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Bearing and Sharing the Duty to Consult and Accommodate in the Grey Areas in Consultation:

Municipalities, Crown Corporations and Agents, Commissions, and the Like

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Introduction

Everyone at this conference is well aware of the Crown's duty to consult and accommodate where called for in respect of Aboriginal peoples' rights and claims (referred to throughout this paper as the duty to consult). This is a constitutional duty. Without delving into all the nuances, the duty arises when the Crown 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] and, in the context of established treaty rights, the Crown also has that duty when its actions could adversely affect those treaty rights.[2]

But what entities are "the Crown" for purposes of this duty, when particular decisions or activities are not made or carried out by entities like Ministries or Departments that are clearly "the Crown"? Do municipalities have the duty to consult? What about crown corporations, and statutory bodies like the Niagara Escarpment Commission, the St. Lawrence Seaway Authority, the Canadian Nuclear Safety Commission, or the Canada Ports Corporation or local port authorities? The role of these bodies is still a grey area in the law of consultation and accommodation.

In this conference, other speakers will be discussing the role of tribunals in light of the leading decision in *Rio Tinto Alcan Inc. et al. v. Carrier Sekani Tribal Council* ("*Carrier Sekani").*[3] This paper also addresses this decision since it is suggested it will have implications for the roles of various commissions when there is a Crown duty to consult, including those commissions that are Crown corporations and/or Crown agents.

No matter who the Crown's duty rests with, the duty must be met

Delegation of executive authority within a particular government ministry or department, by way of delegation from a Minister to responsible officials in the department, is of course commonplace. A Minister (a servant of the Crown and part of the Crown) regularly delegates powers and responsibilities in accordance with authority to delegate which are expressly or impliedly included in a statute, or may do so by way of an Order in Council.[4] The legislature regularly delegates powers and responsibilities to outside bodies through statute. But in the matter of the constitutional duty of Aboriginal consultation, the legal principles normally applicable to the Crown's delegation of powers have not generally been referred to in the developing jurisprudence about who may exercise the duty to consult other than the Crown "proper". Rather, the law regarding delegation by the Crown of the duty to consult and accommodate has followed its own course.

In the process of delegation of the duty to consult, it is obvious the Crown's duty to consult Aboriginal peoples will not disappear. The Crown cannot make its duty vanish, no matter whom it delegates its duty to – whether it delegates to Crown bodies or non-Crown bodies. As the Supreme Court of Canada stated clearly in *Carrier Sekani* when dealing with the particular case

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[1] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*], at para. 35.
[2] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. 2005 SCC 69 (CanLII), 259 DLR (4th) 610, [2006] 1 CNLR 78.
[3] *Rio Tinto Alcan Inc. et al. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Carrier Sekani*].
[4] For a general discussion of delegation of executory authority by the Crown, see Paul Lordon, Q.C., *Crown Law* (Toronto and Vancouver: Butterworths, 1991) [Lordon] at Chapter 2.

of a tribunal charged with deciding whether to issue an approval for an energy purchase agreement, the duty to consult "must be met".[5]

Given that central reality, it is our general view that the ideal way to proceed when the entities that are engaged in carrying out the duty to consult are several – which they almost always will be because at least one Crown entity and the proponent will always be involved – practical discussions should be held early on in order to identify the roles and responsibilities during the process of consultation and accommodation.

Whether a Crown entity could have a duty to consult in a particular case will depend on the unique characteristics of that particular body. There are some general principles that will probably apply, but the legal answer about that body's precise duties will vary in each case. So, in practice, unless there is some court decision about that particular body and that particular type of circumstance, the parties involved in a given situation may not have a clear picture about exactly who is supposed to consult. What to do?

The practical advice we would offer for municipalities and other bodies with delegated powers is: do the most you can within your legal powers to carry out consultation with aboriginal parties where their rights or claims may be affected.

The practical advice for First Nations and other Aboriginal peoples is: don't hesitate to deal with the entity or entities that have the power to make or influence the decisions that could affect your rights and claims. In order to reach the best outcome possible, this means you will need to determine who those entities are and you will need to deal with more than one entity.

The practical advice we would suggest to the Crown itself is: because there will often be several entities that share aspects of the duty to consult (including proponents, when delegation of procedural aspects of consultation occurs),[6] the Crown has to step up to the plate and deal head-on, and pro-actively, with how funding and coordination for this complex consultation and accommodation process will take place.

Unfortunately, the best approach may not always be possible to attain, or it can take a long time to settle on that approach. For example, if the starting point of the Crown and/or the proponent is that the Aboriginal claim is weak or the effect on a right is limited or simply does not exist, while the Aboriginal party maintains its claim is strong or the effects on their rights could be substantial, then working out roles and responsibilities in the consultation and accommodation process in advance will likely be impossible. In these all-too frequent situations, the dispute could end up going to the courts to determine whether there is a duty to consult, and if so, the scope of that duty.

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[5] *Carrier Sekani*, *supra* note 3 at para 63.

[6] Though this paper does not focus on the role of proponents in the consultation and accommodation process, it is often the case that it will be prudent for proponents to deal directly with Aboriginal peoples in order to move their project forward, and prudent for Aboriginal peoples to deal directly with the proponent in order to practically address effects on their rights. Whether and when to have those discussions, and how to establish the framework for how those consultations and accommodations can best be achieved, are of course complex matters and will not be addressed in this paper.

This paper, however, concerns itself not with the question of whether there is a duty and the scope of it, but rather focuses on the question of which entity or entities on the Crown's side of the ledger may bear the duty. Adding to our practical advice offered above, we discuss the legal framework, grey as it is.

Legal Framework – Leading Cases

We start with a brief analysis of two leading cases on consultation, as they provide some general principles that we believe practitioners will continue to see applied in the grey areas. Then we will briefly outline what the courts have said so far about specific types of bodies like municipalities and others.

Haida Nation v British Columbia (Minister of Forests), 2004 SCC 73

Haida is of course a seminal Supreme Court decision on the Crown's duty to consult and accommodate Aboriginal peoples. It lays out a general framework for the duty to consult.

In looking for legal principles to help us with these grey areas in consultation, we can draw some guidance from the section in *Haida* on "third parties"[7]. In *Haida*, the third party was Weyerhaeuser, a private company that held the logging licence in dispute in that case. The Haida Nation had argued that Weyerhaeuser should be held legally responsible for failing to consult, just like the BC Minister of Forests.

