binnie J wrote at paragraph 59 of *Mikisew* that the Court could order a remedy for a breach of the duty to consult without undertaking a *R v Sparrow*, [1990] 1 SCR 1075 justification analysis:

> *Where, as here, the Court is dealing with a proposed "taking up" it is not correct (even if it is concluded that the proposed measure if implemented would infringe the treaty hunting and trapping rights) to move directly to a Sparrow analysis. The Court must first consider the process by which the "taking up" is planned to go ahead, and whether that process is compatible with the honour*

> *of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing and trapping rights.*

[44] The question is whether the Court should find that a duty to consult arises at any point during the above-referenced law-making process. The Alberta Court of Appeal visited this issue in *R v Lefthand*, 2007 ABCA 206, 77 Alta LR (4th) 203 where Slatter JA, writing for the Court, at paragraphs 37 to 39 said:

> *37 The exact content of the duty to consult is in its formative stages, and is still being hammered out on the anvils of justice. The three leading cases on the duty to consult are Haida Nation, Taku River and Mikisew Cree. They are all cases involving a challenge to administrative (as opposed to legislative) acts that had an impact on aboriginal rights: i.e. road construction or forestry permits. They are all "taking up" cases, that is cases where a government decision would result in the exploitation or occupation of previously unoccupied lands, effectively resulting in the permanent removal of those lands from a treaty or laTnd claim area, or permanent change to the land in the area. The duty to consult is at its highest in those cases. Consultation has also been recognized as one factor to be considered in other contexts, for example in the "justification" analysis when aboriginal rights are breached (infra, para. 139).*
>
> *38 The duty to consult is of course a duty to consult collectively; there is no duty to consult with .any individual.* ***There can however be no duty to consult prior to the passage of legislation, even where aboriginal rights will be affected****: Authorson v. Canada (Attorney General), [2003] 2 S.C.R. 40. It cannot be suggested there are any limits on Parliament's right to amend the Indian Act.* ***It would be an unwarranted interference with the proper functioning of the House of Commons and the Provincial Legislatures to require that they engage in any particular processes prior to the passage of legislation****. The same is true of the passage of regulations and Orders in Council by the appropriate Executive Council.* ***Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them. Once enactments are in place, consultation only becomes an issue if a prima facie breach of an***

> ***aboriginal right is sought to be justified****: Mikisew Cree at para. 59 [emphasis added].*
>
> *39 Beyond the passage of legislation and regulations, the matter becomes less well defined. Administrative tribunals often do have a duty to consult when their orders will have an impact on aboriginal rights. There may also be a duty on study groups that are formed by governments to report on matters that may affect aboriginal rights. For example, in this case the Eastern Slopes Regulation Review Committee was established in 1997 to make regulations respecting the fisheries covered by Treaty No. 7. When it is anticipated that such a study group might recommend amendments to a regulatory regime, consultation is generally appropriate. This does not mean that the legislative body is bound to follow the recommendations of such a committee, nor that the legislative body is required to consult further with the aboriginal groups if it decides not to follow all the recommendations of the committee. The right to be consulted is not a right to veto: Haida Nation at para. 48. The integrity of the traditional methods of enacting legislation and regulations is not affected by the duty to consult.*

[45] The Supreme Court of Canada addressed the *Lefthand* decision in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650. The Chief Justice, writing for the Court, left for another day the question of whether government conduct includes legislative action. At paragraphs 43 and 44, she wrote:

> *43 This raises the question of what government action engages the duty to consult. It has been held that such action is not confined to government exercise of statutory powers: Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests), 2005 BCSC 697, [2005] 3 C.N.L.R. 74, at paras. 94 and 104; Wii'litswx v. British Columbia (Minister of Forests), 2008 BCSC 1139, [2008] 4 C.N.L.R. 315, at paras. 11-15. This accords with the generous, purposive approach that must be brought to the duty to consult.*
>
> *44 Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights (Woodward, at p. 5-41 (emphasis omitted)). Examples include the transfer of tree licences*

> *which would have permitted the cutting of old-growth forest (Haida Nation); the approval of a multi-year forest management plan for a large geographic area (Klahoose First Nation v. Sunshine Coast Forest District (District Manager), 2008 BCSC 1642, [2009] 1 C.N.L.R. 110); the establishment of a review process for a major gas pipeline (Dene Tha' First Nation v. Canada (Minister of Environment), 2006 FC 1354, [2007] 1 C.N.L.R. 1, aff'd 2008 FCA 20, 35 C.E.L.R. (3d) 1); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re, 2009 CarswellBC 3637 (B.C.U.C.)). We leave for another day the question of whether government conduct includes legislative action: see R. v. Lefthand, 2007 ABCA 206, 77 Alta. L.R. (4th) 203, at paras. 37-40.*

[46] Groberman JA, for the Yukon Court of Appeal, in *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14, 358 DLR (4th) 100, leave to appeal to the Supreme Court of Canada dismissed, [2013] SCCA No 106, commented on this part of *Rio Tinto*. *Ross River Dena Council* dealt with whether the Government of Yukon had a duty to consult when pursuant to the *Quartz Mining Act* , SY 2003, c 14, it allowed the recording of mineral claims on land which the plaintiff claimed Aboriginal title and rights. Once an individual acquires mining rights under the *Quartz Mining Act*, he or she can claim and conduct certain exploration activities on the land without further authorization from or notice to the Government of Yukon. In finding that a duty to consult existed, the Yukon Court of Appeal distinguished between the Court's jurisdiction to find existing statutory regimes defective for failing to allow accommodation and consultation and the Court's reticence in imposing procedural consultation requirements on the legislature during the formulation and introduction of a bill:

