Creating the Perfect Storm for Conflicts Over Aboriginal Rights:

Critical New Developments in the Law of Aboriginal Consultation

Lorraine Land
Olthuis, Kleer, Townshend LLP

The Commons Institute
January 27, 2014

Table of Contents

I. Introduction

It will come as no surprise to those attending this conference that Aboriginal consultation processes may be triggered when the Crown is facing a decision, including whether to approve a development. What may surprise some is hearing that recent developments in the area of Aboriginal consultation law are setting the stage for a "perfect storm" of more conflict over Aboriginal rights and resource development.

It is now firmly established law that the Crown has a duty to consult Aboriginal groups when it has real or constructive knowledge of the potential existence of an asserted Aboriginal right or title and contemplates conduct that might adversely affect it.[1] The Crown also has that duty when its actions could adversely affect already established treaty rights.[2]

Since the Supreme Court's *Haida* decision in 2004,[3] additional case law has further elucidated the scope and content of the duty to consult. In the ensuing decade, Aboriginal groups, the Crown and industry have worked together (or sometimes at cross purposes) to establish processes that meet the legal obligations for Aboriginal consultation. While many situations involving Aboriginal consultation triggers have been successfully resolved on a case-by-case basis, there remains tremendous uncertainty about how consultation obligations can best be discharged in a practical, efficient and honourable fashion.

Most recently, a series of legal and policy decisions is setting the stage for massive confrontations regarding Aboriginal consultation to develop. The failure of the federal and provincial Crowns to establish workable and just Aboriginal consultation regimes, compounded by the impacts of regulatory reforms in

---

[1] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida)*, at para. 35.
[2] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. 2005 SCC 69 (*Mikisew*).
[3] *Supra* note 1.

environmental assessment, are setting up a situation that will likely lead to extensive lost economic opportunity for industry, the Crown and Aboriginal groups.

II. Moulton Contracting II: The Emergence of Aboriginal Consultation Rights For Industry?

A. Aboriginal Consultation as a Tri-Partite Relationship

First Nations are not the only ones now pursuing legal recourse against the Crown for the damage caused when Aboriginal consultation processes go wrong. The past year has seen critical developments in the assertion of industry's rights in these situations.

Any large development that impacts Aboriginal and Treaty rights requires a substantial degree of interaction and even cooperation between the Crown, industry and impacted Aboriginal groups. While the Crown ultimately owes the duty to consult and accommodate,[4] it can and must (realistically) delegate aspects of the consultation process to third parties.

The practical reality is that industry must be involved in the consultation process.[5] A project proponent has the specific information about the technical aspects of a project which is relevant to understanding its impacts and how those can be mitigated if there are harms to Aboriginal and treaty rights. The proponent is best situated to understand how projects can be modified or adapted to minimize those harms, and/or to accommodate any harms to Aboriginal rights by way of

[4] The principle that the duty to consult is owed by the Crown (including the Provincial Crown), and not industry, was established in *Haida*, supra 1. Haida and its companion case, *Taku River Tlingit First Nation v. British Columbia,* 2004 SCC 74 (*Taku River Tlingit*) also made it clear that procedural aspects of Aboriginal consultation can (and likely should) be delegated to industry, and fulfilled in part through existing processes such as environmental assessment.

[5] For a good overview of the practical benefits to industry arising from the Aboriginal consultation process, see Dr. Dean Jacobs, "*Consulting and Accommodating First Nations in Canada: A Duty That Reaps Benefits*" (National Claims Research Workshop, 2005) available at http://gsdl.ubcic.bc.ca/collect/firstna1/index/assoc/HASH0139/9454866e.dir/doc.pdf.

compensation where appropriate (typically through Impact and Benefits Agreements).

Since *Haida*, a plethora of consultation structures have emerged across the country, varying from province to province, industry to industry, and project to project. Many Aboriginal and industry groups have established consultation protocols, to standardize the process for a particular project or industry.[6] Many of these protocols and the negotiations they trigger eventually lead to Impact and Benefits Agreements (IBAs), particularly for large projects. These IBAs can also vary considerably, although the degree of variance is difficult to track as the terms of the agreements are normally confidential.

But the road to successful Aboriginal consultation processes is not always smooth. And, while the ultimate consultation obligation rests on the Crown, it is often industry and Aboriginal groups that suffer when the Crown does not ensure that proper consultation occurs.

B. Moulton Contracting II

Just before Christmas, the BC Supreme Court dealt with an intriguing new phase of a case that had already gone to the Supreme Court because of Aboriginal consultation concerns. [7] In *Moulton Contracting Ltd. v. British Columbia*[8] *("Moulton II")*, a company caught in the crossfire of an inadequate Aboriginal consultation case successfully sued the provincial Crown for the damage caused to their business because of an unresolved Aboriginal rights dispute.