The Supreme Court responded with two principles. First, it held that, Weyerhaueser did not hold the legal duty to consult. Ultimately, "the Crown alone remains legally responsible" for the duty to consult and accommodate Aboriginal peoples".[8] So the first principle laid down by the Supreme Court is that the legal duty belongs to the Crown.

But the Supreme Court added a second principle, which is that "the Crown may delegate procedural aspects of consultation".[9] This introduces the concept of delegation, even while the ultimate legal duty may rest with the Crown.

These principles are likely to carry forward to current grey areas of consultation, raising questions about the consultation role of bodies beyond just project proponents. Roughly speaking, *Haida* gives us the following framework for analysis about a given actor's role in consultation:

(1) Is it the Crown? If it is part of the Crown, it remains ultimately legally responsible.
(2) If it is not the Crown, what has been delegated to this body by the Crown?

Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council, 2010 SCC 43

While there have been other important consultation cases since *Haida*, in this paper we will skip over them and go straight to *Carrier Sekani*, a Supreme Court decision released at end of October of last year (2010). *Carrier Sekani* tells us a bit more about delegation in the duty to

[7] *Haida, supra* note 1 at paras. 52-56.
[8] *Ibid.* at para. 53.
[9] *Ibid.*

consult, which helps us analyze the grey areas we are looking at today. In other words, it helps us answer the second question from our *Haida* framework: if the body in question is not the Crown, what consultation roles have been delegated to it from the Crown?

Carrier Sekani spoke about delegation in the context of "tribunals", which are administrative bodies with delegated decision-making powers. In that case, the tribunal at issue was the BC Utilities Commission, which had approved an electricity purchase deal between Rio Tinto Alcan and BC Hydro. The Carrier Sekani Tribal Council argued that the Commission should not have approved the deal because the Tribal Council had been owed a duty to consult and that duty was not met.

The Supreme Court agreed with the Commission's ruling that in fact a duty to consult did not even arise in this case. This issue (about when the duty arises) takes up the bulk of the Supreme Court's decision.

Nevertheless, the Supreme Court also had to consider the Commission's role. Was the Commission itself supposed to consult? Was it supposed to consider the duty to consult and whether it had been met?

Although the Supreme Court's comments use the word "tribunals", in our view the general principles used in *Carrier Sekani* are likely to apply more broadly. Logically, there is no apparently reason why these principles would not apply to other bodies with powers and responsibilities delegated from the Crown, such as municipalities, Crown corporations and agents, various commissions, and in some cases project proponents.

The first principle from *Carrier Sekani* is that the Crown's delegation can be express or implied. When trying to assess a given body's role in consultation, we should look to the relevant statutes for direction, but we cannot limit ourselves to the express language of those statutes. We also need to look for what roles may be implied by the overall purpose and scheme that is laid out.

The second thing we can learn from *Carrier Sekani*, and this is no surprise, is that when the Crown delegates powers, we will need to use a contextual, case-specific approach to figure out where the chips will fall. There is no easy answer. We will need to look at the powers, responsibilities, functions and abilities of each particular body involved to evaluate their role.

The third principle from *Carrier Sekani* is that we should look separately for two different roles in consultation. One role is actually consulting. This role is about getting in touch with affected Aboriginal peoples, engaging with them, identifying and exploring the potential impacts on the rights and claims of those peoples, working out reasonable accommodations where appropriate, etc. Let's call this the "consulting" role. The other role is reviewing whether there was a legal duty to consult and whether it was met. We can think of this function as being more judicial: it is more about assessment than action. Let's refer to this as the "reviewing" role.

Interestingly, the Supreme Court notes that, depending on the body at issue, it might do both consulting and reviewing, one of them, or neither of them. *Carrier Sekani* tells us a bit more – but not much – about how to look for each of these delegated mandates to "consult" and "review".

The consulting role is discussed very briefly.[10] *Carrier Sekani* says that the mandate to consult can be express or implied. The Court says that consulting is "a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise".[11] This gives us some idea about the kinds of functions we would want a consulting body to have. The Court also says that a consulting body needs to have power to actually make some of the relevant changes that come out of the consultation (i.e. it should be able to make accommodations): to quote, it "must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation."[12]

The Court's discussion of the reviewing role comes from the existing law about when tribunals should consider constitutional issues. *Carrier Sekani* confirmed that the Crown's duty to consult Aboriginal peoples is a constitutional duty. So, unsurprisingly, the existing test to assess when tribunals have the power to decide constitutional issues applies in this case. This is the "questions of law" test. In other words, if the body at issue has the express or implied power to decide questions of law, then it has an implied power to decide constitutional issues that are properly before it, unless this power is clearly and expressly removed by the legislature.[13]

Legal Framework – Specific Bodies

In this section, we will examine some specific bodies whose role in consultation remains grey. What has the legal framework indicated thus far about the specific roles of each of these bodies?

A word of caution may be warranted; as the duty to consult is a new and rapidly evolving area of law, this jurisprudence can be expected to continue to shift and evolve.

1. MUNICIPALITIES

Municipalities are creatures of provincial statute. They have a very wide range of powers and responsibilities delegated from the provincial Crown. Their structure and function is governmental in nature.

What kinds of impacts can municipalities have on Aboriginal peoples? It depends on the nature of each project, and the unique circumstances of the Aboriginal peoples affected. A few common examples of adverse impacts in the municipal context are:

- Where land use planning or a particular development project could affect a sacred or cultural site, including a burial ground;

- Where land use planning or a particular development project could limit the exercise of hunting, fishing, and other traditional harvesting rights, either directly (e.g. access, re-zoning, etc.) or indirectly (e.g. environmental impacts on habitat, etc.); and

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[10] *Carrier Sekani*, *supra* note 3 at para. 60.
[11] *Ibid*.
[12] *Ibid.*
[13] *Ibid.* at para. 69, citing *R. v. Conway*, 2010 SCC 22, [2010] 1 SCR 765, at para. 81 and *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585 at para. 39.

- Where land use planning or a particular development project are on lands subject to a land claim of some kind (in other words, a claim that the lands are or should be for the exclusive use and benefit of the First Nation).

It's clear, then, that municipalities will often be key actors in cases where the duty to consult arises, i.e. where contemplated Crown action (even if delegated Crown action) will have a potential adverse effect on Aboriginal or Treaty rights.

What do existing court decisions say about the municipal role? So far, not much. Some cases assume that the municipality does or could have the responsibility for common law Aboriginal consultation.[14] On the other hand, some cases have expressed doubt about the municipal role, because of concerns that the municipality is not "the Crown".[15] Thus far, courts have generally shied away from clear pronouncements on the municipal role in consultation.