> *37 The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First Nations can be reconciled with the Crown's right to manage resources. Statutory*

> *regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist [emphasis added].*
>
> *38 The honour of the Crown demands that it take into account Aboriginal claims before divesting itself of control over land. Far from being an answer to the plaintiff's claim in this case, the failure of the Crown to provide any discretion in the recording of mineral claims under the Quartz Mining Act regime can be said to be the source of the problem.*
>
> *39 I acknowledge that in Rio Tinto the Supreme Court of Canada left open the question of whether "government conduct" includes legislative action.* ***I read that reservation narrowly, however. It may be that the doctrine of parliamentary sovereignty precludes the imposition of a requirement that governments consult with First Nations before introducing legislation*** *(see Reference Re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525 at 563) [emphasis added]. Such a limitation on the duty to consult would, however, only apply to the introduction of the legislation itself, and could not justify the absence of consultation in the carrying out of a statutory regime [emphasis added].*
>
> *40 In my view, therefore, the chambers judge was correct in finding that the regime for the acquisition of a quartz mineral claim in Yukon is deficient in that it fails to provide any mechanism for consultation with First Nations.*
>
> *…*
>
> *45 It is not necessary or appropriate for the Court, in this proceeding, to specify precisely how the Yukon regime can be brought into conformity with the requirements of Haida. Those requirements are themselves flexible. What is required is that consultations be meaningful, and that the system allow for accommodation to take place, where required, before claimed Aboriginal title or rights are adversely affected.*

[47] The triggering of Court intervention at the point where a duty to consult arises has been clearly established subsequently by the Supreme Court of Canada in *Tsilhqot'in Nation v British*

Columbia, 2014 SCC 44, 374 DLR (4th) 1. The Chief Justice wrote the decision of the Court. At paragraph 89, she wrote, building on *Rio Tinto*:

> *[89] Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 37.*

[48] The question then becomes whether the Court may intervene where it appears that a duty to consult arises at a point in the legislative process that is before a bill is introduced into Parliament. Sopinka J., in *Reference re Canada Assistance Plan* at page 559, clearly drew a line saying that, except possibly in *Charter* cases, the Court should not impose a legal impediment upon government so as to require further procedural steps to be taken before a bill is introduced. He said, at pages 559 - 560:

> *The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle. So too is the purely procedural requirement in s. 54 of the Constitution Act, 1867. That is not to say that this requirement is unnecessary; it must be complied with to create fiscal legislation. But it is not the place of the courts to interpose further procedural requirements in the legislative process. I leave aside the issue of review under the Canadian Charter of Rights and Freedoms where a guaranteed right may be affected.*
>
> *The respondent seeks to avoid this proposition by pointing to the dichotomy of the executive on the one hand and Parliament on the other. He concedes that there is no legal impediment preventing Parliament from legislating but contends that the government is constrained by the doctrine of legitimate expectations from introducing the Bill to Parliament.*

This submission ignores the essential role of the executive in the legislative process of which it is an integral part. The relationship was aptly described by W. Bagehot, The English Constitution (1872), at p. 14:

A cabinet is a combining committee -- a hyphen which joins, a buckle which fastens, the legislative part of the state to the executive part of the state. [Emphasis in original.]

Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. Such expectations might be created by statements during an election campaign. The business of government would be stalled while the application of the doctrine and its effect was argued out in the courts. Furthermore, it is fundamental to our system of government that a government is not bound by the undertakings of its predecessor. The doctrine of legitimate expectations would place a fetter on this essential feature of democracy. I adopt the words of King C.J. of the Supreme Court of South Australia, in banco, in West Lakes Ltd. v. South Australia (1980), 25 S.A.S.R. 389, at p. 390, a case strikingly similar to this one:

Ministers of State cannot, however, by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations.

While the statement deals with contractual obligations, it would apply, a fortiori to restraint imposed by other conduct which raises a legitimate expectation.

A restraint on the Executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself. This is particularly true when the restraint relates to the introduction of a money bill. By virtue of s. 54 of the Constitution Act, 1867, such a bill can only be introduced on the recommendation of the Governor General who by convention acts on the advice of the Cabinet. If the Cabinet is restrained, then so is Parliament. The legal effect of what the respondent is attempting to impugn is of no consequence to the obligations between Canada and British Columbia. The recommendation and introduction of Bill C-69 has no effect per se, rather it is its impact on the legislative process that will affect those obligations. It is therefore the legislative process that is, in fact, impugned.

[49] Similar situations, with similar results, have arisen in *Authorson* Major J's unanimous decision in *Wells v Newfoundland*, [1999] 3 SCR 199; *Penikett v Canada*, [1987] BCJ No 2543, 45 DLR (4th) 108 (CA) and Stayer J's decision in *Native Women's Assn of Canada v Canada*, [1993] 1 FC 171, 57 FTR 115 (TD).

[50] The Applicant made the following arguments in an attempt to avoid the application of these authorities to this case: (1) the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 374 DLR (4th) 1 and *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, 372 DLR (4th) 385 "establish, contrary to the Crown's arguments that the duty to consult applies to the imposition of legislation" (Paragraph 13 of the Applicant's Reply), (2) the separation of powers cases at issue were executive rather than legislative decisions, and (3) most of those decisions concerned common law rights and none of those decisions concerned the constitutional duty to consult.