---

[6] For an example of best practices developed for these protocols, see the Report developed by the New Relationship Trust in British Columbia: http://www.newrelationshiptrust.ca/downloads/consultation-and-accomodation-report.pdf.

[7] I am indebted to my colleague Judith Rae for her thoughts on the *Moulton Contracting II* case, including her trenchant summary which is posted on the Olthuis Kleer Townshend LLP blog at: http://www.oktlaw.com/blog/new-twist-after-supreme-court-decision-in-behn/.

[8] *Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348 ("*Moulton II*").

Interestingly, the company succeeded in obtaining judicial relief for an improper Aboriginal consultation process while the original Aboriginal litigants themselves had failed in a previous related proceeding. In May 2013, the Supreme Court rendered its decision in *Behn v. Moulton Contracting ("Behn"),*[9] denying *Behn* the right to rely on a failed Aboriginal consultation process as a defense for damages arising from the blockade of a logging operation on the Behn trapline lands.

The *Behn* case involved a lawsuit brought by Moulton Contracting, a logging company, against members of the Behn family. Moulton received a logging permit from the province, but the Behn family (who are the trapline holders in the license area and members of the Fort Nelson First Nation) blocked Moulton from accessing the area. The Behns argued, in their defence, that they were not properly consulted about the logging, and that it would infringe upon their Treaty 8 rights to hunt and trap. The First Nation to which they belonged (Fort Nelson First Nation) had already complained to the Province about lack of consultation, including lack of funding to support that consultation, but nothing had come of it.

The matter went to the Supreme Court on a procedural question of whether Moulton was entitled to strike out parts of Behn's statement of defence. The Supreme Court held that the duty to consult in cases of infringement of aboriginal rights was a collective right, held by the First Nation as a whole and not the Behn family as individuals. The Court did find, however, that the Behns could be entitled to individual consultation as holders of Treaty rights. Nevertheless, the Court decided that it would be an abuse of process to allow the Behns to raise consultation or rights infringement issues in their own defence. A key reason for this decision appeared to be the economic consequences for the company, if the Court allowed Behn to rely on failed Aboriginal consultation as a defense. The Court said that not want to condone the '"self help" remedies of the aboriginal protestors, and found

[9] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 ("*Behn"*).

that the proper procedure for bringing forward the consultation concerns should have been an injunction application.[10]

The Province, meanwhile, did not act to resolve the consultation issue, nor did it inform Moulton of the outstanding Aboriginal consultation concerns. Moulton continued with its lawsuit against the Province for breach of contract and negligent misrepresentation, and against the Behns and their First Nation for the tort of intentional interference with economic interests and a related "conspiracy" between them. After the Supreme Court decision on the procedural issue of whether the Behns could depend on Aboriginal consultation as a defence, the underlying action proceeded to trial in the BC Supreme Court.

In December 2013, Justice Saunders made his decision on the merits of Moulton's case as a whole in *Moulton II*.[11] Justice Saunders dismissed Moulton's case against the Behns and the First Nation, but found that the Province was liable to Moulton for $1.75 million.

A notable twist in this case is that, although the Supreme Court of Canada said the duty to consult was an inappropriate defence argument for the Behns, Justice Saunders found that it was relevant to Moulton's claim against the Province. The BC court held that resource agreements between companies and the Crown, like this logging license, have an "implied consultation promise" from the Crown to the company:

> The need to engage in meaningful consultation with aboriginal groups is fundamental to questions of land use in territory covered by Treaty 8. If adequate consultation were not to take place, the legitimacy of the "taking up" under the Treaty would stand to be challenged, and a party given license

[10] For a good analysis of the reasons in *Behn v Moulton Contracting Ltd.*, see the article by my colleague H. W. Roger Townshend, "*Recent and Upcoming Aboriginal Law Decisions by the Supreme Court of Canada*", presented at the *Supreme Court and Constitutional Litigation Conference*, The Commons Institute, June 2013, available at http://www.oktlaw.com/wp-content/uploads/2014/01/hwrtDecisions.pdf.

[11] *Supra* note 8.

> by the Crown to use land would inevitably run the risk of conflict. The Crown must be taken to be aware of this risk in any given situation, and a party engaging in negotiations with the Crown for license to use Crown land must be entitled to assume that the Crown has taken adequate steps to discharge its obligation. The commercial reality of dealing with land subject to aboriginal claims justifies and necessitates such expectations being recognized as forming implied terms of a contract with the Crown [*emphasis added*].[12]

The main reason the court found BC liable to Moulton was because the Province should have at least told Moulton about the continuing conflict. The Court found that this was information of "fundamental relevance" to Moulton's license and related contract with the Province.

