A Pragmatic Approach:

The Nunavut Wildlife Management Board and the Duty to Operationalize Consultation

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The author would like to thank Lorraine Land and Shin Imai for their assistance with this article. He would also like to thank Sheryl Sarfin, and his family for their support and their many proofreads. The opinions expressed in this article are those of the author alone and do not represent those of the Ministry of the Attorney General for Ontario or the Nunavut Department of Justice.

The constitutional duty to consult and the application of the duty to administrative and regulatory boards and tribunals has only been minimally explored by jurisprudence. The limited jurisprudence on this topic has found the duty to apply only when boards meet certain criteria.

The focus of this article is the Nunavut Wildlife Management Board and the application of the duty to consult in that context. The author discusses the Nunavut Wildlife Management Board and determines that on the basis of duty to consult jurisprudence, the constitutional duty to consult would not apply to the Nunavut Wildlife Management Board. However the author considers the British Columbia Court of Appeal's recent pragmatic approach to assessing consultation obligations and advocates a pragmatic approach in the Nunavut context. The author ultimately argues that consultation obligations must fall to the Nunavut Wildlife Management Board because on a strict reading of the Nunavut Land Claims Agreement, the Board is the most appropriate locus for consultation to take place.

I Introduction

Since the Supreme Court of Canada's 2004 decision in *Haida Nation v. British Columbia (Minister of Forests)*,[1] the common law surrounding the duty to consult has been expanding quickly. It is now recognized that consultation is an obligation on the Crown that is rooted in the concept of the Honour of the Crown.[2] The expansion of consultation principles since *Haida Nation*, specifically its exclusive application to "the Crown," has led to questions regarding how these principles interplay with administrative and regulatory boards. While the court in *Haida Nation* accepted that the Crown could make use of administrative boards to facilitate consultation,[3] the extent to which boards are obligated to operationalize consultation remains a question. These issues have not yet been substantially addressed by the courts. On some occasions, courts have recognized that regulatory bodies can have a constitutional duty to consult in their political functions. More recently, courts have also recognized that a body with adjudicative functions can have a *duty to decide* on the adequacy of the Crown's consultation with Aboriginal people.

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1 *Haida Nation v. British Columbia (Minister of Forests)* [2004] S.C.J No. 70, 245 D.L.R. (4th) 33 [*Haida Nation*, cited to S.C.J.].

2 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] S.C.J. No. 71, at para. 51.

3 *Haida Nation*, *supra* note 1 at para. 51.

While there is confusion over the extent to which administrative and regulatory bodies are bound to the constitutional duty to consult, the interaction of the constitutional duty to consult and the Nunavut Wildlife Management Board (NWMB) is even murkier. The NWMB is a unique body which is difficult to slot in to any established category of governance and is difficult to analogize with other regulatory or administrative bodies. As Graham White has observed, Aboriginal co-management boards like the NWMB "do not constitute a form of Aboriginal self-government, but neither are they part of the federal or territorial governments."[4] This paper argues that ensuring that meaningful consultation occurs in the context of the NWMB requires the recognition of a different duty—a duty on the NWMB to operationalize and report consultation and potentially accommodate in its recommendations.[5] Such a duty is not the product of traditional constitutional analyses of consultation obligations. Rather it should be seen as a duty stemming from a pragmatic analysis of the *Nunavut Land Claims Agreement* (*NLCA*) and in meeting the objectives of the Agreement. The underlying objectives of the *NLCA* are spelled out in part on the first page of the document and include providing "certainty and clarity of ... rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources ..." The *NLCA* also provides for participatory decision-making rights in wildlife management issues.[6] Under the *NLCA*, Inuit ceded any future claims for rights or title "in and to lands and waters."[7] In exchange, the government of Canada agreed, amongst numerous other things, to assist in the creation of a form of Inuit self-government. This commitment was to come in the form of the public territorial government of Nunavut as well as through the creation of a number of tripartite co-management boards. The boards, known as institutions of public government, were created in order to ensure that Inuit will always have some input into matters that pose eco-systemic or socio-economic concerns to Nunavummiut.[8] Their purpose was to facilitate consultation in a manner that went above and beyond the common law Aboriginal-Crown con-

4 Graham White, "Not the Almighty: Evaluating Aboriginal Influence in Northern Land-Claims Boards" (2008) 61 Arctic suppl. 1. 71, at 72 [White].

5 It should be noted from the outset that the Yukon Court of Appeal's decision in *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)* 2008 YKCA 13, [2008] Y.J. No. 55 [*Little Salmon/Carmacks First Nation*, cited to Y.J.], has been appealed to the Supreme Court of Canada. The Government of Yukon has advanced the argument that no Crown consultation obligations exist beyond those found in the text of modern land claims agreements. Should this argument be accepted by the Court, the thesis advanced by this paper may be rendered moot.

6 Canada, Department of Indian and Northern Development, *Nunavut Land Claims Agreement* (Ottawa: Department of Indian and Northern Development, 1993) online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/agr/nunavut/index_e.html> at 1 [*NLCA*].

7 *Ibid*. Art. 2.7.1.

8 See for example *NLCA supra* note 6, Art. 12.4.2.

sultation requirements at the time. These consultation requirements stemmed from the Supreme Court of Canada's judgments in *R. v. Sparrow*[9] and *R. v. Badger*[10] in which the court concluded that it is necessary for governments to consult with Aboriginal people in order to justify government infringement of Aboriginal rights or title. The institutions of public government include the Nunavut Water Board (Article 8), the Nunavut Impact Review Board (Article 12), the Nunavut Planning Commission (Article 9) and the Nunavut Wildlife Management Board (Article 5). The Nunavut Wildlife Management Board is the focus of this paper.

Section II contains a brief summary of the Nunavut Wildlife Management Board and discusses the common law constitutional duty to consult and will posit that, the duty to consult may require more consultation than that which is spelled out in the NWMB's provisions in the land claims agreement.

Section III discusses the ambiguities in the current state of the law with regard to the constitutional consultation duties of regulatory and administrative bodies, and concludes that the NWMB meets neither of the criteria which courts have used to assess boards and tribunals when considering the existence of a constitutional duty to consult.

Sections IV, V and VI are dedicated to arguing that even if the NWMB cannot be said, on a pragmatic assessment of the *NLCA*, to have a constitutional duty to consult, it should be obliged to take on consultation responsibilities.

Section V considers the nature of the duty on the NWMB, exploring how a court may characterize the consultation obligations incumbent upon both the NWMB and the Crown in the NWMB process.

Section VI engages in a pragmatic assessment of the NWMB. The paper advocates a pragmatic reading of the *NLCA* in order to find a duty on the part of the NWMB to operationalize consultation. To support this argument, the paper explains the implications of the converse situation.

Section VII considers the efficacy of the duty to operationalized consultation.

Ultimately, I conclude that however a court may see fit to characterize the NWMB's duty to operationalize consultation, an NWMB duty to operationalize consultation must be recognized. Such a result is necessary to ensure meaningful consultation and thereby, maintain the Honour of the Crown.

II The Nunavut Wildlife Management Board: A Unique Body

Co-management boards such as the Nunavut Wildlife Management Board are a common feature of most modern land claims agreements in Canada.[11]

9 *R. v. Sparrow* [1990] 1 S.C.R. 107, 570 D.L.R. (4th) 385.
10 *R. v. Badger* [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324.
11 *NLCA*, *supra* note 6.