[51] On the Applicant's first argument, I find that neither case stands for the proposition that the conduct at issue constitutes Crown conduct for the purpose of triggering the duty to consult. Paragraph 77 of *Tsilhqot'in Nation* dealt explicitly with the government's burden to demonstrate that it discharged its procedural duty to consult and accommodate in the context of the Court's application of the *R v Sparrow*, [1990] 1 SCR 1075 justification test in the Aboriginal title context, and not a stand-alone inquiry for the duty to consult. *Grassy Narrows* affirmed that application of the justification test in the treaty context, and also held that the Ontario government has a duty to consult whenever it intends to take up Treaty 3 lands for the purposes of a project within its jurisdiction (Paragraph 52); the decision contains no language whatsoever

on whether the Crown must consult during the development of legislation. Therefore, the Supreme Court of Canada has yet to revisit the question that it left for another day in *Rio Tinto*, whether legislative decisions constitutes Crown conduct that can trigger a duty to consult.

[52] Moreover, existing Supreme Court of Canada jurisprudence supports the proposition that Courts should refrain from finding that the law-making process at issue in this case constitutes Crown conduct that could give rise to a duty to consult that would allow the Court to intervene in said law-making process. At paragraph 51 of *Haida Nation* the Chief Justice held:

> *51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in R. v. Adams, [1996] 3 S.C.R. 101, at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers.*

[53] At paragraphs 55 to 58 of *Rio Tinto*, the Chief Justice substantiated on paragraph 51 of *Haida Nation* by specifically including the legislative branch of government within this principle of the Courts deferring to governments to set up a regulatory scheme for the purpose of discharging the duty to consult:

> *55 The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal [emphasis added]. Tribunals are confined to the powers conferred on them by their constituent legislation: R. v. Conway, 2010 SCC 22, [2010] 1 S.C.R. 765. It follows that the role of particular tribunals in relation to*

> *consultation depends on the duties and powers the legislature has conferred on it.*
>
> *56 The legislature may choose to delegate to a tribunal the Crown's duty to consult [emphasis added]. As noted in Haida Nation, it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource.*
>
> *57 Alternatively, the legislature may choose to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process [emphasis added]. In this case, the tribunal is not itself engaged in the consultation. Rather, it is reviewing whether the Crown has discharged its duty to consult with a given First Nation about potential adverse impacts on their Aboriginal interest relevant to the decision at hand.*
>
> *58 Tribunals considering resource issues touching on Aboriginal interests may have neither of these duties, one of these duties, or both depending on what responsibilities the legislature has conferred on them. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant considerations in determining the contours of that tribunal's jurisdiction: Conway. As such, they are also relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.*

[54] Although the Supreme Court of Canada did not mention the principle of separation of powers in this reasoning, I interpret these passages as the Supreme Court of Canada's attempt to balance the principle of separation of powers with the duty to consult. Courts will not intervene to dictate a particular regulatory scheme for Parliament to impose upon the Crown because Parliament is best placed to make the policy choice for creating the procedure for which the Crown administers in discharging the duty to consult.

[55] This has the effect of preventing the triggering of the duty to consult for the development of those legislative provisions that made procedural changes to the *Acts*. These provisions include:

- Sections 4.1 and 4.2 of the *Fisheries Act* and sections 32 to 37 of the *Canadian Environmental Assessment Act, 2012*. These are provisions that could lead to the offloading of federal responsibilities to the provincial Crown. This reflects Parliament's choice to create the possibility for the Crown to discharge its duty to consult at the provincial level. The Court must respect this choice.
- The Mikisew raised sections 28(5) of the *Navigation Protection Act* as reducing opportunities for public participation and consultation with Aboriginal peoples. However, by the Mikisew's own admission, sections 5(6) and 7 leaves to the discretion of the Minister the ability to take measures to ensure that proponents of a project notified the public.
- The Mikisew raised a similar concern regarding the *Canadian Environmental Assessment Act, 2012*'s restriction of public participation under section 43(1)(c) only to an "interested party" defined under subsection 2(2)(b). It also raised sections 9(c) and 27 and 38's imposition of time-limits throughout the process as potentially limiting consultation opportunities. However, on this point, I agree with the Respondent that it is premature for the Court to speculate on a process that Parliament chose to change where the quality of the same will become apparent. We have yet to see how these procedures will occur in tandem with the federal government's existing Consultation *Guideline* referenced earlier.

- The Mikisew also took issue with sections 58.301 and 111 of the *National Energy Board Act*, RSC 1985, c N-7's removal of power lines and pipelines from the term "work" under the *Navigation Protection Act* for the purpose of the requirement for authorization. Yet the Court should not read those provisions in isolation. Reading sections section 58.301 with 58.302, section 111 with 111.1 demonstrates that these sections transfer the regulatory authority over pipelines and powerlines from the jurisdiction of the *Navigation Protection Act* and to the Governor in Council pursuant to his or her regulation making authority under sections 58.302(1) and 111.1(1) of the *National Energy Board Act*. Indeed, while in the past the Minister of Transport had jurisdiction under the *Navigation Protection Act* to approve works, now the relevant Minister under the National Energy Board Act and the Minister of Transport can make a joint recommendation to the Governor in Council to make regulations on works passing in, on, over, under, through or across a navigable water under the *National Energy Board Act*. It is not for this Court to intervene here to instruct Parliament on the statute under which the federal government regulates pipelines and powerlines that could affect navigable waters.
- Similar reasoning applies to section 77(1.1) of the *Species At Risk Act* which exempts certificates of public convenience and necessity issued by the National Energy Board from a direction of the Governor in Council pursuant to section 54(1)(a) of under the *National Energy Board Act* from section 77(1) of the *Species At Risk Act*. However, that Board only makes a recommendation to the relevant Minister under section 52(1) of the *National Energy Board Act* and subsection 52(2)(e) requires the Board to have regard to "any public interest that in the Board's opinion may be affected by

> the issuance of the certificate or the dismissal of the application". Moreover, the Governor in Council can send the recommendation back to the Board for reconsideration. As with the *Navigation Protection Act*, this reflects a policy choice by Parliament to reserve decisions relating to certificates of public convenience to the National Energy Board, the relevant Minister and the Governor in Council under the *National Energy Board Act*.