In addition, when Justice Saunders looked at what happened with consultation, he found that the Province had in fact failed to meet its constitutional duties to the First Nation and its members, including the Behns. The Behns were left without legal remedy, however, due to the Supreme Court decision issued earlier in the year.

The *Moulton II* case raises interesting questions about the legal remedies available to industry when Aboriginal consultation goes wrong. While the duty to consult rests with the Crown, it is now evident that there can be substantial economic harm to industry when the consultation process does not proceed smoothly. And the *Moulton II* case is only one of several examples of industry now turning to the courts for financial remedies when the Aboriginal consultation process goes wrong.

C. Mining Companies Claim Against Crown

Recently, in Ontario, a couple of mining companies have issued claims against the Ontario Crown based on the Province's failure to properly undertake Aboriginal consultation with First Nations impacted by proposed mining development. In October 2013, Northern Superior Resources Inc ("NSR") filed a $110 million lawsuit alleging that Ontario had failed to properly consult with the Sachigo Lake First

[12] *Ibid* at para 290.

Nation. NSR alleges that Ontario's failure resulted in substantial losses for the junior gold mining company, which was working a number of unpatented mining claims in northwestern Ontario.

In January 2013, meanwhile, Solid Gold Resources Corp. filed a $100-million claim against the Province of Ontario, alleging that the Province "encouraged and promoted" a conflict with Wahgoshig First Nation. In 2011, Wahgoshig First Nation filed for and won an injunction against Solid Gold, stopping drilling and exploration activities by the company.[13] Solid Gold claims that the Province of Ontario bears the ultimate responsibility for any duty to consult, which in this case has gone wrong, and thus the government is liable for the company's losses as a result of the injunction which shut down the mining exploration on the basis of inadequate Aboriginal consultation.

The success of the industry plaintiff in *Moulton Contracting II*, in obtaining economic damages relief from the Provincial Crown for inadequate Aboriginal consultation, raises the possibility of more such legal actions by industry against the Crown. From the perspective of Aboriginal rights holders, the spectre of the Crown's potential financial liability to industry may encourage the Crown to develop better Aboriginal consultation processes, which could result in positive outcomes for First Nations. On the other hand, it is ironic that Aboriginal consultation remedies obtained by Aboriginal groups have been constrained, for the most part, to the Aboriginal groups' right to more or better consultation rather than economic damages. First Nations have not been successful in seeking "hard" economic remedies in Aboriginal consultation cases, and often end up with remedies that are

[13] See *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al.,* 2011 ONSC 7708. The initial case dealt with the injunction. Solid Gold applied for leave to appeal this decision, which was granted in *Wahgoshig First Nation v. Ontario*, 2012 ONSC 2323. Changes to the *Ontario Mining Act* regime have raised questions about whether and how the appeal will proceed. In the interest of full disclosure, I note that my firm, Olthuis Kleer Townshend LLP, represents Wahgoshig First Nation in this matter.

never-ending cycles of more and more consultation with no final accommodation outcome.[14]

It must then be a bitter pill to swallow, when the Behn family in *Behn v Moulton Contacting* is denied the right to rely on their section 35 constitutional rights as a defence, while Moulton is ultimately allowed to rely on those same rights to receive a $1.7 million award from the Province.

III. The Alberta Consultation Policy and Levy: The Emergence of a (Flawed) Standardized Consultation Process

A. The Policy and the Aboriginal Consultation Office

One of the key challenges for Aboriginal consultation processes is ensuring that all the parties know the "rules of the game" and what to expect in the consultation process. [15] This is difficult to achieve when Aboriginal consultation has, for the most part, developed as a hodge-podge of consultation processes (and outcomes) that vary widely from jurisdiction to jurisdiction, industry to industry and project to project.

It is natural, in these circumstances, that all the parties should look for more certainty in the process, and better mutual understanding of the content and expected outcomes of negotiations. Over time, some industry sectors have offered

[14] For a good example of this, see the line of BC cases involving the Gitxsan's attempts to force a proper Aboriginal consultation process regarding the Province's approval of changes to control of logging licenses in their territory. In a series of cases, the Gitxsan returned to Court repeatedly after the Court ordered proper consultation; the Court repeatedly ordered the Province to enter into proper consultations but questions keep arising about the adequacy of the process, forcing the parties to return to Court repeatedly. See *Gitxsan v. British Columbia (Minister of Forests),* 2002 BCSC 1701, *Gitanyow First Nation v. British Columbia (Minister of Forests)*, 2004 BCSC 1734, *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 and *Wii'litswx v. HMTQ*, 2008 BCSC 1620.
[15] I am indebted to my articling student, Kaitlin Ritchie, who assisted greatly with the research for this section of the paper.

suggested guidelines for Aboriginal consultation.[16] Similarly, the federal government and provinces have released Aboriginal consultation guidelines over the past decade.[17] But no Crown has gone as far as the Province of Alberta in recent attempts to standardize Aboriginal consultation processes and control all aspects (including financial) of the Aboriginal consultation process.