What do the Supreme Court's principles say about the municipal role? In our view, based on the principles discussed above, it is quite likely that municipalities will often have a delegated duty to engage in consultation, implied from the delegation of their authority in a given subject matter. If the municipality has the delegated power to authorize a project, and if it has the power to make the changes that would alleviate the adverse effect of that project on an Aboriginal people, then *Carrier Sekani*'s comments about "remedial powers" suggest that this municipality would have the corresponding delegated duty to engage in the consultation and accommodation.

Carrier Sekani also noted that consultation involves "facts, law, policy, and compromise". Municipal governments are adaptable structures with wide-ranging functions, and unlike, say, a quasi-judicial tribunal, they deal regularly with community engagement, facts, law, policy and compromise. So municipalities are often well-placed to consult.

Practically speaking, there are numerous examples where municipalities have taken the advice we gave above, which is to do the most they can within their legal powers to carry out consultation with First Nations and other Aboriginal parties where their rights or claims may be affected. In many cases, municipalities have done this and in doing so they have created win-win outcomes, improved their relationships with their Aboriginal neighbours, and avoided litigation.

In 2009, the Ontario Ministry of Municipal Affairs and Housing published a collection of positive case studies of this kind.[16] This is a good reference for practical ideas.

We will give another short example from our own firm's work. After Michigan declared it would not keep taking Toronto's garbage, the City of Toronto took steps to secure a landfill site in Ontario. In fall 2006, Toronto agreed to purchase the Green Lane Landfill site south of London, Ontario, and in the years since it has dramatically expanded that site in order to handle Toronto's waste.

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[14] *John Voortman & Associates v. Haudenosaunee Confederacy Chiefs Council*, 2009 CanLII 14797 (ON SC); *Kane et al. v Rural Municipality of Lac Pelletier No. 107*, 2009 SKQB 348 at para. 51-59.

[15] *City of Brantford v. Montour et al.*, 2010 ONSC 6253 at para. 58.

[16] Ontario Ministry of Municipal Affairs and Housing, *Municipal-Aboriginal Relationships: Case Studies* (Toronto: Queen's Printer for Ontario, 2009).

This landfill is on the traditional territories of the Oneida Nation of the Thames First Nation and the Chippewas of the Thames First Nation. In fact, the Green Lane Landfill is immediately adjacent to the Oneida Nation reserve, and not far from the Chippewas.

At first, the municipal-Aboriginal relationship was difficult. Toronto had no initial consultation with the communities. Frustrated, in January 2007 the Oneida Nation filed an application for judicial review. It asked the court to quash Green Lane's Certificate of Approval under the *Environmental Protection Act* and to order the City to consult and accommodate.

But the City then changed its course. It decided to resolve things through negotiation, rather than through litigation. By spring 2007, before the City's purchase of the facility closed, both First Nations had reached a Community Benefits Agreement with the City of Toronto that provided for mitigation of the project's impacts and a share in its benefits. The First Nations lent their full support to the project. The litigation was settled out of court, and the parties – now neighbours for decades to come – emerged from the process no longer divided as adversaries.

2. CROWN CORPORATIONS AND CROWN AGENTS

(a) Do Crown corporations and/or Crown agents, as a class of Crown entities, always owe the duty to consult?

If the requirements for the duty to consult are determined to exist with respect to particular Crown conduct, can Crown corporations or agents always be assumed to have a duty to consult where they are involved in the particular Crown conduct or decision? Not necessarily. We believe a more case-specific approach will be required, because of the wide array of Crown corporations and agents.

Crown corporations can range from looking like a government department to looking much more like a private corporation. Why are they created? According to one leading text on Crown law,[17] Crown corporations are created to separate management of activity from continuous partisan intervention, and to provide independence from the financial controls within governmental departments. Some sense of the variety of Crown corporations and their roles can be taken from a general overview of federal Crown corporations.

Federal crown corporations are defined by the *Financial Administration Act*[18] as both "parent Crown corporations", being a corporation that is wholly owned directly by the Crown (Her Majesty in right of Canada) but not including a departmental corporation, and their wholly-owned subsidiaries. In other words, a federal Crown corporation is owned by the Crown.

A review of the statutory provisions does not fully answer the question of whether a Crown corporation would be obliged to carry out the duty to consult. Of note is that s. 88 of the *Financial Administration Act* provides that "Each Crown corporation is ultimately accountable, through the appropriate Minister, to Parliament for the conduct of its affairs."[19] This could argue in favour of the Crown corporation not bearing the duty to consult, as the Minister ultimately

[17] See Lordon, *supra* note 4 at p. 50.
[18] *Financial Administration Act*, RSC 1985, c F-11, at s. 83.
[19] *Ibid.* at s. 88

remains accountable. Alternatively, it could be used to argue that the Crown corporation shares in the Crown's duty.

Section 89 provides that Cabinet can give "directives" to parent Crown corporations where it is in the "public interest" to do so.[20] Could such a directive include directing the Crown corporation to carry out the duty to consult? Conceivably, yes. But, would the absence of such a directive preclude that corporation from having the duty? We would argue not; the function of the corporation, its context, and other circumstances would need to be considered too.

Federal Crown corporations are not all alike in character. There are several types:

- Schedule II:
    - *e.g.*: Canadian Nuclear Safety Commission (CNSC), Parks Canada, Canadian Polar Commission
    - These Crown corporations are established by an Act of Parliament to perform administrative, research, supervisory, advisory or regulatory functions of a governmental nature. Some appear likely to be in situations where they could have a duty to consult. Given their "governmental" functions, it seems fairly likely that these corporations may be required to engage in consultation in fulfilment of the Crown's duty. The CNSC is discussed further below.

- Schedule III, Part I:
    - *e.g.*: Atomic Energy of Canada Ltd., Canada Lands Company Ltd., Corporation for the Mitigation of Mackenzie Gas Project Impacts, VIA Rail Canada Inc.
    - These are generally responsible for management of trading or service operations or for managing procurement, construction or disposal activities on behalf of the Crown. Some are agency corporations and some are proprietary corporations (those that can compete with private corporations). Depending on the powers and context of each corporation, one can easily imagine their involvement in actions or decisions where Aboriginal or treaty rights or claims would be at issue. The Canada Lands Company is discussed further below.