In general, co-management boards are regulatory structures made up of both government and Aboriginal appointees, the purpose of which is to "facilitate a collaborative relationship that embeds Indigenous participation."[12] Shin Imai suggests that a viable alternative to hard negotiation and litigation is the establishment of a co-management regime to approach governmental regulation and access to indigenous lands and resources.[13]

The Nunavut Wildlife Management Board is a product of the *Nunavut Land Claims Agreement*. The *NLCA* was negotiated between the Canadian government and the Inuit representative organization, Tunngavik Federation of Nunavut (now Nunavut Tunngavik Incorporated). The *NLCA* was signed in 1993 and is a constitutional document under s. 35 of the *Constitution Act, 1867*.[14] As a result of Articles 2.4.1 and 36.1.3(b), the *NLCA* required ratification by legislation in order to be valid.[15] The passage of the *Nunavut Land Claims Agreement Act*[16] provided the *NLCA*'s status as a valid treaty. The Nunavut Wildlife Management Board and other co-management boards created through the *Nunavut Land Claims Agreement* are without a doubt the most sophisticated and complex in the country.[17]

The NWMB is a tripartite institution of public government with a total of nine members.[18] Four of the members are appointed by Inuit organizations and four more are appointed by a combination of the territorial and federal governments. The final member is the chairperson and is appointed by the NWMB itself.[19] While board members are appointed by government and Inuit political organizations and can be removed for cause by the body that appointed the member,[20] in reality members are not directly accountable to their appointers. The NWMB has an independent legal identity and is capable of engaging in litigation in its own name.[21] It is also adamant about the independence of its membership.[22] This membership structure and independence of the NWMB is consistent with other co-management boards created through the *Nunavut Land Claims Agreement*.

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12 *Ibid*.
13 Shin Imai, "Indigenous Self-Determination and the State" (2008) 4 CLPE 5, at 25.
14 *NLCA*, *supra* note 6, Art. 2.2.1.
15 *Ibid*.
16 *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29.
17 For example, see *Little Salmon/Carmacks*, *supra* note 5. The case provides a good example of a co-management regime outlined in a final agreement between the Little Salmon/Carmacks First Nation and the governments of Canada and the Yukon. The co-management boards in the Yukon agreement are not nearly as elaborate as those found in the *Nunavut Land Claims Agreement*.
18 *NLCA*, *supra* note 6, Art. 5.2.1.
19 *Ibid*.
20 *Ibid*. Art. 5.2.5.
21 See for example, *Nunavut Wildlife Management Board v. Minister of Fisheries and Oceans*. 2009 FC 16.
22 White, *supra* note 4 at 78.

While the co-management system in the *NLCA* was created in order to facilitate consultation, consultation jurisprudence that has been decided subsequent to the signing of the agreement, including the seminal *Haida Nation* decision, have changed the legal landscape. Specifically, common law jurisprudence has led to a considerably more thorough conception of the Crown's consultation obligations than had previously existed. It is now clear that infringements on Aboriginal rights are to be conceived of as existing on a spectrum whereby greater infringement necessitates deeper consultation.[23] Under the *NLCA*, the NWMB is able to choose how it should carry out public consultation, including which parties should be able to make submissions and how those submissions are to be made to it.[24] Under the *Haida Nation* test it is not guaranteed that these self-determined public hearing processes will always result in sufficient consultation in all cases of infringement.

In terms of how much consultation is necessary, an argument exists that by virtue of certainty provisions in the land claims agreement, Inuit have given up any future claims in and to lands based on Aboriginal rights or title and any rights associated with title.[25] If this were true, the implication would be that Inuit are not entitled to any consultation beyond those processes spelled out in the text of the land claims agreement. In other words, based on this argument, the Crown could fulfill its constitutional consultation obligations simply by putting its proposal before the NWMB. The NWMB's consultation obligations would then extend no further than what is spelled out by the letter of the *NLCA*; that being a NWMB-determined consultation process. However the Yukon Court of Appeal's decision in *Little Salmon/Carmacks First Nation v. Yukon (Minister of Energy, Mines and Resources)* seems to cast doubt on this interpretation.[26] This case confirms the general consensus amongst government and Inuit actors in Nunavut that constitutional consultation obligations cannot be met simply by putting proposals before the NWMB. In general it is agreed that common law consultation requirements will often necessitate consultation beyond what is spelled out in the land claims agreement.[27] On this point, debate has emerged over the extent to which the NWMB itself

23 *Haida Nation*, *supra* note 1 at para. 43.

24 Under Art. 5.2.23, the Board creates its own by-laws and procedures for conducting hearings and consultations.

25 *NLCA*, *supra* note 6, Art. 2.7.1.

26 *Little Salmon/Carmacks First Nation*, *supra* note 5. The court in this case claimed that there exists a free-standing duty to consult outside of the consultation provisions in the land claims agreement in question. However this case involved a much less complex land claims agreement with a much more basic consultation mechanism, so an argument may still be made that the consultation provisions in the *NLCA* satisfy completely constitutional consultation obligations. This is beyond the ambit of this paper however, and so for the purposes of this discussion, it will be assumed that a duty is owed beyond the land claims agreement's provisions.

27 This statement is anecdotal based on the author's research and discussions with different actors within the Government of Nunavut.

should be bound by these constitutional consultation obligations. The NWMB has denied that it should be so bound and argues that any duties beyond those spelled out in the land claims agreement belong solely to the government. In other words, the NWMB advocates a strict and technical application of consultation duties based solely on those that are textually or constitutionally mandatory. A question then emerges as to whether or not the NWMB can be constitutionally obligated to consult beyond the requirements set out in the land claims agreement. This is best addressed by an assessment of decisions that have held other administrative and regulatory bodies to a constitutional duty to consult.

III Administrative Bodies and the Constitutional Duty to Consult

Thus far there have only been two instances where a court has found that an administrative or regulatory body has a duty to consult. In both of these cases courts recognized that this duty existed in the context of the body's policy-making functions. Though there has been speculation, there has thus far been no litigation discussing whether or not a duty to consult Aboriginal people can be applied to an administrative body exercising a quasi-judicial function.[28]

As noted above, the Nunavut Wildlife Management Board is unique and cannot be classified as either a quasi-judicial or policy-making body. In that sense, the following cases do not provide much guidance as to whether or not the NWMB might be found to have a constitutional duty to consult. However these cases are useful for the guidance they provide as to the legal criteria that a court may look to in assessing whether or not the NWMB might be found to have a constitutional duty to consult.

In *Transcanada Pipelines Ltd. v. Beardmore (Township)*,[29] the Ontario Court of Appeal characterized the commission in question as "political." At issue in *Beardmore* was an order passed by the Greenstone Amalgamation Commission (GAC) which authorized the amalgamation of a number of townships in to one. The GAC was established as a body that was obligated, on the request of a municipality, to create a proposal for the restructuring of municipal political boundaries. This is a legislatively mandated function, and the Commission has no discretion as to whether or not it will perform this function. Noting that there is no decision-making involved in this process, the court characterized it as a "political process," one that is therefore "neither quasi-judicial nor administrative."[30]

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28 The issue is discussed in Morris Popowich, "The National Energy Board as Intermediary between the Crown, Aboriginal Peoples, and Industry" (2007) 44 Alta. L. Rev. 837 [Popowich].

29 *TransCanada Pipelines Ltd. v. Beardmore (Township)* [2000] O.J. No. 1066, 186 D.L.R. (4th) 403 (C.A.), [*Beardmore* cited to O.J.].

30 *Ibid*. at para. 16.

In *Beardmore*, the GAC created a plan for a municipal amalgamation. Several First Nations had been undergoing land claims negotiations in the area around the township. These First Nations appealed the GAC decision on the grounds that the integration of the three townships and the inclusion of surrounding unoccupied land would inhibit the negotiation process. They alleged that the GAC decision was made without reference to the concerns the First Nations had raised and that the Commission had violated its duty to consult.