Alberta has recently undertaken several initiatives to reform and centralize Aboriginal consultation throughout the province. These initiatives include releasing a new Aboriginal consultation policy (specifically, "The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013" ["the Policy"]),[18] authorizing a new governmental office to be the authoritative body responsible for managing all aspects of consultation throughout the province (the Aboriginal Consultation Office),[19] and enacting the *Aboriginal Consultation Levy Act*.[20]

The new Policy was released on August 16, 2013. While it is not yet implemented (the Province of Alberta's website suggests that the Policy is currently going through the "Consultation Policy implementation period", which it says includes dialogue with First Nations and industry stakeholders)[21], the Aboriginal Consultation Office (ACO) created by the Policy[22] is anticipated to be fully operational by spring 2014.

---

[16] See, for instance, supra note 6, regarding the models suggested by the New Relationship Trust in B.C.

[17] See, for example, Aboriginal Affairs and Northern Development's *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011*, available at: http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675. See also Department of Fisheries and Oceans Canada's *Consultation with First Nations: Best Practices, A Living Document*, June 2006, available at http://www.dfo-mpo.gc.ca/Library/329385.pdf (which, in the humble view of this author, currently appears to be far more honoured in the breach than in the observance).

[18] Available online: http://www.aboriginal.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf

[19] See http://www.aboriginal.alberta.ca/1.cfm.

[20] Bill 22, *Aboriginal Consultation Levy Act,* was introduced in the Legislative Assembly of Alberta on May 27, 2013. It passed Third Reading on May 15, 2013 and received Royal Assent on May 27, 2013. It is not yet in force, but will come into force "on Proclamation".

[21] Available online: http://www.aboriginal.alberta.ca/574.cfm

[22] *Supra* note 18, at page 5.

The ACO will manage all aspects of First Nation consultation, including policy development, pre-consultation assessment, management and execution of the consultation process, consultation capacity-building initiatives, and assessment of consultation adequacy. The ACO is the final government arbiter of whether Alberta has fulfilled its duty to consult obligations.

The Policy applies to "strategic and project-specific Crown decisions" regarding land and natural resource management, including:

(1) provincial regulations, policies and plans;
(2) decisions on projects relating to oil and gas, forestry and other forms of natural resource development; and
(3) provincial Crown decisions relating to or impacting federal Crown lands, in some cases.[23]

In a notable exclusion, the Policy does not apply to the leasing and licensing of rights to Crown minerals, private lands not subject to the exercise of treaty rights and traditional uses, policy matters unrelated to land and natural resource management, and emergency situations that may impact public safety.[24]

The Policy establishes three "levels" of consultation. This, arguably, reflects the Supreme Court's tests for determining what consultation obligations are owed, and the need to determine both the strength of the Aboriginal right asserted and the degree of impact that a Crown decision will have on that right. The ACO will conduct a pre-consultation assessment of each proposed project, and, depending on the scope, will determine the level of consultation required. The levels are:

- **Level 1.** Projects expected to have no adverse impact on First Nations' rights: no consultation required (e.g. annual operating plans, i.e. timber harvesting; routine management in provincial parks);

[23] *Ibid.* at pages 2 – 3.
[24] *Ibid.*

- **Level 2.** Projects anticipated to have low adverse impacts on First Nations' rights: procedural aspects will be carried out by the project proponent (e.g. pipelines, rad development, public land sales, etc.; project proponents will be directed to create and send notification packages of project or activity to First Nations);
- **Level 3.** Projects expected to result in significant or permanent adverse impacts: Alberta will undertake consultation directly (e.g. large-scale transmission lines, projects involving environmental impact assessments as defined in the *Environmental Protection and Enhancement Act*).

Along with the Policy, Alberta has also released draft "Corporate Guidelines for First Nations Consultation Activities"[25] and a draft "Consultation Process Matrix"[26] that outlines the detailed consultation processes and timelines required for each of the three levels. Alberta is currently consulting with industry and First Nations about the draft Guidelines and Matrix, which are expected to be finalized and implemented in spring 2014.