- Schedule III, Part II:
    - Examples include: Canada Post Corp., the Royal Canadian Mint
    - These operate in a competitive market, and are not ordinarily dependent on appropriations for operating purposes. On first blush, it would appear that entities like these would be unlikely to have the duty to consult, because of their degree of removal from government departments. However, at this stage it is too early to know this for sure.

[20] *Ibid.* at s. 89.

There are also other corporations not listed in the Schedules to the *Financial Administration Act* which, though not Crown corporations by definition, have a connection to the Crown. For example, there are subsidiaries not wholly owned by but controlled by the parent Crown corporation, and federal government/private sector owned enterprises.

Statutes can provide that a corporation is, for all purposes of a particular Act, an agent of her Majesty. Courts tend to rely upon those deeming provisions as being conclusive of a corporation being a Crown agent.[21] Agency can also be established by an analysis of whether the corporation is under the *de jure* control of the Crown. The greater the control, the more likely they will be a Crown agent.[22] There are a host of other questions that are considered in determining if an entity is an agent of the Crown.[23]

But does control by the Crown *per se* make an agent capable of or obligated to carry out the duty to consult? In our view, the answer is no. Based on the reasoning in *Carrier Sekani*, it is reasonable to suggest that the question of whether a particular Crown agent might have the duty to consult will turn on the degree to which the agent's powers and functions are suited to the process of consultation, and particularly the question of whether the Crown agent has remedial powers necessary to do what could be required of it in a consultation process. This part of the test for whether a tribunal could have the duty to consult could, we suggest, be applied to any Crown agent because the test derives from the analysis of what consultation is: a complex constitutional process that might involve facts, law, policy and compromise.

Turning now from this general discussion of Crown corporations and agents and whether they might have the duty to consult, we will examine a few cases that have provided some insights into the matter of when a Crown corporation will or will not bear the duty the consult.

(b) Crown corporations engaged in Crown land disposition

In *Squamish Nation et al. v. Minister of Sustainable Resource Management et al.*,[24] the BC Supreme Court considered the duty to consult of the Minister of Sustainable Resource Management and Land and Water British Columbia Inc. ("LWBC"), a Crown corporation that is an agent of government tasked with carrying out activities including disposition of Crown lands, the issuance of land tenures and the administration and licensing of Crown water resources.

The Court in *Squamish Nation* found there was a duty to consult, and it did not distinguish between the responsibilities of the Ministry and the Crown corporation.[25] This is a clear example of where the First Nations had to deal with several Crown entities in order to have its rights and claims addressed.

In Ontario, the Ontario Realty Corporation (ORC) is an agent of the Management Board Secretariat ("MBS") of the provincial government and is responsible for the management and disposition of real property assets of the Province of Ontario. The ORC is required by the *ORC*

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[21] See Lordon, *supra* note 4 at p. 53.
[22] See, for example, *R. v. Eldorado Nuclear Ltd.* [1983] 2 SCR 551.
[23] Lordon, *supra* note 4 at p. 55-56.
[24] *Squamish Nation et al. v. British Columbia (Minister of Sustainable Resource Management) et al.*, 2004 BCSC 1320 (CanLII), [2005] 1 CNLR 347, 34 BCLR (4th) 280.
[25] *Ibid.* at para. 93.

Class EA (for Category "B" undertakings) to, among other things, consult with Aboriginal organizations, as well as individuals, either living in the vicinity or having an interest in the undertaking.

Does it flow from this regulatory requirement that Ontario has determined that the ORC bears and can carry out the constitutional duty to consult if it is disposing of real property assets? Not necessarily. Perhaps the ORC *could* be the entity that, in a particular sale, carries out the duty to consult. On the other hand, the ORC is not well placed to determine the strength of an Aboriginal claim or the existence of treaty rights, and thus assess the level of consultation and accommodation that would be appropriate in a particular transaction. It the case of a sale of real property by ORC, the consultation and accommodation duty might be better carried out by another emanation of the Crown, such as the Ministry of Aboriginal Affairs, or at least carried out in tandem with that Ministry.

Two federal Crown corporations engaged in land disposition – the Canada Lands Company Limited, and its wholly owned subsidiary, Canada Lands Company CLC Limited ("CLC") – have also been involved in litigation on their role, if any, in meeting the duty to consult.[26]

In *Chief Joe Hall*,[27] and *Tzeachten First Nation v. Canada (Attorney General)*[28], the plaintiff communities of the Sto:lo Nation sought declaratory relief that Canada Lands Company Limited and CLC had, along with the Treasury Board and the Minister of Defence, a legal obligation to consult with the First Nations and to accommodate them prior to transferring, selling, or otherwise disposing of lands that CLC and its parent Crown corporation now held.

The facts that preceded the transfer to CLC of the lands in question (the CFB Chilliwack Lands) are complicated but suffice to say that the First Nations had been attempting unsuccessfully, since 1988, to have some of those lands transferred back to them. They had been working at their objective through the specific claims process and through treaty negotiations under the BC Treaty Commission but the dispute had made its way into the courts.

After Canada had transferred the lands to CLC, CLC informed the First Nations that it would not consult at all relating to the CFB Chilliwack lands which it was contemplating transferring to a School Board. CLC told the First Nations that it understood that the Treasury Board was satisfied with the extensive consultation that had occurred *prior to the approval of the transfer of the lands to CLC*. The First Nations then sought to have Treasury Board and DND consult with them, but they did not consult.

In *Chief Joe Hall*, the BC Court of Appeal decided that the BC Supreme Court did not have jurisdiction to consider the application, as the matter was within the exclusive jurisdiction of the Federal Court of Canada. Although Canada Lands Company Limited and CLC had not challenged the jurisdiction of the BC Supreme Court (the challenge came from other federal parties), counsel for the federal Crown agreed during oral submissions that the Federal Court of

[26] Their role is to purchase properties at fair market value from the federal government and then improve, manage or sell those properties.

[27] *Chief Joe Hall v. Canada (Attorney General)*, 2007 BCCA 133, (2007) 281 DLR (4th) 752, [2007] 7 WWR 1, 66 BCLR (4th) 272 [*Chief Joe Hall*].

[28] *Tzeachten First Nation v. Canada (Attorney General)*, 2008 FC 928 (CanLII) [*Tzeachten*].

Canada would have jurisdiction over both Canada Lands Company Limited and CLC (in addition to having jurisdiction over the federal departments).