At the lower court level the judge, in the words of the Ontario Court of Appeal, "superimposed on the legislative scheme a duty on the commission to consult with Aboriginal people whose constitutionally protected rights or land claims might be affected by a restructuring proposal."[31] The Court of Appeal found that the trial judge had done so based on s. 35(1) jurisprudence.[32] Thus the trial judge in essence articulated the duty to consult that would later emerge in *Haida Nation* and superimposed this on to a commission. With regard to the duty to consult, the Court of Appeal, lacking the precedent that would later emerge in *Haida Nation*, denied that the GAC had a duty to consult in this case on the basis that there was no established Aboriginal or treaty right.[33] Ultimately, the Court of Appeal ruled that the court did not have jurisdiction to judicially review the Commission's decision because it was not adjudicative. However, in doing so the Court of Appeal did not explicitly overturn the lower court's finding that a constitutional duty to consult is generally owed by the GAC. Thus *Beardmore* may represent a finding that an administrative body in its legislative or policy-making function can owe a constitutional duty to consult.

Another regulatory board was held to have a constitutional duty to consult in *Saulteau First Nation v. British Columbia (Oil and Gas Commission)*.[34] In that case the British Columbia Court of Appeal held that the British Columbia Oil and Gas Commission had a constitutional duty to consult with Aboriginal people at the fact-finding stage of a licensing approval process. In *Saulteau*, Ryan J.A. found that the Chambers Judge had properly characterized the relationship between the Commission and the Saulteau First Nation as giving rise to a fiduciary duty. The court found that this duty translated into a duty to consult with Saulteau First Nation. However, the Court of Appeal also found that the commissioner had sufficiently met its obligations to the Salteau people at the fact-finding stage of its process. As a result, the court found it unnecessary to comment on whether or not the commission owed a duty to consult at the adjudicative stage of the process.

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31 *Ibid*. at para. 80.
32 *Ibid*. at para. 78.
33 *Ibid*. at para. 119.
34 *Saulteau First Nations v. British Columbia (Oil and Gas Commission)* 2004 BCCA 286, [2004] B.C.J. No. 1182 (*Saulteau* cited to B.C.J.).

Though the above cases hardly represent a significant body of precedent, they do demonstrate that courts may be willing to hold administrative and regulatory bodies to a constitutional duty to consult at least in their fact-finding and policy-making functions. The cases also indicate that the imposition of constitutional consultation duties on a regulatory body likely requires that bodies meet at least two criteria: the body must be characterized as "the Crown," or at least have powers delegated from the Crown, and the body must have final decision-making authority. The Nunavut Wildlife Management Board likely would not be held to meet either of these criteria.

IV Under the Current Case Law the NWMB is likely not "the Crown"

In *Haida Nation* the Supreme Court of Canada stated that procedural aspects of the duty to consult can be delegated to other bodies. The court was amenable to the idea of the Crown delegating procedural consultation responsibilities to private industry.[35] Ultimately, however, the Court concluded that the Honour of the Crown cannot be delegated and that legal responsibility for the duty to consult ultimately falls to the Crown.[36] In keeping with this statement, the Court in *Haida Nation* found that a third-party corporation could not be held responsible for the Crown's duty to consult.[37] What this suggests is that unless the NWMB can be shown to be the Crown, the NWMB cannot be held to have a constitutional duty to consult.[38]

As Michelle Maniago points out, the question of "the ambit of the Crown" has largely been absent from duty to consult jurisprudence.[39] However, in cases involving the duty to consult as pertaining to administrative or regulatory bodies, the courts have inquired in to whether or not the body has been granted legislative powers by the Crown. For example, in *Saulteau* the court noted that under s. 2(5) of the *Oil and Gas Commission Act*, the Commission was "an agent of the government."[40] In *Beardmore* the court implies that the Greenstone Amalgamation Commission's duty to consult was a consequence of the court's characterization of the GAC as a legislated body that could only function in a manner determined by government statute.[41]

35 *Haida Nation*, *supra* note 1 at para. 53.
36 *Ibid*.
37 *Ibid*.
38 Popowich, *supra* note 23. Popowich reaches the same conclusion with respect to the National Energy Board.
39 Michelle Maniago, "A Matter of Hats: Understanding the Ambit of the Crown and the Duty to Consult" (2007) [unpublished paper for Aboriginal Intensive Program at Osgoode Hall Law School] [Maniago].
40 *Saulteau*, *supra* note 34 at para. 5.
41 *Beardmore*, *supra* note 29 at para. 16.

Arguably, the NWMB is distinguishable on a number of important points. For one, the NWMB is not a statutory or legislative initiative implemented by the Crown. Because it is the product of a treaty between the Crown and Aboriginal people, it can be said that the NWMB is a step in the regulatory process born out of the treaty rather than a body on to which the Crown has delegated responsibilities. The responsibilities of the NWMB are not Crown responsibilities that have been passed on to the NWMB. Rather the responsibilities themselves are products of the treaty process as legislatively enacted by the passage of the *Nunavut Land Claims Agreement Act*. As a result of this treaty status, and due to the NWMB's tripartite membership, it would arguably be difficult to characterize the NWMB as the "Crown."

Furthermore, it is clear that the NWMB is not subject to governmental direction or authority. None of the structure, function, or by-laws and regulations of the NWMB can be unilaterally altered by the Minister or the legislature. Rather, as a product of a treaty, the NWMB is constitutionally protected, and any amendments to the procedures in Article 5 would require the agreement of both Inuit and the federal government.[42]

This lack of governmental control over the NWMB process is an important factor in an analysis of the extent to which the constitutional duty to consult affects the NWMB. As Morris Popowich notes, if an administrative body is not "the Crown," it may be an "agent" of the Crown, with agency potentially resulting in the imposition of constitutional consultation obligations.[43] Characterizing the NWMB as an agent of the Crown is difficult under any current jurisprudential test. Most problematic is the fact that the court in *Saulteau* put considerable weight on the fact that the enacting legislation of the Commission explicitly stated that the Commission *was* an agent of the Crown.[44] In direct contrast, s. 10(2) of the *Nunavut Land Claims Agreement Act* states explicitly that the NWMB is not an agent of Her Majesty in right of Canada.[45] On the most basic test for Crown agency then, the NWMB fails.

Nonetheless it is possible that this denial of Crown status under the *Nunavut Land Claims Agreement Act* may not be determinative. An argument could be made that s. 10(2) of the *Act* is solely directed at preventing the NWMB from taking advantage of any Crown immunity or other privileges or for some other specific purpose.[46] Such an interpretation suggests that s. 10(2) would not be determinative of the NWMB's liability. Because of this ambiguity it

42 *NLCA*, *supra* note 6, Art. 2.1.13.
43 Popowich, *supra* note 28 at 840.
44 *Saulteau*, *supra* note 34 at para. 5.
45 *Nunavut Land Claims Agreement Act*, *supra* note 8, s. 10(2).
46 Peter W. Hogg & Patrick J. Monahan, *Liability of the Crown*, 3d ed. (Toronto: Thomson Canada Limited, 2000) [Hogg & Monahan] at 337. Hogg & Monahan discuss limited purposes of Crown agency in the statutory context.

may be necessary to use a common law test in order to determine whether or not the NWMB can be characterized as a Crown agent.

Peter Hogg and Patrick Monahan have spelled out such a test.[47] They note that where there is confusion as to whether or not a corporation or public body should be considered an agent of the Crown, courts have applied a common law "control" test.[48] This test has replaced a "function" test that courts previously applied.[49] Essentially the control test looks to see if a Minister or cabinet has control over a corporation or entity in a similar fashion that a Minister or cabinet may control a government department.[50] If this control test is met, then a court will likely hold that the entity or body is an agent of the Crown and is therefore subject to the same privileges, liabilities and immunities as the Crown.[51] In the context of the NWMB, the Minister has no such control over the NWMB's operations. The Minister only appoints some members to the NWMB and has no say over which representatives from Inuit organizations are appointed.[52] Also, the NWMB has complete control over its processes for hearings.[53] Perhaps most importantly, the Crown cannot unilaterally abolish the NWMB or alter its structure and functions.[54] This lack of governmental control suggests that under the current common law test for Crown agency, the NWMB is neither the Crown nor an agent of the Crown.