B. The Aboriginal Consultation Levy Act

As mentioned above, the new Policy states that Alberta will develop a program to increase capacity funding to First nations and to fund that program through "a levy on industry".[27] Out of this, the *Aboriginal Consultation Levy Act*[28]["the *Levy Act*"] was enacted. It is not yet in force, but is to come into force "on Proclamation".

The *Levy Act* proposes to charge a fee to proponents (defined in the Act as persons who undertake a provincially regulated activity) for the purposes of making grants to First Nations or other identified Aboriginal groups to "assist them in developing

[25] Available online: http://www.aboriginal.alberta.ca/documents/GoACorpGuidelines-FNConsultation-2013.pdf
[26] Available online: http://www.aboriginal.alberta.ca/documents/GoAMatrix-FNConsultation-2013.pdf.
[27] *Supra* note 18, at page 9.
[28] *Aboriginal Consultation Levy Act,* SA 2013, c A-1.2 ("*Levy Act*").

capacity to participate in, and in meeting the costs of, any required Crown consultation in respect of provincial regulated activities".[29]

Notable details of the *Levy Act* include:

- The regulations will prescribe the details of the amount(s) of the levy to be paid by proponents, the amount(s) and form of payment to Aboriginal groups, and the conditions under which payments will be made (there are still no regulations available);[30]
- A "Consultation Levy Fund" will be established and may only be used to make grants to First Nations and other identified Aboriginal groups in respect of consultation;[31]
- In accordance with regulations, the Minister can require proponents to provide personal information, records and other documents, including confidential information and copies of agreements relating to consultation capacity and other benefits, in order to assist the Minister in determining the amount of grants and to plan and facilitate required Crown consultation;[32]
- The regulations may provide for administrative penalties to enforce payment of levies or for failure to comply with a request for information;[33]
- A decision of the Minister made under the *Levy Act* is final and binding, and not subject to review.[34]

C. First Nation Criticism and Opposition

Alberta's new Policy has received considerable opposition from First Nations. Some of the concerns raised by First Nations include:[35]

---

[29] *Ibid*. s. 4(3).
[30] *Ibid,* s. 10(d).
[31] *Ibid.* s. 4.
[32] *Ibid.* s. 8.
[33] *Ibid.* s. 10(h).
[34] *Ibid.* s. 9.
[35] See for example http://www.theglobeandmail.com/news/national/alberta-sets-new-rules-on-industry-aboriginal-consultation/article13856983/ and http://norj.ca/2013/08/albertas-new-aboriginal-consultation-policy-criticized/.

- The Policy only focuses on rights to hunt, fish and trap, and makes no mention of ceremonial or burial grounds or places used to harvest medicines or other types of Aboriginal rights;
- The Policy will override any existing consultation protocols established by Aboriginal governments in the province. (Although the Policy encourages proponents to be aware of such protocols, it does not require proponents to comply with them while consulting, and notes that in cases of conflict between protocols, Alberta's Policy will prevail[36]); and
- The Policy imposes fixed timelines upon First Nations to provide a response to a notification of a proposed project (up to 15 days for "Level 2" projects, and up to 20 days for "Level 3" projects, which is likely not realistic in view of the complexity of some of the oil and gas industry projects, and in view of the enormous volume of projects which some First Nations must review).

The Policy does not require consultation on the leasing of lands or licensing rights to Crown minerals. But First Nations insist that consultation is essential at the land tenure stage. Indeed, the Courts have directed land tenure decisions are exactly these types of high-level and strategic decisions that trigger the duty to consult.[37]

Similarly, many Alberta First Nations are also critical of the *Levy Act* and the proposed regime for funding Aboriginal consultation. The broader concerns/criticisms of the new *Levy Act* are twofold. First, the *Levy Act* was enacted with little to no consultation with First Nations, nor was it subject to any real or thorough review. Many First Nations in Alberta only heard of the legislation after it was introduced into the Legislative Assembly, even though they had met with

[36] *Supra* note 18 at page 7.
[37] *Haida, supra* note 1, established the principle that high level, strategic decisions can trigger the duty to consult. Likewise, in *Ross River Dena Council v. Government of Yukon,* 2012 YKCA 14, the Yukon Court of Appeal found that decisions about mineral claims and leases can attract Aboriginal consultation obligations.

government representatives only days before.[38] In addition, the legislation was introduced in the Legislative Assembly of Alberta on May 8, 2013. Second reading began on May 9, 2013, only 24 hours after First Reading. Less than one week later, the *Levy Act* went through and passed Third Reading. Thus, the new legislation only went through six days' review, before being given Royal Assent on May 27, 2013.