[56] I deal with those provisions that allegedly reduce environmental protection in my discussion of the third element of the test for triggering the duty to consult below.

[57] On the Applicant's second argument, the Applicant submitted that it does not seek to place any limits on Parliament's ability to formulate and introduce a bill into Parliament but rather on the Executive branch's development of policies behind the bills during the earlier stages of the law-making process. Hence, putting a restraint on the Executive branch's policy making role would not put a restraint on Parliament itself.

[58] The Applicant attempts to reconcile this proposition with *Reference re Canada Assistance Plan* and *Criminal Lawyers' Association of Ontario*. On the former, the Applicant argues that Sopinka J's statement that "The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle" does not apply to this case since Sopinka J did not explicitly categorize the policy development behind the formulation and introduce of a bill as part of that process (Page 559). Therefore, according to the argument of the

Applicant, the duty to consult can attach to the policy development stage behind the Omnibus Budget Bills since the conduct only became legislative once the drafting of the Bills occurred.

[59] To support this interpretation of *Reference re Canada Assistance Plan*, the Applicant relies upon Mahoney J's unanimous decision in *Native Women's Association of Canada v Canada* [1992] FCJ No 715, 95 DLR (4th) 106 (CA) wherein the Court found the term formulation and introduction of a bill "does not refer to policy development, a political process, but to action, after the policy has been decided, necessary to legislative implementation" (Para 41). The dispute in that case arose from the constitutional discussions leading up to the Charlottetown Accord. The Applicant in that case argued that the Government of Canada violated its section 2(b) and 15 *Charter* rights as well as their rights under section 35(1) of the *Constitution Act, 1982* by failing to provide them with equal funding and opportunities to participate in the constitutional discussions as allegedly male-dominated Aboriginal groups. The Federal Court of Appeal declared that the Government of Canada restricted the freedom of expression of Aboriginal women in a manner that violated section 2(b) and 28 of the *Charter*.

[60] In their written submissions, the Applicant notes the Supreme Court of Canada in *Native Women's Assn of Canada v Canada*, [1994] 3 SCR 627 reversed Mahoney J's decision on other grounds. Indeed, Sopinka J for the majority did not make an explicit finding on Mahoney J's interpretation of *Reference re Canada Assistance Plan*.

[61] Yet, in overturning Mahoney J's finding on section 2(b) of the *Charter*, Sopinka J for the majority provided the following reasons:

54 Although care must be taken when referring to American authority with respect to the First Amendment, the American version of freedom of express, I find the comments of O'Connor J. of the United States Supreme court in Minnesota State Board for Community Colleges, supra, at p. 285 apposite:

> *Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard [emphasis added]. "There must be a limit to individual argument in such matters if government is to go on." [Cite omitted.] Absent statutory restrictions, the State must be free to consult or not to consult whomever it pleases [emphasis added].*

...

55 And later, at p. 287:

> *When government makes general policy, it is under no greater constitutional obligation **to** listen to any specifically affected class than it is to listen to the public at large.*

56 With respect to the argument that allowing the participation of one group while not equally permitting the same forum to another group amplifies the former's voice, O'Connor J. remarked as follows (at p. 288):

> *Amplification of the sort claimed is inherent in government's freedom to choose its advisers. A person's right to speak is not infringed when government simply ignores that person while listening to others.*

57 Therefore, while it may be true that the Government cannot provide a particular means of expression that has the effect of discriminating against a group, it cannot be said that merely by consulting an organization, or organizations, purportedly representing a male or female point of view, the Government must automatically consult groups representing the opposite perspective. (Paras 54, 57).

[62] Sopinka J's citation of *Community Colleges* mirrors Sopinka J's judgment in *Reference re Canada Assistance Plan*, which I repeat "Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation into government…The business of government would be stalled while the application of the doctrine and its effects was argued out in the courts" (Page 559). This citation of *Community Colleges* brings doubt to Mahoney J's interpretation of the term formulation and introduction of a bill as excluding the policy decision to undertake that process. I therefore do not find myself bound by Mahoney J's interpretation of *Reference re Canada Assistance Plan* on this point.

[63] Moreover, *Criminal Lawyers' Association of Ontario* settled any doubt on whether the policy developments behind a bill constituted part of the legislative process in holding:

> *28* ***The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws*** *with the assistance of a professional public service.* ***The judiciary maintains the rule of law, by interpreting and applying these laws*** *through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the Charter [emphasis added].*

[64] At the hearing, the Applicant attempted to distinguish that statement from this case since the Court did not explicitly state whether policy choices included the executive development of policies. I agree with the Respondent that this submission is exactly the type of the formalistic attempt to characterize a legislative decision as executive because a Minister of the Crown makes said decision which Sopinka J found at pages 559 to 560 of *Canada Assistance Plan*:

> *[I]gnores the essential role of the executive in the legislative process of which it is an integral part…A restraint on the Executive in the introduction of legislation is a fetter on the sovereignty of Parliament itself…If Cabinet is restrained, then so is Parliament…The recommendation and introduction of Bill C-69 has no effect per se, rather it is the impact on the legislative process that will affect those obligations. It is therefore the legislative process that is, in fact, impugned.*

[65] In light of *Criminal Lawyers' Association of Ontario*, this principle applies equally to policy choices: a restraint on the Executive's policy choice to formulate and introduce a bill into Parliament is a restraint on the sovereignty of Parliament itself.