The NWMB is not a Final Decision-Maker

Even if somehow the NWMB was deemed to fit the role of "the Crown" or an agent thereof, the NWMB lacks a second common characteristic of administrative or regulatory bodies that have been held responsible for constitutional consultation obligations. In both *Beardmore* and *Saulteau*, the administrative bodies had final decision-making authority. In other words, there was no role for ministerial discretion or interference after the decision of the board had been made. Judicial review was the only recourse in relation to the decisions of these commissions. In *Beardmore*, the GAC's role was to establish a proposal for municipal amalgamation and it had the final authority to issue orders for implementation of this proposal.[55] The only recourse available to complainants such as the First Nation in that instance was judicial review. Likewise, as the British Columbia Gas and Oil Commission at issue in *Saulteau*

47 *Ibid*.
48 *Ibid*.
49 *Ibid*. at 332.
50 *Ibid*. at 334.
51 *Ibid*.
52 *NLCA*, *supra* note 6, Art. 5.2.1.
53 *Ibid*. Art. 5.2.23.
54 *Ibid*. Art. 2.13.1.
55 *Beardmore*, *supra* note 29.

had final decision-making authority in both its fact-finding and quasi-judicial functions, the only recourse was appeal to the court.[56]

The NWMB is more difficult to characterize as a final decision-making body than these jurisprudential examples. Generally speaking, the NWMB process under Article 5 of the *NLCA* is initiated by a submission of proposed regulations to the NWMB by a territorial Minister. Under Article 5.2.26, the NWMB has discretion as to whether or not it holds a public hearing in the matter. Under Article 5.2.23, the NWMB is bound to follow the procedural rules which it has jurisdiction to create under this same article. Consistent with its powers and functions listed under Articles 5.2.33 and 5.2.34, the NWMB has the authority to make any recommendations that it sees fit. It then forwards these recommendations to the Minister, who, under Article 5.3.8, has the option of either accepting these recommendations or rejecting them. If the Minister rejects the recommendations, he or she will provide reasons to the NWMB. Under Article 5.3.12, the NWMB will then reconsider its recommendations in light of those reasons and issue a final decision to the Minister, which the NWMB will make public. The Minister then has three options under Article 5.3.13: he or she can accept, reject or vary the NWMB's recommendations. It is obvious then, that the final legal decision-making authority with respect to wildlife decisions lies with the Minister and not with the NWMB.

On the one hand, this could help the case for imposing constitutional consultation obligations on the NWMB, as the NWMB cannot rely on any kind of quasi-judicial function in order to deny that it has consultation responsibilities.[57] At the same time however, the fact that, technically speaking, the Minister makes final decisions in the NWMB process certainly makes it less analogous to other bodies that have been found to owe constitutional consultation obligations.

From the foregoing it is clear that the NWMB is distinct—on a number of important levels—from those administrative bodies that have been held to owe a constitutional duty to consult. It would thus appear unlikely that the NWMB would be held to this constitutional duty. On a strict reading this means that the NWMB does not have any consultation responsibilities beyond those found in the guidelines and policies that it sets out for itself.[58] This leaves the Minister with sole responsibility for ensuring that adequate consultation and, potentially, accommodation takes place with the appropriate Aboriginal parties. As we will see, the practical result of this situation is that

56 *Saulteau*, *supra* note 34.

57 Popowich, *supra* note 28, explains that even under the new conception of the duty to consult being born out of the Honour of the Crown as opposed to fiduciary duties, boards with quasi-judicial functions may still not be liable for those duties when they would interfere with a board's judicial functions.

58 *NLCA*, *supra* note 6, Art. 5.2.23.

the effectiveness of the consultation process is limited. If the NWMB cannot be held to a constitutional duty to consult, a pragmatic assessment, taking into account the practical realities of consultation obligations, suggests that a separate duty to operationalize and report consultation should be imposed on the NWMB.

The "Duty to Decide" and the Courts' more Pragmatic Approach to Duties

As noted above, the Supreme Court of Canada, in *Haida Nation*, stated that, while the Crown could delegate consultation responsibilities to administrative and regulatory bodies,[59] "the ultimate legal responsibility for consultation and accommodation rests with the Crown."[60] In making this statement, the Court was attempting to ensure that the Crown cannot abdicate its responsibilities to Aboriginal people by "privatizing" its duties to industry or other non-Crown entities. These statements have been interpreted to preclude any kind of consultation obligations on administrative or regulatory bodies that do not meet the criteria of "the Crown."[61] However, in the context of what has been referred to as the "administrative state,"[62] confining the obligations of regulatory and administrative bodies to a strict analysis of rigid constitutional criteria is unhelpful. The diversity of administrative regimes in terms of structure, function and jurisdiction means that adopting a rigid analysis of the responsibilities of these bodies will not necessarily translate into the optimal functioning of the regime. Complex regulatory systems will sometimes necessitate a more pragmatic approach for the imposition of different duties on regulatory boards in order to facilitate and ensure effective Crown consultation. Such an approach was recently adopted by the British Columbia Court of Appeal when it recognized and enforced the *duty to decide*.

In two recent cases the British Columbia Court of Appeal has held that the British Columbia Utilities Commission is under a constitutional duty to decide on whether the Crown's consultation obligations have been adequately discharged.[63] In doing so, the court demonstrated an approach to its analysis that de-emphasized the technical test for consultation duties. Rather, the major focus of both of the court's recent decisions was that "there is no other forum more appropriate [than the Commission] to decide consultation issues in a

59 *Haida Nation*, *supra* note 1 at para. 51.
60 *Ibid*. at para. 54.
61 See Maniago, *supra* note 39.
62 Colleen M. Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery Publications, 2008).
63 *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)* 2009 BCCA 67, [2009] B.C.J. No. 259 at para. 35 [*Carrier Sekani*, cited to B.C.J.]; *Kwikwetlem First Nation v. British Columbia (Utilities Commission)* 2009 BCCA 68, [2009] B.C.J. No. 260 [*Kwikwetlem*, cited to B.C.J.].

timely and effective manner."[64] In other words, the courts pragmatically recognized that the Commission had a duty to decide on the issue of consultation.

In *Carrier Sekani*,[65] BC Hydro had entered in to a contract to purchase surplus electricity from a company with a number of hydroelectric generators downstream from the traditional lands of the Carrier Sekani. BC Hydro needed approval from the BC Utilities Commission in order for the contract to be enforceable. In its decision, the Commission declined to decide whether or not BC Hydro owed a duty to consult to the Carrier Sekani. The Court of Appeal found that the Commission had been regularly declining to decide Aboriginal consultation issues in its hearings. The court rejected the Commission's argument that it had no jurisdiction in the matter and held that the Commission had a duty to decide on the adequacy of Crown consultation.[66]

Kwikwetlem[67] was released concurrently with *Carrier Sekani*. In *Kwikwetlem* the British Columbia Court of Appeal built on the decision in *Carrier Sekani*, holding again that the Commission had a duty to decide the issue of the adequacy of Crown consultation. However, in a holding more relevant to the NWMB context, the court also decided that the Commission's passing on of this decision to a federal Minister, who had to sign off on an environmental review of the same project was insufficient to discharge this duty. In *Kwikwetlem*, a hydroelectric line was to be extended over lands of the Kwikwetlem First Nation. As part of the regulatory process, the Commission was to determine whether or not the proposal posed a significant environmental risk. If the Commission concluded that it did, it would pass the proposal on to a federal environmental review board, the result of which review would have to be approved of by the Minister. Part of the environmental review process involved assessing the consultation that had taken place with affected Aboriginal peoples. The Commission argued that it was not required to assess the adequacy of the Crown's consultation as the environmental review process would take care of this aspect under the auspices of a Minister. The court ruled that, in fact, the Commission did have a responsibility to decide on the issue of consultation and that interactive consultation and, potentially, accommodation must take place "at every stage of a Crown activity that has the potential to affect Aboriginal interests."[68] In order to ensure that this consultation occurred meaningfully at every stage of the process, the court found that it was necessary for the Commission to consider the issue of consultation and to decide on it. In other words, if BC Hydro's duty to consult was to be given meaning, the court had to recognize a corollary "duty to decide" on