Second, the funding arrangement under the *Levy Act* entrenches an outdated colonial relationship between the Crown and First Nations. Under current "arrangements", a First Nation develops an estimate of the capacity funding needed to participate in the consultation process, provides it to the proponent, and the proponent provides the First Nation with an agreed sum of money. Under the new *Levy Act*, the government collects money from the proponent(s) and determines who gets what, and how much. The consultation levy is unilaterally determined by the Minister, meaning that it will not be determined through negotiations with First Nations.[39]

Third, any decision(s) made by the Minister under the *Levy Act* are final and are not subject to review.[40] This unilateral and non-appealable nature of the decision-making about funding for Aboriginal consultation will mean an extremely politicized funding regime, with all the power in the hands of the Crown, which can then penalize First Nations who are "uncooperative" on consultation or on other non-related issues.

Additional and more specific criticisms of the *Levy Act* include the following:

- **Section 1(1)** of the *Levy Act* defines First Nations with reference to the *Indian Act*, which many First Nations find offensive. This definition also does not accommodate the First Nations who are not First Nations as defined by

[38] Taken from Alberta Hansard on Bill 22, Third Reading, p 2473, available online: http://www.assembly.ab.ca/ISYS/LADDAR_files%5Cdocs%5Chansards%5Chan%5Clegislature_28%5Csession_1%5C20130515_1330_01_han.pdf.
[39] S*upra* note 28, s. 3.
[40] *Ibid.* s. 9.

the *Indian Act*, but who do have reserve lands within the province. It also ignores the rights of Métis, in a Province with a significant Métis presence.

- **Section 1(2)** of the Act prohibits the creation of a trust in favour of a First Nation. In effect, the *Levy Act* is saying that the levies collected will not be used for the exclusive benefit of all First Nations and Aboriginal groups. This is contrary to the intention of the Act, which is to increase the capacity for First Nations to participate in consultation.
- **Section 4** provides the monies that *must* be deposited into the fund. These include consultation levies paid by proponents, as well as money from a supply vote appropriated for purposes of the fund. However, the *Levy Act* also provides the Governor in Council with the power to make regulations providing for the imposition of administrative penalties to enforce payment of a consultation levy or for failure to comply with any other provision of the *Levy Act* or regulation. However, according to s. 4, these penalties will not go back into the consultation fund, meaning they may end up in the government's general revenues, and be used for things other than Aboriginal consultation capacity.
- **Section 10(k)** allows the Minister to make regulations exempting any proponent or industry or an entire class of proponents from paying the levy (or from any other provision of the *Levy Act*). The government can therefore determine which proponents or companies pay the levies, and which do not.[41]
- **Lastly**, and importantly, according the Alberta government itself, the *Levy Act* may actually provide *less* money to First Nations than is currently going to First Nations to assist with consultation. The Minister suggested that industry currently provides First Nations with approximately $150 million per year in capacity funding. The amount that the government is intending to levy from proponents under the new Act is $70 million.[42]

[41] *Ibid,* s. 10(k).
[42] *Supra* note 38.

The new Alberta policy and *Levy Act* are an important example of the Crown taking responsibility for shepherding the Aboriginal consultation process, to ensure it occurs correctly, and to impose more certainty and efficiency. However, the content of the *Levy Act* and Policy, and process used to develop them, have ultimately undermined the underlying purpose of Aboriginal consultation, namely reconciliation of the Crown and First Nations' interests, in a process that reflects the "honour of the Crown". As currently framed and rolled out, the Alberta process will not foster reconciliation—it will breed further uncertainty and antagonism. A number of Alberta First Nations are already anticipating legal challenges to the new regime, which is vulnerable in many areas where it is inconsistent with the principles set out in previous decisions by the Courts.

This now-increased risk of litigation over Aboriginal consultation in Alberta is regrettable, and was avoidable. Any Aboriginal consultation process which allows unilateral Crown decisions about the rights of Aboriginal communities, while politicizing and unilaterally controlling the funding process, is doomed to fail as it contradicts the underlying reconciliation purpose of Aboriginal consultation.

IV. Environmental Assessment Reform Leads to Increased Aboriginal Consultation Risks

The past two years have brought enormous changes in the landscape of environmental assessment and protection in Canada. In 2012, the federal government introduced sweeping reforms to federal legislation protecting Canada's environment, fish and waters. Two budget 'omnibus' bills were passed, changing over 70 federal laws (including in some cases repealing entire Acts and replacing them with entirely new legislation).[43]

[43] Bill C-38, an Omnibus Budget Bill passed in spring 2012, changed over 70 pieces of federal legislation, including entirely repealing the *Canadian Environmental Assessment Act* and replacing it with the new *Canadian Environmental Assessment Act 2012* (*"CEAA 2012"*). Bill C-45, passed in fall 2012, amended over 40 pieces of legislation, including repealing protections for most of Canada's navigable waters under the *Navigable Waters Protection Act*.