[66] In this case, the Ministers made a set of policy choices that lead to the creation of a legislative proposal to submit to Cabinet that led to the formulation and introduction of the Omnibus Bills into Parliament. Therefore, the Ministers acted in their legislative capacity to make decisions that were legislative in nature.

[67] Regarding the Applicant's third attempt to distinguish these authorities from this case on that basis that they dealt with common law rights and not the constitutional duty to consult, I agree with the Respondent that while these latter authorities do not arise in an aboriginal law context, they are illustrative of the endeavours of the Courts to distinguish between constitutional roles occupied by the legislature, executive and judicial branches of government for the purpose of ensuring that one branch does not unduly interfere with the functioning of another. Indeed, the practical effect of the Court's intervention after finding a duty to consult exists in the law-making process would have the same effect as finding that the common law doctrine of

legitimate expectations applies to the same: both would place procedural constraints upon Parliament and thus could stall the business of government.

[68] The Respondent demonstrated that the Applicant problematically relies on the above-referenced *Guide* to the law-making process in order to outline which steps of the law-making process would give rise to the duty to consult and which would not. The Respondent noted that this process is integrated and the Government does not always commence that process in a linear manner. Moreover, since the *Guide* arises from a Cabinet Directive and not as a promise for third parties to rely upon, Cabinet can change its procedure at any time and need not consult anyone about such changes. I agree and add that for this Court to instruct the Crown on which stages of the law-making process it must consult Aboriginal peoples would have the effect of constraining a process for which the government requires flexibility to carry out its duties.

[69] In this context, I repeat McLachlin CJ and Karakatsanis J's discussion of the principle of the honour of the Crown at paragraph 72 of their Judgment for the majority in *Manitoba Metis Federation*:

> *72 The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples. Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown: Little Salmon, at para. 62.*

[70] The question thus becomes whether any Aboriginal right or treaty right exists or alternatively, whether any rights or treaty rights or any Crown obligation exists that would create

a special relationship between the Mikisew and the Crown that would require the Court to depart from the long-established separation of powers principle in the law-making context.

[71] In the present case, there is no dispute arising out of the title to land, land claims or a taking up of land. Regarding the nature of the duty to consult in the context of Treaty No. 8, Binnie J found at paragraph 57 of *Mikisew* that "Treaty 8 therefore gives rise to Mikisew procedural rights (e.g.) consultation as well as substantive rights (e.g. hunting, fishing and trapping rights." However, even with the principle of treaty interpretation expressed by Cory J for the majority in *R v Badger*, [1996] 1 SCR 771 at paragraph 41 that "any ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians", there is no special provision in Treaty No. 8 that characterizes the law-making process as Crown actions that would allow the Misikew, in preference to other Canadians, to intervene in the legislative process before a bill that may, in some arguable way, interfere with the Mikisew's treaty rights of fishing and trapping. This does not mean that all legislative conduct will automatically fail to constitute Crown conduct for the purpose of triggering a duty to consult. However, for the purpose of this case, intervention into the law-making process would constitute undue judicial interference on Parliament's law-making function, thus compromising the sovereignty of Parliament.

[72] Therefore I find that, if there was a duty to consult (a matter that I will consider next), it cannot trigger judicial intervention before a bill is introduced into Parliament.

XI. DUTY TO CONSULT

[73] In the context of aboriginal law in Canada, a duty on the government to consult with one or more nation's bands can arise in one of two ways, one is through a duty imposed by the honour of the Crown, the other by a duty imposed by a treaty.

[74] The Supreme Court of Canada in *Haida Nation* dealt extensively with the general duty to consult in the absence of a treaty obligation. The Chief Justice, at paragraphs 16 and 17, wrote that the duty arises from the honour of the Crown and must be understood generously:

> *16 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.*
>
> *17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act [page523] honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": Delgamuukw, supra, at para. 186, quoting Van der Peet, supra, at para. 31.*

[75] At paragraph 35, she wrote duty arises when the Crown has knowledge, real or circumstance, of the "potential existence" of an Aboriginal "right to settle" and contemplates conduct that might affect it:

> *35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest 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: see Halfway River First Nation v. British*

> *Columbia (Ministry of Forests), [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, per Dorgan J.*

[76] At paragraph 51 of *Rio Tinto*, the Chief Justice divided the *Haida Nation* test for establishing a duty to consult into three elements:

> *51 As we have seen, the duty to consult arises when: (1) the Crown has knowledge, actual or constructive, of potential aboriginal claims or rights; (2) the Crown proposes conduct or a decision; and (3) that conduct or decision may have an adverse impact on the Aboriginal claims or rights. This requires demonstration of a causal connection between the proposed Crown conduct and a potential adverse impact on an Aboriginal claim or right.*

[77] Thus I note that, while the existence is only potential, it is directed to "right or title" and contemplates conduct that might "adversely affect" the right and title.