64 *Ibid*. at para. 42.
65 *Ibid*.
66 *Ibid*. at para. 51.
67 *Supra* note 63.
68 *Ibid*. at para. 62.

the part of the Commission. Consequently, the court recognized the Commission's duty to decide based on its finding that "there is no other forum more appropriate to decide consultation issues in a timely and effective manner."[69]

A more recent decision of the Federal Court of Appeal has arguably neutralized the approach that the court took in *Kwikwetlem* and *Carrier Sekani*. In *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc*.,[70] the Court considered three appeals from decisions of the National Energy Board (NEB) which granted approvals to three pipeline projects. The appellant, Dakota First Nations, had expressed concerns that their unextinguished Aboriginal and self-government rights were threatened by the projects. Thus the appellant argued that as a result of the Supreme Court of Canada's decision in *Haida Nation*, they were entitled to Crown consultation. The NEB declined to decide the issue of whether or not a duty to consult arose. In holding that the NEB was not obligated to decide the issue of whether a duty to consult was owed by the Crown to the Dakota First Nations, the Court distinguished *Kwikwetlem* and *Carrier Sekani*. First, the Court distinguished *Kwikwetlem* on the basis that the Commission in that case had accepted that it was under what it called a *Haida* duty to consult and therefore the question of whether the Commission owed any duties to the First Nation was not before the Court. Additionally, the Court held that in both *Kwikwetlem* and *Carrier Sekani*, the parties had accepted that the proponent corporations before the Commission were Crown agents. In contrast, in *Standing Buffalo Dakota* the Court held that all of the proponent corporations in the case before it were private companies and that, therefore, the NEB did not have an obligation to decide whether Crown consultation obligations existed.[71]

The Federal Court of Appeal in *Standing Buffalo Dakota* moved away from the pragmatic approach of the British Columbia Court of Appeal and looked to traditional factors, such as the NEB's role as a quasi-judicial body, to determine that no duty to decide was owed. The Court engaged in no analysis as to whether it made practical sense to obligate the NEB to decide if *Haida*-type consultation was required on the part of the Crown. On the contrary, the Court in *Standing Buffalo Dakota* advised that if a First Nation in a given case feels that they have not been adequately consulted in a given project, the appropriate route is to address these concerns through the courts.[72] The Court went on to encourage First Nations to continue using the NEB process despite the fact that the Court refused to impose any duties to decide on Crown consultation. This is precisely the type of approach that should be avoided. It

69 *Ibid*. at para. 42.
70 *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc*. [2009] F.C.J. No. 1434 (C.A.) [*Standing Buffalo Dakota*, cited to F.C.J.].
71 *Ibid*. at paras. 32-33.
72 *Ibid*. at paras. 30 and 43.

is an approach that de-emphasizes the effectiveness of administrative boards and tribunals in the consultation process and stands in stark contrast to the pragmatic approach taken in *Kwikwetlem* and *Carrier Sekani*.

Despite the misgivings of the Federal Court of Appeal, the pragmatic assessment taken in determining the "duty to decide" in *Kwikwetlem* and *Carrier Sekani* is warranted in the context of operationalizing consultation in the NWMB review process. As the remainder of this paper will demonstrate, on a practical assessment of the Nunavut Wildlife Management Board, the NWMB is the most appropriate forum for consultation to take place in a "timely and effective manner."[73] Consequently, a corollary of the Crown's duty to consult—a duty to operationalize consultation, whether constitutional or non-constitutional—should be found to apply to the NWMB.

V The Review Process with No Operational Duty on the Part of the NWMB

At this point, it is worthwhile considering the impacts of a holding that the NWMB owes no common law consultation duties whatsoever. That is, the NWMB is not obligated to fulfill any consultation requirements. In this scenario there are three opportunities in the NWMB review process for the Minister to consult Inuit with regard to regulatory proposals. The first such opportunity is during the drafting of the proposal prior to its being sent to the NWMB for review. After the Minister has submitted the proposed regulations to the NWMB for review, the NWMB will undergo its review process by conducting public consultations and preparing recommendations for amendments to the regulations. During this phase of the review process the regulations are out of the Minister's control.

The second opportunity comes after the NWMB's first consideration of the proposed regulations. The Minister is given the recommendations of the NWMB and can opt to either reject or accept those recommendations. Two aspects of the NWMB process make questionable the practical viability of consultation here. First, questions arise as to whether or not the Minister is even permitted to consult at this phase. The agreement is clear that at this stage the NWMB is not to make its recommendations to the Minister public.[74] While it is true that this provision does not explicitly constrain the Minister's ability to disclose the content of the NWMB recommendations, the provision could suggest that at this point in the process it is intended that these recommendations remain private. If constitutional consultation obligations cannot be placed on the NWMB, then the Minister will have to disclose the recom-

73 *Kwikwetlem*, *supra* note 63 at para. 42.
74 *NLCA*, *supra* note 6, Art. 5.3.8.

mendations at this stage in order to independently ensure that consultation has taken place with the appropriate Inuit communities. This would, in essence, render moot the non-disclosure provision in the agreement. Even assuming that the Minister is allowed to consult at this stage beyond any consultations that the NWMB has already undertaken, a second potential practical problem with consultation occurring at this point in the process is the time constraint imposed by the agreement.[75] Unless the Minister applies for and is granted more time by the NWMB, the Minister has only 30 days after receipt of the NWMB's recommendations before he or she must decide to either accept or reject those recommendations.[76] The Minister has only this 30-day window in which to assess the adequacy of the NWMB's consultation efforts and to fill in any gaps in consultation that the Minister determines are necessary. This is a very limiting time period, particularly in the context of Nunavut where Inuit communities are often remote and lack the infrastructure for instantaneous communication.

In the event that the Minister does not feel that consultation or accommodation has been adequate during the NWMB process to this point, the Minister can only reject the NWMB's recommendations and articulate why the recommendations were rejected. The Minister's aforementioned lack of control over the NWMB means that the Minister is incapable of demanding that the NWMB take particular steps to ensure that consultation has taken place adequately with the correct parties.

If the Minister does not accept the proposal after the second stage, there is a third opportunity for the Minister to consult after the NWMB has carried out the second review. At this time, the recommendations of the NWMB may be made public.[77] The Minister again must determine whether or not the NWMB adequately consulted and accommodated the appropriate organizations and communities and may reject or vary the NWMB's recommendations. This is the final stage in the NWMB review process. Again, unless the NWMB grants extra time, the Minister's decision must be made within 30 days of receiving the NWMB's recommendations.[78]

Looking strictly at the provisions of the land claims agreement, it would appear at this stage that the Minister has absolute discretion over the proposal, particularly because of the Minister's ability to vary the recommendations. However the decision to reject or vary the recommendations of the NWMB is a very serious one. In order to obtain a sense of the significance of such a decision, it is worth considering that the land claims agreement articulates that one of the NWMB's functions is to "approve plans for management of ...