It is beyond the scope of this paper to review in detail the specifics of the extensive changes to various federal environmental laws.[44] For the purposes of this paper, an examination of the practical impacts of the amendments to the federal environmental legislation is key.

The budget bills repealed the *Canadian Environmental Assessment Act* (CEAA) and enacted an entirely new piece of legislation, the *Canadian Environmental Assessment Act 2012* ("*CEAA 2012")*[45]. Some of the key changes in the new *CEAA 2012* regime include:

- Severe restrictions on the number and types of projects requiring a federal environmental assessment ("EA") as well as the scope of issues to be considered in federal EAs;
- More narrow definitions of environmental impacts;
- Allowing Cabinet discretion to 'remove' a particular component (such as water, fish or birds) from the definition of "environment" (thus also removing any review of impacts in that area);
- Restrictions on who can participate in EA hearings; and
- Imposition of new, strict and much shorter time limits on environmental assessment.

Under the new *CEAA 2012*, Aboriginal consultation obligations are more explicit than under the previous legislation, and require consideration of the effect of a project on Aboriginal peoples':

- health and socio-economic conditions;
- physical and cultural heritage; and
- structures of historical, archaeological, paleontological or architectural

[44] For a good summary of the specifics of the amendments to the federal environmental laws in 2012, see: http://www.ecojustice.ca/files/ceaa-backgrounder-1/at_download/file, and my blog post about the amendments, available at: http://www.oktlaw.com/blog/a-legislative-road-map-as-idle-no-more-revs-up/.

[45] *Canadian Environmental Assessment Act, 2012*. S.C. 2012, c. 19 ("*CEAA 2012"*).

significance.[46]

These changes were enacted to allow for the 'streamlining' and acceleration of federal development approvals for projects. The number and scope of federal EAs is drastically reduced under the new *CEAA 2012* regime, with more projects being reviewed by provincial processes, or undergoing less rigorous and faster, coordinated federal-provincial reviews.

From an Aboriginal consultation perspective, there is a key problem with these changes. In gutting of federal environmental assessment legislation and EA processes, the federal government has removed a vital part of the process by which it was previously discharging key Aboriginal consultation obligations.

On a practical level, EAs have played an important procedural role in examining and addressing the impacts of projects on Aboriginal and treaty rights impacts. In *Haida*, the Supreme Court explicitly found that EA processes can form part of the 'delegated' procedure of Aboriginal consultation, carried out by proponents.[47] Indeed, in *Haida's* companion case, *Taku River Tlingit*, the Supreme Court ruled that fulsome Aboriginal participation in the EA assessment process and the technical aspects of the EA (looking at both environmental and Aboriginal rights impacts) was one of the benchmarks of the adequate Aboriginal consultation found in that case.[48]

There is a significant practical overlap in the process of an EA on the one hand, and review of Aboriginal and treaty rights impacts on the other hand. The technical reviews conducted in EA processes, to determine environmental impacts and necessary mitigation, also help identify impacts on Aboriginal and treaty rights. Impacts on water, land, and specific species (as reviewed in an environmental assessment process) are intimately linked to impacts on the harvesting, cultural and land-use rights of Aboriginal groups. A fulsome assessment of environmental

[46] *Ibid*. 5.1.
[47] *Haida, supra* note 1, at para. 53.
[48] See *Taku River Tlingit, supra* note 4, at para. 2, 12, 22 and 40.

impacts will inevitably go a great distance to assessing impacts of a project on Aboriginal and treaty rights as well.

The new streamlined federal EA process leaves a void. Fewer, less substantial and faster federal environmental assessments mean the Crown and First Nations have significantly less opportunity to use these processes to properly analyze and address impacts of projects on Aboriginal rights. Federal approvals for projects will, however, still trigger the duty to consult impacted Aboriginal groups, and that duty must be discharged regardless of the parameters of a federal EA. But, without more rigorous federal EA's in place, there are questions about how the technical reviews and analysis of impacts of projects on Aboriginal and treaty rights will be properly assessed, so that appropriate mitigation or accommodation can be determined to minimize those impacts.

In addition, under the new process, more projects are now only subject to less rigorous provincial reviews which generally do not require as complete an assessment of a project's impacts as the former federal EA process. *CEAA 2012* also allows the Minister to substitute a provincial process for the federal one (and the federal government has been signing Memorandums of Understanding with the provinces to expedite this process).[49] However, the Minister's decision to substitute provincial EA processes does not negate the obligation of the federal Crown to consult if Aboriginal rights are impacted and any federal decisions regarding project approvals are required. These provincial–only EA processes raise questions about how the federal government can properly consult and accommodate Aboriginal groups if a province is conducting the EA.