[78] At paragraph 39 of *Haida Nation*, the Chief Justice states that the duty is variable and proportionate to the circumstances.

> *39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.*

[79] At paragraphs 43 to 45 of *Haida Nation*, the Chief Justice examines the two ends of a spectrum, always in reference to claims to title, and the extent of the duty that may arise:

> *43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a*

spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty [page533] on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail 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. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown [page534] may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

[80] In the case of a treaty, the situation may be difficult. Treaty No. 8, the Treaty signed by the Misikew, was the subject of a decision of the Supreme Court of Canada in *Misikew First Nation*. Binnie J, writing for the Court, began at paragraph 1 of the Decision by stating that reconciliation of Aboriginal and non-Aboriginal peoples is the fundamental objective of modern aboriginal law.

> *1 The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.*

[81] At paragraphs 24 to 27, Justice Binnie specifically addressed Treaty 8:

> *24 The post-Confederation numbered treaties were designed to open up the Canadian west and northwest to settlement and development. Treaty 8 itself recites that "the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering and such other [page402] purposes as to Her Majesty may seem meet". This stated purpose is reflected in a corresponding limitation on the Treaty 8 hunting, fishing and trapping rights to exclude such "tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". The "other purposes" would be at least as broad as the purposes listed in the recital, mentioned above, including "travel".*
>
> *25 There was thus from the outset an uneasy tension between the First Nations' essential demand that they continue to be as free to live off the land after the treaty as before and the Crown's expectation of increasing numbers of non-aboriginal people moving into the surrendered territory. It was seen from the beginning as an ongoing relationship that would be difficult to manage, as the Commissioners acknowledged at an early Treaty 8 negotiation at Lesser Slave Lake in June 1899:*

> *The white man is bound to come in and open up the country, and we come before him to explain the relations that must exist between you, and thus prevent any trouble.*
>
> *(C. Mair, Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899, at p. 61)*

As Cory J. explained in Badger, at para. 57, "[t]he Indians understood that land would be taken up for homesteads, farming, prospecting and mining and that they would not be able to hunt in these areas or to shoot at the settlers' farm animals or buildings".

26 The hunting, fishing and trapping rights were not solely for the benefit of First Nations people. It was in the Crown's interest to keep the aboriginal people living off the land, as the Commissioners themselves acknowledged in their Report on Treaty 8 dated September 22, 1899:

[page403]

We pointed out that the Government could not undertake to maintain Indians in idleness; that the same means of earning a livelihood would continue after the treaty as existed before it, and that the Indians would be expected to make use of them. [p. 5]

27 Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction "and thus prevent any trouble" (Mair, at p. 61).

[82] At paragraph 34, Justice Binnie stated that the Crown will always have notice of the contents of the Treaty; the question is as to what conduct will trigger that duty; and, once triggered, what is the extent of that duty:

> *34 In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. Haida Nation and Taku River set a low threshold. The*

flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered. At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice" (Haida Nation, at para. 43). The Mikisew say that even the low end content was not satisfied in this case.

XII. IS THE DUTY TO CONSULT TRIGGERED IN THIS CASE?

[83] On the first element of the *Haida Nation* test, the Crown conceded that it has knowledge of the Mikisew's rights under Treaty No. 8.

[84] I also proceed to the third element with the assumption that the steps that Cabinet Ministers undertake during the law-making process prior to introducing a bill into Parliament do indeed constitute Crown conduct that can give rise to the duty to consult.

[85] Regarding the third element, I begin with a discussion of Treaty No. 8 which provides that Her Majesty the Queen agrees with the Misikew that they shall have the right to pursue their usual vocation of hunting, trapping and fishing throughout the tract of land being ceded to the Crown.

[86] Since the Treaty was signed in 1899, development such as the construction of the W.A.C. Bennett Dam, oil exploration and extraction has occurred. Such development has affected the "usual vocations" of the Misikew. The evidence shows that monitoring the waterways has been beneficial in processes intended to protect the environment and preserve the "usual vocations" of the Misikew.

[87] It is argued by the Misikew that the proposals contained in the Omnibus Bills, now the *Acts*, will reduce the federal monitoring in many of the waterways within their "tract" of the

Treaty No. 8 lands, and this reduction has the potential of losing the ability to monitor effectively, those waterways.

[88] Specifically, section 5(1) of the *Navigable Waters Protection Act* prior to its amendment prevented the building or placing of any work on, over, under, through or across any navigable water without the Minister's prior approval of the work, its site and the plans for it. The common law definition of navigable waters included those waterways as small as those capable of supporting a canoe (*Quebec (Attorney General) v Fraser* (1906), 37 SCR 577 at para 16). By contrast, section 3 of the *Navigation Protection Act* prohibits a work on, over, under, through or across any navigable water listed in the Schedule except in accordance with the *Act* or any other federal Act. Therefore, while the *Navigable Waters Protection Act* offered protection to all navigable waters in Canada, the *Navigation Protection Act* only protects those navigable waters listed in the Schedule and only for the purpose of protecting navigation. The Applicant advised that the Schedule includes 97 lakes, 62 rivers and 3 oceans. Many navigable waters that received protection in the *Navigable Waters Protection Act* do not appear in the Schedule of the *Navigation Protection Act*.