75 *Ibid*. Art. 5.3.11(a).
76 *Ibid*.
77 *Ibid*. Art. 5.3.12.
78 *Ibid*. Art. 5.3.11(a).

wildlife."[79] Additionally, the land claims agreement uses the term "final decision" to characterize the NWMB's recommendations to the Minister.[80] These terms reflect the NWMB's role as "the main instrument of wildlife management in the Nunavut Settlement Area," and as the "main regulator of access to wildlife."[81] Thus, while legally the Minister appears to be free to do as he/she pleases with the recommendations of the NWMB, the practical reality is quite different. In practical terms the Minister is quite confined by the political optics of making policy in spite of the recommendations of the NWMB, and by the consequent threat of judicial review of such decisions. As Graham White notes in his assessment of territorial co-management boards, the boards represent a reverse of the "usual political calculus."[82] He observes that whereas, generally, advisory boards must expend political capital in the hopes that their recommendations will be taken in to account, the government in this case must expend enormous political resources in order to reject or modify the board's recommendations.[83] In White's first-hand research with several members of a northern co-management board that he chose not to name, the members noted that "in practice, rejection or modification of a decision [of the board] carries with it a high political risk ..."[84] While this is not a hard and fast rule and there have been instances in which the Minister has rejected the NWMB's suggestions,[85] generally speaking, Ministerial rejection of NWMB recommendations entails risks.

The legal and political risks involved in the Minister's treatment of the recommendations of the NWMB were demonstrated in *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans)*.[86] In that case, NTI successfully challenged a decision of the federal Minister of Fisheries and Oceans to extend turbot quotas that would affect areas within the jurisdiction of the land claims agreement. NTI alleged that the Minister had failed to adequately consider the recommendations of the NWMB. The trial court agreed with NTI and set aside the Minister's decision. The court ruled that the land claims agreement mandated "meaningful inclusion of the NWMB in the Governmental decision-making process before any decisions are made."[87] The Federal Court of Appeal upheld the trial judge's decision to overturn the

79 *Ibid*. Art. 5.2.34.
80 *Ibid*. Art. 5.3.13.
81 *Ibid*. Art. 5.2.33.
82 White, *supra* note 4 at 74.
83 *Ibid*.
84 *Ibid*. at 75.
85 For example in a 2009 ruling in which the Minister rejected the NWMB's recommendation for polar bear harvesting quotas.
86 *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans)* [1997] 4 C.N.L.R. 193 (F.C.T.D.) [*Nunavut Tunngavik*].
87 *Ibid*. at 211.

Minister's decisions, but downplayed the legal significance of the NWMB's decisions.[88] However it should be noted that the NWMB's recommendations in this case stemmed from Article 15, the Marine Areas provisions of the land claims agreement, as opposed to the general provisions of the NWMB under Article 5.[89] The role of the NWMB under Article 15 is much weaker and imposes far fewer procedural obligations on the Minister than does Article 5. The Minister has much greater legal capacity to overturn recommendations of the NWMB under Article 15 than he or she does under Article 5. However, regardless of the legal precedent that one takes out of the *Nunavut Tunngavik* case, they are indicative of the practical realities of the NWMB. Even in the context of NWMB decisions under weaker provisions such as Article 15, a Minister will very likely face judicial review and lengthy legal battles if he/she declines to accept the NWMB recommendations.

VI A Pragmatic Assessment and the Need for an Operational Duty

A rigid analysis of the duty to consult does not consider the practical implications discussed above that the placement of consultation obligations will have on the consultation process. The British Columbia Court of Appeal in *Carrier Sekani* and *Kwikwetlem* seems to recognize as much by taking a purposive approach to its analysis of where particular duties should fall. However, the court does not provide substantial guidance as to what such a purposive approach should be.

Writing in the context of administrative and regulatory regimes, W.A. Bogart proposes useful guidelines adapted from L. Salamon for such an analysis. Using these guidelines provides us with an assessment of the practical capability of a regulatory system to achieve its goals.[90] In order to undertake this pragmatic assessment, Bogart suggests the use of a non-exhaustive list of essential criteria for the assessment of regulatory strategies.[91] Arguably, the three most significant criteria are effectiveness, efficiency and legitimacy.[92] The following section will evaluate the consultation process on these criteria when the NWMB is not obligated to take on some operational consultation responsibilities. It will argue that placing operational consultation obligations with the NWMB provides for a much more effective consultation process.

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88 *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans)* [1998] 4. F.C. 405, 162 D.L.R. (4th) 625 (C.A.).

89 *NLCA*, *supra* note 5, Art. 15.

90 W.A. Bogart, "The Tools of the Administrative State and the Regulatory Mix", in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond Montgomery Publications, 2008) at 40 [Bogart].

91 *Ibid*. at 41-42.

92 *Ibid*.

A pragmatic assessment allows us to evaluate the implications of the place-ment and non-placement of consultation obligations on the NWMB as opposed to the purely technical determination that obligations fall with the Crown and only the Crown. Shin Imai advocates a similar pragmatic approach in evaluating Crown-Aboriginal negotiation. He finds it much more useful to evaluate the success of Crown-Aboriginal negotiations on the "merits of the result," as opposed to the arrival at an agreement.[93] Hence, the next section will posit that a technical approach that imposes consultation obligations only where the constitutional duty to consult can be found has the potential to create results that are counterproductive to the underlying principles and goals of consultation. A pragmatic approach shows that the NWMB is the most appropriate place for consultation to be taking place in the wildlife management process.

Effectiveness

The first criterion that Bogart identifies in the assessment of regulatory strategies is arguably the most significant one. While Bogart acknowledges the difficulty of determining how to define "effectiveness,"[94] in the context of the consultation with Aboriginal peoples, jurisprudence has established some minimum standards for the content of consultation. The extent to which these minimum standards are met by a given system of consultation provides an excellent foundation for an assessment of the efficacy of that system.

The judicial theme running through most cases dealing with the content of consultation is the notion that consultation must, at a minimum, be carried out in such a way that accommodation can be achieved where it is appropriate. This principle was made clear by the British Columbia Court of Appeal in *Halfway River First Nation v. British Columbia (Ministry of Forests)*.[95] In that case the court stated that the purpose of the duty to consult is to ensure that Aboriginal people "have an opportunity to express their interests and concerns and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action."[96]

This statement was based on a more definitive statement that had been made previously by the Supreme Court of Canada in *Delgamuukw v. British*

93 Shin Imai, "Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes" (2003) 41 Osgoode Hall L .J. 587-627 at 593 [Imai, "Sound Science"].

94 Bogart, *supra* note 90 at 41.

95 *Halfway River First Nation v. British Columbia (Ministry of Forests)* [1999] 64 B.C.L.R. (3d) 206 (C.A.).

96 *Ibid*. at para. 160.

Columbia.[97] The Court in *Delgamuukw* described a spectrum of consultation and explained that even when only the bare minimum of consultation is required, it must be done in such a way that it attempts to facilitate Aboriginal concerns. As the Court stated, "even in … rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue."[98]

In *Haida Nation*, the Supreme Court of Canada reiterated its comments in *Delgamuukw*, stating that consultation must always be meaningful and that in order to be meaningful it had to be done with the intention of altering plans in order to incorporate and address the concerns of Aboriginal people.[99] Interestingly, the Court in *Haida Nation* found that the Crown in that case had sufficient practical capacity to consult meaningfully and, if necessary, to alter forestry proposals. On this basis the Court found it unnecessary to impose the duty to consult on third parties. An argument had emerged before the Court that denying that a third-party private corporation had a duty to consult would render the duty to consult meaningless. The Court found that the government in that case had legislative authority over forestry harvesting and that therefore the duty to consult would not be "hollow and illusory."[100]

As will become clear, if the NWMB is not held to some kind of operational duty to consult, then the content of consultation with Aboriginal peoples in Nunavut will be negatively affected. For one, as previously noted, unless special arrangements are permitted by the NWMB, the Minister's 30-day time constraint for consideration of the NWMB's recommendations creates consequent time limits for consultation to take place and obvious practical concerns for consultation. Additionally, the political consequences of the Minister varying or rejecting the recommendations of the NWMB greatly limit his or her ability and motivation to alter the NWMB's recommendations in any significant way. Thus, by the time the Minister has the opportunity to consult affected Aboriginal communities, the NWMB's decision is already in hand and the clock is ticking on the Minister's decision. The pressure will be on the Minister to approve of the regulations and avoid as much political and legal trouble as possible. The recommendations of the NWMB will, in essence, be a "done deal." Such a scenario is likely to result in government consultation undertaken as a legal formality, not with any legitimate intention of substantially altering the proposal. As Timothy Huyer has opined, consultation