The matter went to Federal Court, and the Court reached its decision in *Tzeachten* just over a year later, in June 2008. However, the Federal Court did not come to the same conclusion as the Crown had earlier submitted regarding its jurisdiction. Although the Federal Court noted that the Canada Lands Company Limited is a Crown corporation and agent of the Crown,[29] and that CLC was its wholly owned subsidiary, the Federal Court did not decide whether CLC is an agent of the Crown bound by its honour to consult with the First Nations. Instead, the Federal Court concluded that it did not have jurisdiction to grant remedies with respect to CLC because CLC was not a "federal board, commission or tribunal". Thus, the Federal Court's decision effectively meant that the BC courts would have to consider whether the federal CLC had a duty to consult! [30]

The Federal Court had determined that the relevant period for the purposes of assessing whether Canada fulfilled its duty to consult extended over an 8-year period, from the announcement of the closure of CFB Chilliwack to the time when Treasury Board authorized the transfer of some of the CFB Chilliwack lands to CLC. Although it did not expressly say this, we would suggest that, had the Federal Court decided it had jurisdiction to make a ruling about the existence of CLC's duty to consult, given its ruling on the timeline of consultation it likely would have concluded that *in the circumstances* CLC did not bear the duty to consult, because the period for opportunities for consultation had closed.

The following year, in *Brokenhead First Nation v. Canada*,[31] the Federal Court considered another CLC case, this time involving the Kapyong Barracks, in Winnipeg. In *Brokenhead*, the Federal Court was not specifically asked to consider whether the Canada Lands Company Limited had a duty to consult once lands were transferred to it. However, the Court found that a transfer of the lands to CLC would place them out of the reach of the Brokenhead and Peguis First Nations (i.e. if a transfer were to take place to the Canada Lands Company Limited, the lands would no longer be counted as surplus lands that could be available to settle the First Nations' treaty entitlements to land). Therefore, the Court found that the duty to consult must be met during the time <u>before</u> the decision was taken to transfer the Kapyong Barracks to the Canada Lands Company: "It is at this point in the decision-making continuum that meaningful consultation must take place."[32]

The Court seemed to be suggesting that, once the transfer had taken place to CLC, meaningful consultation could no longer take place. So CLC, a Crown agent, might not have had the duty to consult and accommodate in these circumstances.

There are several preliminary comments and conclusions to be drawn from the *Tzeachten* and *Brokenhead* decisions:

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[29] They are declared as such under the *Government Corporations Operation Act*, RSC 1985, c G-4.

[30] On appeal of the Federal Court's decision in *Tzeachten* to the Federal Court of Appeal (*Tzeachten First Nation v. Canada*, 2009 FCA 337 (CanLII)) the decision that CLC was not subject to the jurisdiction of the Federal Court was not appealed (para. 35). The Supreme Court of Canada denied leave to appeal (2010 CanLII 21648 (SCC)).

[31] *Brokenhead First Nation v. Canada*, 2009 FC 982 (CanLII) [*Brokenhead*].

[32] *Ibid.* at para. 36.

- The Federal Court in *Tzeachten* (2008) did not conclude that federal bodies who are not "federal boards, commissions or tribunals" cannot hold the duty to consult. The determination about whether a body constitutes a "federal board, commission or tribunal" only relates to the jurisdiction of the Federal Court.
- It appears to be up to the provincial courts to determine whether the CLC has the duty to consult in a particular circumstance.
- There were other important Crown actors engaged with the First Nations claims in these cases prior to the transfer or planned transfer to CLC. A First Nation would be well advised to try to deal with these other Crown actors in the consultation and accommodation process, and these Crown actors would be well advised to deal with the First Nation's rights and claims, rather than waiting until the transfer to CLC to seek to have the duty met.
- Following on *Carrier Sekani*, whether the CLC might have a duty to consult in a particular case could also depend on whether the CLC would be found to have the "remedial powers" necessary to do what it is asked to do in connection with the consultation process. This analysis has not yet been undertaken by the courts. In fact, no case has yet expressly determined whether the CLC has a duty to consult.
- If there has been a process of consultation and accommodation before the transfer to CLC with a government department, it is possible the Courts will determine that the consultation process has ended once the CLC is in possession of the lands, and will confine itself to asking if the duty to consult was met prior to that transfer, and if not, to send it back to those Crown entities in order to comply with the duty.

We would also suggest one further general point that could be gleaned from considering all of these cases and other ones discussed below: whether or not a particular Crown corporation (or commission or the like) will bear or share the duty to consult (assuming that there is a Crown duty to consult) is not the right question to ask. The better question likely is: does a Crown corporation have the duty *in the particular circumstances*?

(c) Crown corporations that provide utilities

In *Carrier Sekani*, the Supreme Court dealt with the situation of an application to the BC Utilities Commission (a tribunal) for the approval of a contract with a private company (Rio Tinto Alcan) to sell excess power from the Kenney Dam to the British Columbia Hydro and Power Authority ("BC Hydro"), a Crown corporation. Although the Supreme Court did not consider the general question of whether a Crown Corporation could have the duty to consult, it made it completely clear that as a Crown corporation, BC Hydro could be subject to a duty to consult (though in this particular case, it found the Crown did not have a duty to consult at all):

> BC Hydro's proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown.[33]

[33] *Carrier Sekani*, *supra* note 3 at para. 81.

The Supreme Court referred to the questions the Court of Appeal determined the Commission should have asked – "How can a contract formed by a Crown agent [BC Hydro] in breach of a constitutional duty be in the public interest? The existence of such a duty and the allegation of the breach must form part and parcel of the public interest inquiry".[34] The Supreme Court did not take issue with the implicit conclusion of the BC Court of Appeal that BC Hydro as a Crown agent could have a constitutional duty to consult.

The Court of Appeal's decision was overturned by the Supreme Court, but not on the matter of whether BC Hydro could have the duty to consult. The Court of Appeal was also of the view this Crown corporation *could* have had a duty to consult in this particular situation:

> But of greater importance from my position as a reviewing judge is the Commission's decision not to decide whether B.C. Hydro had a duty to consult. It decided that it did not need to address that question because of its conclusion on the triggering issue. As I will explain later, I consider that to be an unreasonable disposition for, amongst other reasons, the fact that B.C. Hydro, as a Crown corporation, was taking commercial advantage of an assumed infringement on a massive scale, without consultation. In my view, that is sufficient to put the Commission on inquiry whether the honour of the Crown was upheld in the making of the EPA. [35]
>
> B.C. Hydro may be able to defend the Crown's honour on a number of powerful grounds, including the impact question, but this should happen in a setting where the tribunal accepts the jurisdiction to make a decision on the duty to consult."[36]

There was no question raised or considered by the B.C. Court of Appeal that the analysis of the question would differ because the entity under consideration as to whether it had the duty to consult – a Crown corporation – was not the Crown *per se.* Rather, the Court of Appeal was of the view that BC Hydro was fully able to "defend the Crown's honour" in this situation. The fact that BC Hydro was a Crown agent[37] played into, but did not determine, the Court's view that BC Hydro was charged with the duty to consult in this situation.