[89] In addition, the earlier version of section 35(1) of the *Fisheries Act* provided that:

35. (1) No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.	*35. (1) Il est interdit d'exploiter un ouvrage ou une entreprise ou d'exercer une activité entraînant la détérioration, la destruction ou la perturbation de l'habitat du poisson.*

[90] By contrast, the amended version of section 35(1) provides:

35. (1) No person shall carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery.	*35. (1) Il est interdit d'exploiter un ouvrage ou une entreprise ou d'exercer une activité entraînant des dommages sérieux à tout poisson visé par une pêche commerciale, récréative ou autochtone, ou à tout poisson dont dépend une telle pêche.*

[91] Hence the amendments to the *Fisheries Act* removed the protection to fish habitat from section 35(1) of that *Act*. The Applicant submitted that this amendment shifted the focus from fish habitat protection to fisheries protection which offers substantially less protection to fish habitat and the term "serious harm" permits the disruption and non-permanent alteration of habitat: "Any activity harmful to fish impairs the exercise of aboriginal and treaty rights to fish". (Para 74 of the Applicant's Amended Memorandum of Fact and Law).

[92] The Respondent characterizes these concerns as speculative and itself speculates that the *Acts* may, in some respects, be beneficial.

[93] I agree that no actual harm has been shown but that is not the point. As the Supreme Court of Canada in *Haida Nation* at paragraph 35 has said, the "*potential existence*" of a harm (in that case, the potential right as title to land, here to fishing and trapping) is sufficient to trigger the duty. I find that, on the evidence, a sufficient potential risk to the fishing and trapping rights has been shown so as to trigger the duty to consult.

[94] Finally, the *Canadian Environmental Assessment Act, 2012* has the effect of reducing the number of projects that could trigger an environmental assessment as compared to the *Canadian*

Environmental Assessment Act, 1992. The new *Act* only requires an environmental assessment if a project is on a list of designated projects, known as the *Regulations Designating Physical Activities*, SOR/2012-147. Section 14(2) sets out circumstances wherein the Minister may order the designation of a physical activity not already prescribed by regulations. The Applicant noted that the new list often requires that designated projects be of a minimum size. Hence, this designated list allows for approval of projects with reduced environmental oversight. Although those projects will usually be smaller in size, they could have a cumulative effect on the ecosystem which the Mikisew relies upon. This has the potential of affecting the Mikisew's fishing, hunting and trapping rights.

[95] This reasoning does not apply to certain provisions of the *Canadian Environmental Assessment Act, 2012* and the *Species At Risk Act*. The Applicant correctly noted that pursuant to section 5(1) of the *Canadian Environmental Assessment Act, 2012*, environmental assessments can only consider certain specified environmental components while excluding others, thus leading to a narrowed consideration of environmental effects. However, section 5(1)(c) included a broader provision relating to Aboriginal peoples:

5. (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are	*5. (1) Pour l'application de la présente loi, les effets environnementaux qui sont en cause à l'égard d'une mesure, d'une activité concrète, d'un projet désigné ou d'un projet sont les suivants :*
…	*…*
(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on	*c) s'agissant des peuples autochtones, les répercussions au Canada des changements qui risquent d'être causés à l'environnement, selon le cas :*

(i) health and socio-economic conditions,	*(i) en matière sanitaire et socio-économique,*
(ii) physical and cultural heritage,	*(ii) sur le patrimoine naturel et le patrimoine culturel,*
(iii) ***the current use of lands and resources for traditional purposes*** *[emphasis added], or*	*(iii)* ***sur l'usage courant de terres et de ressources à des fins traditionnelles,*** *[Je souligne.]*
*(iv) any structure, site or thing that is of historical, archaeological, paleontologica*l or *architectural significance*.	*(iv) sur une construction, un emplacement ou une chose d'importance sur le plan historique, archéologique, paléontologique ou architectural.*

[96] Therefore, while section 5(1) of the *Canadian Environmental Assessment Act, 2012* does narrow the scope of environmental effects to consider, 5(1)(c) exists to ensure that such a narrowing does not occur in relation to Aboriginal peoples and, in this case, the Mikisew.

[97] Moving to the *Species At Risk Act*, section 73(1) provides (as it did in the past):

73. (1) The competent minister may enter into an agreement with a person, or issue a permit to a person, authorizing the person to engage in an activity affecting a listed wildlife species, any part of its critical habitat or the residences of its individuals.	*73. (1) Le ministre compétent peut conclure avec une personne un accord l'autorisant à exercer une activité touchant une espèce sauvage inscrite, tout élément de son habitat essentiel ou la résidence de ses individus, ou lui délivrer un permis à cet effet.*

[98] The Omnibus Bills added subsection 73(6.1) which states the agreement or permit must set out the date of its expiry. The Applicant submitted that subsection 73(6.1) allowed persons to engage in activities that affect a listed wildlife species, any part of its critical habitat or the

residences of its individuals. I disagree. Without the permit or agreement, that person would be in contravention of the *Act* if they did anything that the *Species At Risk Act* prohibited and that the permit or agreement exempted.

[99] As I discussed throughout, in the circumstances of this case where a duty to consult has been found to be triggered, it can be triggered on the occasion when the Omnibus Bills were introduced into Parliament.

XIII. WHAT IS THE EXTENT OF THE DUTY TO CONSULT?

[100] As the Supreme Court has written in *Haida Nation* the duty to consult and accommodate varies with the circumstances. The nature of the exercise of that duty is to be proportionate to the circumstances.