97 *Delgamuukw v. British Columbia* (1997) 3 S.C.R. 1010, S.C.J. No. 108 (*Delgamuukw* cited to S.C.J.).
98 *Ibid*. at para. 168.
99 *Haida Nation*, *supra* note 1 at para. 42.
100 *Ibid*. at para. 56.

carried out in such a manner may be legally sufficient in many cases, but is inconsistent with the Honour of the Crown.[101]

Obliging the NWMB to take responsibility for operationalizing consultation is also the only way to fulfill the principle recently articulated by the court in *Kwikwetlem* that "the Crown's obligation to First Nations requires interactive consultation and, where necessary, accommodation, at every stage of a Crown activity that has the potential to affect their Aboriginal interests."[102] It is clear that due to the NWMB's mandatory role in reviewing and altering ministerial proposals, the NWMB review process can properly be characterized as a stage of a Crown activity. Because the Minister has no authority to determine what the consultation process of the NWMB is, it is impossible to ensure that consultation and, potentially, accommodation occurs at every stage of the regulatory process. If the NWMB is not obliged to operationalize consultation, there is no guarantee that the consultation principle from *Kwikwetlem* will be realized in practice.

Finally, it is important to distinguish the NWMB from the consultation mechanisms available in the circumstances which gave rise to *Haida Nation* and which formed the basis for a technical approach to the Crown's constitutional duty to consult. On the facts in *Haida Nation*, the alternative to a Crown consultation obligation was either a privatized consultation process or no consultation process at all.[103] There was no tripartite board already in existence through which consultation could be carried out. Thus, it was ideal to place the duty to consult with government bureaucrats in that factual scenario. In the context of this paper, creating a situation in which the NWMB is responsible for the majority of consultation and negotiation presents a preferable alternative for realizing meaningful consultation that was not available on the facts in *Haida Nation*.

As a neutral third party with Aboriginal participants, the NWMB is the ideal place for consultation to be taking place. This finding is supported by a number of authors who point out the potential for neutral third parties and co-management boards to provide for more productive negotiations. Timothy Huyer argues that direct consultation and negotiations between the Crown and Aboriginal people can often be characterized as adversarial and lacking in trust.[104] To Huyer, the strengthening of joint review boards such as the Nunavut Wildlife Management Board would help to alleviate this problem.[105]

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101 Timothy Huyer, "Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation" (March, 2006) 21 *W.R.L.S.I.* 33, at 40.
102 *Kwikwetlem*, *supra* note 63 at para. 62.
103 *Haida Nation*, *supra* note 1.
104 Huyer, *supra* note 101 at 43.
105 *Ibid*.

Likewise, Shin Imai argues that the use of neutral third parties as a means of carrying out Crown-Aboriginal negotiations will assist in creating a more equal power dynamic between the consulting parties. Imai also argues that the use of neutral boards to negotiate can facilitate the longer-term goal of helping establish a consistent pattern for the relations between the Crown and the First Nation, in this case, Inuit.[106] Imai advocates that courts nudge Aboriginal and Crown parties toward increasing their use of such neutral systems.[107] Holding the NWMB responsible for operationalizing consultation would do precisely that.

Efficiency

The second criterion on which Bogart suggests administrative systems should be assessed is the system's efficiency.[108] This can include economic and monetary efficiency, but of course efficiency can also refer to more intangible costs such as time and energy. If the duty to consult rests solely on the Minister in the wildlife management process, this essentially requires the establishment of parallel consultation mechanisms. The first such mechanism is of course the NWMB process itself as mandated in the land claims agreement. In addition to this mechanism, the placement of common law consultation obligations solely on the Minister would require that the government also establish a parallel bureaucratic mechanism. This second mechanism would have to ensure that constitutionally adequate consultation had taken place at the NWMB level and then to fill gaps in consultation where it was determined that consultation or accommodation had been lacking. In purely economic terms, this would add considerable expense to the regulatory process, money that would be better spent on much-needed social programs.

Secondly, parallel consultation mechanisms will, in many cases, result in duplicative consultation of Inuit organizations and communities as government bureaucrats attempt to ensure that regulation of wildlife will not be legally challenged. Aside from the very obvious problems of wasted time and resources inherent in consulting doubly, parallel consultation mechanisms are inconsistent with what Suluk and Blakney suggest were the original Inuit conceptions of the land claims agreement.[109] This has direct implications on another of Bogart's assessment criteria, the legitimacy of the process.

106 Imai, "Sound Science", *supra* note 93 at 608.
107 *Ibid*.
108 Bogart, *supra* note 90 at 42.
109 Thomas K. Suluk & Sherrie L. Blakney, "Land Claims and Resistance to the Management of Harvester Activities in Nunavut" (December 2008) Arctic 61.4 (Dec. 2008) 62 at 66 [Suluk & Blakney].

Legitimacy

Bogart identifies that it is crucial that an administrative system has legitimacy within the population it intends to regulate.[110] This basic theory is confirmed in the context of Nunavut by Suluk and Blakney, who suggest that hunters and other harvesters in the territory are beginning to resist attempts at oversight by either the government or the institutions of public government.[111] Suluk and Blakney attribute this resistance to a number of fundamental inconsistencies between co-management of wildlife and other environmental resources in the territory and the Inuit conception of what the land claims agreement represents. Specifically, they note that thus far the co-management system of regulation and monitoring of Inuit land-based harvesting has been inconsistent with the desire of Inuit to feel free and in control of their resources.[112] Suluk and Blakney suggest that bureaucrats and researchers are seen to be hounding and attempting to control Inuit communities and, as a result, the regulations and systems that they represent have lost legitimacy amongst Inuit hunters and trappers.[113] It is clear, then, that a dual scheme of consultation featuring non-integrated and often repetitive bureaucratic information-gathering in Inuit communities would only continue to delegitimize the wildlife management process in the eyes of Inuit. Such a result is inconsistent with one of the very objectives of Article 5 of the *NLCA*, which is to promote public confidence in the wildlife management system, particularly amongst Inuit.[114]

Alternatively, if the NWMB is obliged to fulfill consultation responsibilities, there is a much greater potential for the creation of a streamlined process without a multiplicity of actors. In the long-term such a development represents the potential for facilitating "integrated management planning on a consistent basis," something that Suluk and Blakney consider important in establishing and maintaining engagement of Inuit in the co-management system.[115] In this sense, the argument that Bogart's efficiency and effectiveness criteria are best realized by obligating the NWMB to consult is inextricably linked with the argument based on Bogart's legitimacy criteria.

Tying in to the legitimacy of the system is the certainty that a system with established consultation obligations would provide for all of the parties involved. Recognition that the NWMB is obligated to fulfill consultation and, potentially, accommodation during the review process would provide consistency for Aboriginal as well as governmental parties. It would solidify the NWMB's role as the central body through which consultation would take

110 Bogart, *supra* note 90 at 42.
111 Suluk & Blakney, *supra* note 109.
112 *Ibid*. at 66.
113 *Ibid*. at 68.
114 *NLCA*, *supra* note 6, Art. 5.1.3(b)(v).
115 *Ibid*. at 68.

place, thereby creating a regulatory review system that is "consistent, thorough, and pan-governmental."[116] Isaac and Knox maintain that providing such a high level of certainty in a system of consultation is important if it is to be considered legitimate from the perspective of the general public.[117]

VII The Source of the Duty to Operationalize Consultation

While the British Columbia Court of Appeal demonstrated a more pragmatic approach to establishing consultation obligations, the imposition of a constitutional duty arguably still hinged on the court's finding that the Commission was a "Crown entity."[118] As this paper has made clear, there are many features of the NWMB which would make it difficult for a court to characterize it as the "Crown" or a "Crown entity." Thus, if the duty to operationalize consultation is to be considered a constitutional duty, a court would need to articulate a test for what constitutes a Crown entity. It would then need to establish that the NWMB, as a unique, treaty-based body, could be characterized as a Crown entity with constitutional duties. In short, the unique NWMB context may require that a court re-evaluate how the jurisprudence has traditionally searched for constitutional consultation obligations. It is beyond the scope of this paper to thoroughly grapple with this issue; however, some possible sources of such a duty are discussed below.