The Supreme Court's and Court of Appeal's view that BC Hydro could have a duty to consult (where such a duty existed at all), and the fact that there was no challenge about this, are not surprising. BC Hydro in fact behaves as though it has the duty. For example, in another case dealing with BC Hydro, *Kwikwetlem First Nation v. British Columbia (Utilities Commission),*[38] BC Hydro had developed a consultation process for a transmission line project proposed by another Crown Corporation, the British Columbia Transmission Corporation. The Court of Appeal ordered the BC Utilities Commission to determine whether the Crown's duty to consult

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[34] *Ibid.* at para. 21.
[35] *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67 (CanLII), [2009] 4 WWR 381, [2009] 2 CNLR 58, 89 B.C.L.R. (4th) 298 (BCCA) at para. 13.
[36] *Ibid.* at para. 16.
[37] *Ibid.* at para. 42.
[38] *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 (CanLII), 308 DLR (4th) 285, [2009] 2 CNLR 212, 89 BCLR (4th) 273.

and accommodate the appellants (i.e. to look at the BC Hydro consultation and accommodation efforts) had been met up to that decision point. [39]

As we know, the SCC concluded in *Carrier Sekani* that the past infringements of the duty to consult could be compensable in damages. In that case, the responsible Ministry had granted the water licence for the hydroelectric development many years before the energy purchase agreement between Rio Tinto Alcan and BC Hydro was negotiated, allegedly infringing Aboriginal interests without prior consultation. The reason we raise this is to once again illustrate the point that the duty to consult in relation to a particular project can reside with different Crown entities at different points in the development and operation of a project. Crown and government-related entities, whoever they may be at a particular point in time in a project's life, need to be vigilant about using their responsibilities to carry out the duty, whenever it arises, as far as their role will take them.

(d) Canadian Nuclear Safety Commission

The Canadian Nuclear Safety Commission (a Crown corporation) is an agent of Her Majesty, and may exercise its powers only as an agent of Her Majesty.[40]

In *Athabasca Regional Government v. Canada (Attorney General)*,[41] the Federal Court decided (among other things) that the Canadian Nuclear Safety Commission had the capacity to carry out the Crown's consultation obligations, and had the ability to assess if the consultation was adequate in the circumstances. In reaching this conclusion, it looked at several factors (but note that this decision preceded *Carrier Sekani*):[42]

- That the Commission is a Crown agent;[43]
- The Commission's mandate, which gave it the power to assess and mitigate environmental, health and safety risks resulting from developing, producing or using nuclear substances; and
- That the Commission had the power to refuse, suspend or revoke or place conditions upon licencees.[44]

In support of its conclusion that a regulatory process such as the one before the Canadian Nuclear Safety Commission could provide adequate opportunity for consultation and mitigation, the Federal Court in *Athabasca* also cited *Brokenhead Ojibway First Nation v. Canada (A.G.)*[45]

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[39] In Newfoundland and Labrador, the provincial Crown corporation dealing with energy resource development, Nalcor Energy, has been engaged in consulting with various aboriginal parties in relation to its proposed Lower Churchill hydroelectric project, which is currently going through a joint federal-provincial environmental assessment before a Joint Review Panel. No cases have proceeded into the courts to determine whether it bears the legal duty to consult, or shares that duty with the Province.

[40] As per the *Nuclear Safety and Control Act*, SC 1997, c 9, s 8(2).

[41] *Athabasca Regional Government v. Canada (Attorney General)*, 2010 FC 948 (CanLII).

[42] *Ibid.* at paras. 191-200.

[43] The court did not say whether this alone was sufficient to give the Commission the power to carry out the duty to consult.

[44] In other words, it could impose and enforce mitigation measures if it so decided.

[45] *Brokenhead Ojibway First Nation v. Canada (Attorney General*), 2009 FC 484 (CanLII), [2009] 3 C.N.L.R. 36 [*Brokenhead Ojibway*].

(different from the *Brokenhead* case referred to above), a trial level decision in May 2009 of Justice Barnes dealing with the NEB.

However, is the CNSC likely to have the duty to consult in view of the reasoning in the *Carrier Sekani* decision? Does it have the necessary remedial powers? It does have the power to impose conditions on a licencee, and also a power to refuse or revoke a licence (e.g. if appropriate accommodation had not been arranged).

On the other hand, those powers must be exercised within its mandate, which extends to environmental, health and safety risks. A question arises about whether the effects on Aboriginal and treaty rights which the Commission can consider are limited to only those arising from those three classes of risks. Some situations, for example, spiritual or cultural activities, may not fit cleanly into those three subject areas. Depending on the circumstances, the CNSC may not have sufficiently broad powers to deal with the full scope of consultation and accommodation. The CNSC obviously needs to participate in Aboriginal consultation processes, but at least in some cases, the ultimate consultation obligation may lay elsewhere.

(e) The National Energy Board

In *Brokenhead Ojibway,*[46] the Federal Court Trial Division addressed some of the same pipeline projects that were the subject of the Federal Court of Appeal's decision in *Standing Buffalo Dakota* (discussed below). In *Brokenhead Ojibway*, the Court framed one of the issues before it as being whether and to what extent the NEB could fulfill the Crown's duty to consult, if the Court determined that such a duty existed. The Court determined, without of course the benefit of the *Carrier Sekani* decision, that the NEB could fulfill that duty, but not in all circumstances:

> I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown.[47] …
>
> I have no doubt, however, that had any of the Pipeline Projects crossed or significantly impacted areas of unallocated Crown land which formed a part of an outstanding land claim a much deeper duty to consult would have been triggered. Because this is also the type of issue that the NEB process is not designed to address, the Crown would almost certainly have had an independent obligation to consult in such a context." [48]

The Court did not use any of the tests that were suggested in *Carrier Sekani* to determine if the NEB had a duty to consult, so the analysis leading to this conclusion may no longer be reliable.