The fruits of these changes is now increasingly evident. Recently concluded EAs on major energy projects are triggering litigation by First Nations who are arguing that

[49] Under *CEAA 2012,* Canada and a province can agree to substitute a provincial EA for a federal EA. For instance, in March 2013 the federal government and British Columbia signed a Memorandum of Understanding allowing B.C.'s EA processes to substitute for the federal EA process on a case-by-case basis or for entire classes of projects.

they have not been properly consulted and accommodated regarding the impacts of the projects on Aboriginal and treaty rights. In the past several months, major litigation has been commenced by a number First Nations, responding to federal EA processes, arguing the failure of federal government to properly address Aboriginal consultation concerns (see the list below).

V. Conclusion

The developments above describe a current and escalating drift, in Canada, towards more litigation arising from conflicts over Aboriginal consultation. A number of significant legal challenges have commenced in recent months as a result of failed Aboriginal consultation processes, and this will inevitably lead to more project delays and more economic risks and losses for the Crown, industry and Aboriginal groups.

Just some of the litigation recently commenced includes:

- The Gitga'at First Nation in BC lawsuit regarding the federal EA of the Northern Gateway pipeline;
- The Haisla Nation in BC lawsuit regarding the federal EA of the Northern Gateway pipeline;
- The Gitxaala First Nation lawsuit in BC regarding the federal EA of the Northern Gateway pipeline;
- The Athabasca Chipewyan First Nation in Alberta lawsuit regarding the federal EA for the Shell Jackpine mine expansion;
- The Fort McKay First Nation in Alberta lawsuit regarding Alberta's approval of Brion Energy (and the new Alberta policy which expressly forbids the province's energy regulator from hearing arguments based on Aboriginal rights);

- The Mikisew Cree and Frog Lake First Nation in Alberta lawsuit challenging the amendments made in the aforementioned Omnibus legislation to the federal *Fisheries Act* and *Navigable Waters Acts*;
- The Lubicon Cree's lawsuit against Penn West regarding oil and gas drilling operations, including responses to a recent injunction obtained by Penn West regarding the First Nation's current blockade preventing access to drilling sites;
- The Squamish and Lil'wat Nations' lawsuit against British Columbia regarding the approval of the new Whistler Official Community Plan; and
- Anticipated litigation by Alberta First Nations regarding the new Alberta Aboriginal Consultation Policy and *Aboriginal Consultation Levy Act* described above.

The inability to address the underlying conflicts over Aboriginal and treaty rights, through efficient and just Aboriginal consultation processes, also creates economic risks beyond litigation. There is the potential for significant social unrest when and if Aboriginal communities (and particularly a demographically large and growing population of Aboriginal youth) turn away in disillusionment from the Courts as a mechanism to achieve justice when Court decision do not result in consultation successes.

Ironically, the attempts to constrain the parametres of Aboriginal consultation and standardize processes, as seen in the recent federal initiatives to "get out of the business" of environmental assessment, and in Alberta's new consultation policy and legislation, is leading to more, not less, uncertainty and economic risk. This comes at a time when the federal government intends to invest over $650 million on resource development projects in the next decade.[50] Almost all of the areas targeted

[50] Statement of Greg Rickford, Parliamentary Secretary to the Minister of Aboriginal Affairs and Northern Development, speaking to Bill C-38 on January 31, 2013, as found in the House of Commons Hansard #201 of the 41st Parliament, 1st Session, and available at http://openparliament.ca/debates/2013/1/31/greg-rickford-2/.

for that investment are in regions where Aboriginal and treaty rights (and unsettled land claims) mean that Aboriginal consultation will be triggered.

It is time to return to the underlying task before us in Canada. The fundamental underlying objective of Aboriginal consultation processes, the Supreme Court found, is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions.[51]

The word reconciliation has its roots in the Latin root words *re* ("again") and *consilare* ("make friendly") which in turn is rooted in the Latin words *con* ("with") and *sella* ("seat"). Reconciliation means, quite literally, "coming and taking a seat together again, to make friendly." The reconciliation project has an embedded sense of the need for mutuality in the relationship and openness of heart.

True reconciliation (and resolution of the conflicts over Aboriginal and treaty rights) will not occur until Aboriginal consultation processes reflect the mutual nature of the decisions that must be made, and until the Crown shows a genuine willingness to get on with the project of addressing the rights of Aboriginal groups which pre-exist (and which must be reconciled with) the interests of the Canadian Crown and industry.

[51] Justice Binnie described the task thusly, in *Mikisew Cree First Nation v. Canada*, 2005 SCC 69 at para 1.