[101] In the present case, certain aspects of the Omnibus Bills clearly address waterways that are within the Misikew Treaty No. 8 territory. Clearly, the *Navigation Protection Act* reduces the number of waterways monitored, although section 29(2) authorizes the Governor in Council to make regulations to amend the schedule to the *Navigation Protection Act* to re-introduce certain waterways in certain circumstances. A reasonable person would expect that a reduction in the number of waterways monitored carries with it the potential risk of harm. In addition, for the reasons the Applicant expressed above, the amendment to section 35(1) of the *Fisheries Act*'s clearly increases the risk of harm to fish. These are matters in respect of which notice should have been given to the Misikew together with a reasonable opportunity to make submissions.

[102] However, given that we have yet to see the application of these provisions to specific situations involving the Mikisew, I do not see the situation as one that would fall within the high end of the spectrum envisioned by the Supreme Court of Canada in *Haida Nation*. Rather, it lies at the lower end.

[103] I find that upon the introduction of each of the Omnibus Bills into Parliament, notice should have been given to the Misikew in respect of those provisions that reasonably might have been expected to possibly impact upon their "usual vocations" together with an opportunity to make submissions.

[104] In the present case, no notice was given and no opportunity to make submissions was provided. In fact, each Bill, which was structured as a "confidence" Bill, went through Parliament with remarkable speed.

XIV. WHAT RELIEF, IF ANY, SHOULD THE COURT PROVIDE?

[105] The Applicant has asked for various declarations together with an order which would amount to an injunction. Sections 18 and 18.1 of the *Federal Courts Act* provides for such relief, however such relief is discretionary.

[106] I see no value in giving an injunction. The scope of the terms of such an order would be almost impossible to define. The effect of such an order would place an undue fetter on the workings of government. As the Supreme Court said in *Criminal Lawyers' Association of Ontario*, each of the branches of government should respect their role and the limits on those

roles without imposing undue fetters on the other. Furthermore, citing *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44 at para 37, the Court at paragraph 31 of *Criminal Lawyers' Association of Ontario* held that:

> *31 Indeed, even where courts have the jurisdiction to address matters that fall within the constitutional role of the other branches of government, they must give sufficient weight to the constitutional responsibilities of the legislative and executive branches, as in certain cases the other branch will be "better placed to make such decisions within a range of constitutional options."*

[107] Thus, even if the constitutional nature of the duty to consult confers upon the Court jurisdiction to review the conduct at issue that led to the breach of the duty to consult, the Court should defer to the constitutional responsibilities of the legislative branch. As with *Khadr* this means providing no remedy beyond a declaration.

[108] Rennie J of this Court has provided sound guidance as to when declaratory relief may be appropriate in *The Mohawks of the Bay of Quinte v Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 669, 434 FTR 241. A declaration may be provided where it may have some practical effect in resolving the issues. He wrote at paragraphs 61 to 64 and 67:

> *61 Declaratory relief may be appropriate when there is a real dispute between the parties and when a declaration may have some practical effect in resolving the issues. Here, a declaratory order would have some practical effect in clarifying the scope of the Policy. It is in the interest of both the parties that there be clarity regarding the possible components of any potential settlement so that the parties may consider the full range of the options available.*
>
> *62 As the Supreme Court of Canada set out in Solosky v The Queen, [1980] 1 S.C.R. 821, "[d]eclaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of*

> *which a 'real issue' concerning the relative interests of each has been raised and falls to be determined."*
>
> *63 Many of the factors to be considered by a court in deciding whether to grant a declaration weigh in the applicant's favour. First, the question is real, not theoretical. The negotiations remain extant. Second, the applicant has an identifiable interest in the relief, and the Minister a real interest in opposing.*
>
> *64 This then leads to the third consideration, whether the remedy will have any utility. On this point the parties have opposing views. The Minister sees no utility in a bare declaration as the negotiating position is within the Minister's discretion. This argument conflates two discrete issues: i) the substance of the Minister's negotiation position; and ii) the legal framework that governs that negotiation. The former is not in issue; the latter, however, is. It is hard to quantify the practical effect but in these circumstances the requirement for utility is satisfied by the desirability of bringing clarity to the law and a governing policy instrument.*
>
> ...
>
> *67 To conclude, it is an open question as to whether the parties will continue down the path of the Policy when neither of the settlement vehicles available under the Policy are palatable to the opposite party. Declaratory relief in this Court would perhaps move the parties closer to a resolution which would be in their joint and public interest.*

[109] In the present case, as the Omnibus Bills have now passed into law, a declaration that the parties must now consult would be pointless. However, a declaration to the effect that the Crown ought to have given the Misikew notice when each of the Bills were introduced into Parliament together with a reasonable opportunity to make submissions may have an effect on the future respecting continuing obligations to the Misikew under Treaty No. 8.

XV. CONCLUSIONS AND COSTS

[110] In conclusion, I have found that pursuant to the principle of separation of powers, the Court cannot intervene into the law-making process to impose procedural constraints upon the Ministers of the Crown acting in their legislative capacity. However, a duty to consult arose in the circumstances of this case. That duty was triggered upon the introduction of each of the Omnibus Bills in Parliament. The extent of that duty was for the Crown to give notice to the Misikew and a reasonable opportunity to make submissions. A declaration to that effect will be ordered.

[111] The parties have advised the Court that they have agreed that each party should bear its own costs.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. It is declared that the Crown had, in the circumstances of this case, a duty to consult with the Misikew at the time that each of the Omnibus Bills was introduced into Parliament which duty comprised the giving of notice to the Misikew of the those portions of each of those Bills as might potentially have an impact on the usual vocations of the Misikew, as defined in Treaty No. 8, together with giving the Misikew a reasonable opportunity to make submissions.

2. Each party shall bear its own costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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