The Federal Court of Appeal decision several months later, in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*[49] in October 2009 did not follow the Federal Court's approach

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[46] *Ibid.*
[47] *Ibid.* at para. 42.
[48] *Ibid.* at para. 44.
[49] *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308 (CanLII) [*Standing Buffalo*].

in *Brokenhead.* Rather, it stated clearly (though it seems the matter was not even argued by any parties before it) that the NEB is not capable of carrying out the Crown's duty to consult. But why did it reach that decision? The Federal Court of Appeal noted the NEB is a quasi-judicial body and when it functions as such, it is not the Crown or its agent.

Is this part of the Court of Appeal's decision[50] – i.e. that the NEB has no duty to consult – still good law after *Carrier Sekani*? Leave to appeal from the Court of Appeal decision was refused in December 2010. However, the Court of Appeal reached the conclusion that the NEB has no duty to consult by relying upon the Supreme Court of Canada's 1994 decision, *Quebec A.G. v. Canada (National Energy Board),*[51] a case predating many of the SCC's subsequent leading cases about the duty to consult. In *Carrier Sekani*, the SCC made no mention of this 1994 decision when it decided what factors a tribunal should satisfy in order to determine if it itself can carry out the Crown's duty to consult. The quasi-judicial nature (or not) of the BC Utilities Commission was not even considered in *Carrier Sekani* when the SCC set out the test for whether a tribunal could be found to have the power to engage in consultation, finding that the test requires consideration of the remedial powers of the tribunal.

It seems clear that the Supreme Court has decided that the power to discharge the duty to consult does not turn on whether a tribunal has a quasi-judicial function or not. Thus, we would argue the question is still open as to whether the NEB could carry out the Crown's duty to consult.

If, however, the rulings set out in the Court of Appeal's decision in *Standing Buffalo* continue to stand with respect to the NEB, it leaves Aboriginal parties in the costly position of having to deal with the proponent, the Crown and possibly also the NEB in order to achieve its objectives with respect to effects on its Aboriginal and treaty rights and claims:

> 1. A First Nation needs to decide if it will participate in consultation with *proponents* who, under the NEB process, are obliged to consult with aboriginal groups to determine their concerns and attempt to address them. As a practical matter, not pursuing consultation with the proponent could leave an Aboriginal party with little power to effect the kind of on-the-ground changes they would wish to see to limit negative effects on their rights and claims. Furthermore, clear accommodation measures can often best be achieved through dealing directly with the proponent.
>
> 2. A First Nation needs to deal with *the Crown* directly in order to have them meet their duty to consult, and if the First Nation believes the Crown failed in its duty, it would only have recourse to the courts, not the NEB, to determine if the duty has been met. This is because the Federal Court of Appeal determined (again, not using the analysis in *Carrier*

[50] The FCA also determined that, thought the NEB had to ensure that a proponent respects aboriginal rights, the NEB was not required to determine whether the Crown had the duty to consult in the particular application for a s. 52 certificate, and the NEB lacked jurisdiction to make that determination where the Crown is the Crown in right of a province, as was the case in the three particular projects.

[51] *Quebec A.G. v. Canada (National Energy Board)*, 1994 CanLII 113 (SCC), [1994] 1 SCR 159 at p. 184. In this case, the Supreme Court found that the quasi-judicial nature of the National Energy Board meant that it had no *fiduciary duty* to consult First Nations. The case was decided based on Aboriginal consultation caselaw frameworks that preceded the seminal *Haida* case, where the Supreme Court laid down the current legal framework for an Aboriginal consultation analysis based on the honour of the Crown.

Sekani) that the NEB has no jurisdiction to determine if the Crown has met its duty to consult.

3. A First Nation may also want to appear before *the NEB* when it is determining whether to issue a s. 52 Certificate of Public Convenience and Necessity to the proponent. The Court of Appeal called the NEB process "a practical and efficient framework within which the Aboriginal group can request assurances with respect to the impact of the particular project on the matters of concern to it."[52]

3. LAND USE PLANNING BODIES (ONTARIO MUNICIPAL BOARD)

In addition to municipalities and Crown corporations, another grey area where questions consistently arise regarding consultation duties is with respect to land use planning regimes. We will look at two examples in the Ontario context: the Niagara Escarpment Commission (a development control board with jurisdiction over a sensitive environmental region) and the Ontario Municipal Board (a land use planning appeal tribunal).

(a) The Niagara Escarpment Commission

The Niagara Escarpment Commission is a small regulatory body established under the *Niagara Escarpment Planning and Development Act*. It deals with certain matters within the Niagara Escarpment Planning Area, which is a defined area of around 2,000 km^2 with its own land use plan, the Niagara Escarpment Plan.

The NEC makes recommendations to the Minister of Natural Resources on amendments to that Plan, and it also deals with development permit applications within the Plan area.

The Commission's powers are fairly limited. It is not clear whether the NEC has powers to consider questions of law and thus *review* consultation. It is not clear whether it has the power to *engage* in consultation either. The responsible Minister for the NEC is the Minister of Natural Resources, and at a minimum it appears that this Ministry could have obligations relating to consultation that arise in matters that come before the NEC. The NEC is, however, knowledgeable, local, and well situated to deal with at least parts of the complex web of "facts, law, policy and compromise" that is referred to in *Carrier Sekani*. Practically speaking, the NEC should be part of any consultation process within its planning area.

(b) The Ontario Municipal Board

The Ontario Municipal Board is established under the *Ontario Municipal Board Act*,[53] and it has a number of powers and responsibilities under that Act, the *Planning Act*, the *Municipal Act*, the *Aggregates Resources Act* and others. Its functions relate mainly to adjudicating disputes in land use planning and municipal affairs.

[52] *Standing Buffalo*, *supra* note 49 at para. 44.
[53] *Ontario Municipal Board Act*, RSO 1990, c O.28.

Section 35 of the *Ontario Municipal Board Act* provides that the OMB has the power to determine questions of law on all matters within its jurisdiction.[54] Therefore, at least in some cases, the OMB will be obliged to consider constitutional issues, including the duty to consult, where these issues are raised on the facts before it.

It is true that the OMB has occasionally, in some of its past decisions, protested that the duty to consult Aboriginal peoples is beyond its jurisdiction[55] – and in one case the Ontario Superior Court agreed with this view.[56] In contrast, in some other cases, the OMB has addressed the merits of consultation arguments (although in our own view, it may not have addressed the merits particularly *well*, but that is another matter altogether).[57] Despite these past cases, however, it seems fairly clear since *Carrier Sekani* that the OMB, as a tribunal with the power to consider questions of law, cannot simply decline to review whether the duty consult was met.

Whether the OMB has a role in actually consulting is less clear. As an adjudicative tribunal, it is not well suited to going out and engaging with Aboriginal communities. The OMB will normally be reviewing appeals of decisions that were made by other bodies, such as municipalities, counties and the Ministry of Natural Resources, reinforcing a conclusion that the OMB is well situated to *review* whether adequate Aboriginal consultation has occurred with respect to a matter before the OMB. This appeal role also lends support to the view that the OMB is not well-suited to the task of consultation itself, because consultation must occur from the earliest stages, not after the fact. However, the OMB does have important decision-making authority, and therefore it has some remedial powers to structure its decisions in ways that can accommodate Aboriginal interests and concerns.

4. DELEGATED TECHNICAL REVIEWS (ONTARIO'S NEW ARCHAEOLOGICAL STANDARDS & GUIDELINES)

In addition to delegating Aboriginal consultation to proponents and various Crown agencies and bodies, the Crown also delegates some aspects of consultation to technical reviewers who are not agents of the Crown. In Ontario, an example is the delegation of archaeological assessments to independent contractor archaeologists. Consultation obligations arising in the archaeology process are an emerging critical concern for First Nations, because of the combination of deeply-rooted Aboriginal cultural sensitivities about respect for burial and cultural sites, and because of the very poor track record of proper consultation in this area.

Under the *Ontario Heritage Act*,[58] Ontario's Ministry of Tourism and Culture is responsible for licensing professional ("consultant") archaeologists. Many development projects require the proponent to hire a licenced archaeologist to conduct one or more archaeological assessments (Stage 1, 2, 3, or 4). The archaeologist's report must be filed and accepted by the Ministry before

[54] See also *Port Colborne v Nyon Oil Inc*., 2010 ONSC 3693 at para. 6: " The Ontario Municipal Board has authority to hear and determine all questions of law or fact within its jurisdiction".

[55] See *Re Town of Fort Frances Zoning By-Law 8-98-G*, 43 OMBR 180 and *Re Prescott and Russell (United Counties) Official Plan Amendment No. 4*, 49 OMBR 36, 2004 CLB 14237.

[56] *Meness v Ontario*, [2005] OJ No 4691, 51 OMBR 385.

[57] See *Kimvar Enterprises Inc. v Simcoe (County)*, [2007] OMBD No 842; *Re Town of Saugeen Shores Official Plan Amendment No. 13*, 58 OMBR 257; *Ontario (MTO) v Garden River First Nation*, 50 OMBR 44.

[58] *Ontario Heritage Act*, RSO 1990, c 0.18. On licencing, see O Reg 8/06.

various kinds of approvals can be granted by the relevant authorities. The nature of the approval and the approving authority depends on the kind of project; for example, the *Planning Act*, *Green Energy Act*, and *Environmental Assessment Act* can trigger archaeological assessments.

The Ministry recently introduced a new version of the *Standards and Guidelines for Consultant Archaeologists*, which came into force on January 1, 2011.[59] This document sets out rules that licenced archaeologists must comply with in their work. The "standards" are mandatory requirements, and the "guidelines" are optional, to be exercised by the archaeologist in accordance with their professional judgment.

The new *Standards and Guidelines* include new rules requiring "Aboriginal engagement". The Ministry also produced a Technical Bulletin that summarizes the provisions on Aboriginal engagement, entitled *Engaging Aboriginal Communities in Archaeology*.[60] The Bulletin does not create additional requirements; it provides a summary and guide to the provisions on this topic in the *Standards and Guidelines*.

The previous rules were from 1993 and had never been updated.[61] They had no requirements on Aboriginal consultation.[62] Prior to the new *Standards and Guidelines*, archaeologists and the proponents they worked for were – arguably – not strictly required by law to do any consultation with Aboriginal communities. They could argue that consultation was purely a matter for the Crown, or the municipality or other parties. However, in practice, a good number of proponents and archaeologists did in fact engage with Aboriginal communities.

The new *Standards and Guidelines* now make it mandatory for licenced archaeologists to engage with Aboriginal communities at specific points in Stage 3 and Stage 4. They also encourage engagement at various points in Stage 1 and 2, and other points in Stages 3 and 4, but consultation at those points is not mandatory.

Before finalizing the new requirements, the Ministry released drafts versions a year earlier. On the one hand, Aboriginal communities said the requirements were not nearly strong enough, and they pointed out that they need resources themselves to participate meaningfully in consultations. On the other hand, many proponents and archaeologists said that the requirements would increase their costs and they fought to have them removed.

Nevertheless, the provisions on Aboriginal engagement have now come into force. What do they mean for the Crown's duty to consult and accommodate Aboriginal peoples?

The Ministry's *Standards and Guidelines* do not define when the duty to consult arises, or what it takes to satisfy that legal duty. The content of the legal duty is defined by the common law, according to the specific circumstances of each case.

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[59] Ontario Ministry of Tourism and Culture, *Standards and Guidelines for Consultant Archaeologists* (Queen's Printer for Ontario, 2010).

[60] Ontario Ministry of Tourism and Culture, *Engaging Aboriginal Communities in Archaeology: A Draft Technical Bulletin for Consultant Archaeologists in Ontario* (Ministry of Tourism and Culture: 2010).

[61] Ontario Ministry of Culture, *Proposed New Standards and Guidelines for Consultant Archaeologists: Important Information for Property Developers* (Presentation) (Ministry of Culture: October 22, 2009). The previous rules were called the *Archaeological Assessment Technical Guidelines.*

[62] *Ibid*.

However, this does not mean the *Standards and Guidelines* are not relevant. They are certainly going to be taken into account in assessing whether the duty to consult is met in any given circumstance. As per *Haida*, the Crown is allowed to delegate procedural aspects of its duty to third parties and allowed to rely on their consultations. So activities that occur pursuant to the *Standards and Guidelines* are relevant and they will be taken into account. But it is important to remember that compliance with the *Standards and Guidelines* will by no means guarantee compliance with the legal duty to consult.

The Crown also has an obligation to actively monitor the process used by archaeologists to implement the *Standards and Guidelines*, to ensure that adequate consultation is occurring on a case by case basis. As the Federal Court found in the recent *Yellowknives Dene v. Canada* case:

> It is not sufficient, even if it occurred in this case, to have a process, framework or some other system to facilitate negotiation. It is still necessary to evaluate the actual implementation and processes specific to the case. It is not sufficient to set up some form of elaborate system and then put it on auto-pilot and hope for success. [63]

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[63] *Yellowknives Dene First Nation et al. v. Canada (Attorney General) et al.,* 2010 FC 1139 at para. 102.

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