This paper has argued that the NWMB is unlikely to be considered a Crown agent in the eyes of a court. However, the possibility that co-management bodies created by treaty can have constitutional consultation obligations should not be ruled out despite their non-Crown status. By virtue of the constitutional status of treaties, courts may have a strong basis for attributing constitutional consultation obligations to independent boards and tribunals created by treaty. If a treaty is read with a view to establishing the stage of the process at which consultation is best placed, then constitutional obligations may be incumbent on that entity. In searching for where constitutional consultation obligations should fall, courts should read treaties with a mind to where consultation can most meaningfully and effectively take place.

The *NLCA* is a constitutional document under s. 35 by virtue of Article 2.2.1.[119] One of the central purposes of the document, as articulated in its General Provisions is, among many other things, "to provide certainty and clarity of ownership and use of lands and resources."[120] Further, according to

116 Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alta. L. Rev. 49 at 59.
117 *Ibid*.
118 *Carrier Sekani*, *supra* note 63 at para. 56.
119 *NLCA*, *supra* note 6, Art. 2.2.1.
120 *Ibid*. General Provisions.

the principles of Article 5 of the *NLCA*, the wildlife management system (of which the NWMB is the central feature) must be effective and complement Inuit harvesting rights and priorities.[121] Article 5 also highlights that Inuit must have a role in the wildlife management process and that this role must be effective.[122] These provisions essentially provide that the wildlife management process in the *NLCA* is to feature a means of effective consultation with Inuit. In order for this consultation to be optimally effective, the NWMB should be the body responsible for it. If this argument is accepted, then it follows that a strong case can be made for a constitutional duty to operationalize consultation to fall to the NWMB.

Alternatively, a court may find that the NWMB cannot be constitutionally obligated to operationalize consultation. If this is the approach taken by the court, the NWMB's lack of Crown status does not obviate the duty to operationalize consultation. Rather, a court seeking to determine whether the Crown in a given situation has adequately consulted with Inuit still must look to the NWMB because, as will be discussed, it is the locus of where meaningful consultation must take place. If a court is unable to find that the NWMB can be constitutionally obligated to operationalize consultation, the constitutional burden may fall to the Crown to take a more active role in the NWMB process. Because the NWMB is the place where consultation must take place in order to be meaningful, as in *Carrier Sekani* the maintenance of the Honour of the Crown is dependent upon appropriate consultation taking place at this stage. This means that the Crown may be obligated to oversee and monitor the NWMB's consultation process and to support it by sharing staff and information resources and to assist in determining which communities need to be consulted. It also potentially mandates that the Crown provide additional funding to facilitate the consultation process. Even if co-operation between the Crown and the NWMB in this regard is actually occurring, an obligation is necessary to ensure that the process works effectively. As was demonstrated above, if the NWMB process does not result in adequate consultation, the Crown's duty to consult will likely not be met. In short, if the NWMB is not the Crown then a pragmatic reading of the *NLCA* nonetheless mandates that the NWMB operationalize consultation. At the same time, it is arguable that a constitutional obligation upon the Crown exists which requires it to facilitate the NWMB in this process.

This second approach that a court may take to the duty to operationalize consultation admittedly opens a potential floodgate; if the Crown is obligated to fund and support consultation on the basis of the NWMB being the most practical place for consultation to take place, then is the Crown obligated to

121 *Ibid*. Art. 5.1.2(e).
122 *Ibid*. Art. 5.1.2(h).

fund and support consultation at every stage in which consultation is best placed in the process? For example, it is arguable that, in many cases, consultation is best situated between private companies and First Nations. Under this line of reasoning, the Crown could be obliged to fund and support this consultation. In addition, the Crown could be so obliged in order to maintain the Honour of the Crown. This would be an unmanageable burden. A court in articulating the constitutional duties concerning the operationalizing of consultation in the NWMB context must be careful to highlight the unique nature of the NWMB and other treaty-based boards and tribunals.

The context of co-management boards such as the NWMB is vastly different from that of private industry. For one, the NWMB's role is the setting of harvest quotas and the management of wildlife resources. The specifically tailored role of the NWMB, and of co-management boards more generally, serve distinct purposes that were agreed to by the Crown when negotiating modern land claims. Arguably, it is therefore incumbent upon the Crown to ensure that this process is effective. In contrast, the Crown's Honour is less directly at stake in relations strictly between private industry and First Nations. A court must be sensitive to the unique context of independent co-management boards and their distinction from other actors which also do not fit the definition of the Crown. Hence, the considerations above and the pragmatic approach advocated for in this paper suggest solutions to the highly specific problem of independent co-management boards and the application of constitutional consultation obligations to them.

However a court may choose to characterize the consultation obligations, a pragmatic reading of the NWMB's role in the *NLCA* demands that consultation obligations of some kind must be found at the NWMB level.

VIII Conclusion

Clearly, the legal landscape since the Supreme Court of Canada's decision in *Haida Nation* has expanded to the point where some light is being shed on the extent to which the constitutional duty to consult can effect administrative boards and tribunals. While this emerging area of law is starting to generate some answers to lingering questions, the inapplicability of these precedents to particularly complex or unique administrative mechanisms has the potential to create problems. The Nunavut Wildlife Management Board is a good example of where the problems of inapplicability are very clear. As this paper has demonstrated, the NWMB cannot be characterized as "the Crown," and it does not have final decision-making authority, two characteristics that are likely to be important in the determination of where constitutional consultation obligations can be found. While it is uncertain whether the NWMB can be held to a constitutional duty to consult, practical considerations dictate that

this should not preclude the application to the NWMB of a duty to operationalize consultation.

In this context, the pragmatic approach recently recognized in two cases from the British Columbia Court of Appeal is useful. Both of these cases recognized a constitutional duty to decide on whether Crown consultation had been adequate. Decisions of the British Columbia Utilities Commission were at issue in both cases. The court took a pragmatic approach to the issue in both cases and decided that the duty to decide applied because the Commission was the best place for that decision to take place.

Taking a cue from the "duty to decide" cases, this paper has striven to show that a court should take a pragmatic approach to determining whether or not the NWMB should have a duty to operationalize consultation.

On the issue of effectiveness, if the NWMB is not held to a duty to operationalize consultation, the NWMB review process enshrined within the land claims agreement leaves very little capacity to realize one of the central principles of meaningful consultation. Specifically, the NWMB process creates a situation whereby the Minister's ability to enter in to negotiations with Aboriginal people with the intention of substantially altering the NWMB's recommendations is diminished. Additionally, unless the NWMB has a duty to operationalize consultation adequately, there is no way to guarantee the realization of the notion from *Kwikwetlem*, that Aboriginal people must be consulted at every stage of a regulatory process that has the ability to affect their interests.

In terms of efficiency, a duty on the NWMB must be realized in order to prevent the use of parallel consultation mechanisms which will represent both a poor use of resources and the potential to have conflicting results of consultation. More importantly it will represent a situation that is at odds with what many Inuit communities desire—less bureaucratic monitoring.

Ultimately this glut of bureaucratic contact is detrimental to the third criteria, the legitimacy of the process. This lack of legitimacy results in Inuit boycotts and resistance to wildlife management. In the alternative, imposing a duty to operationalize consultation, either constitutional or non-constitutional, on the NWMB creates certainty over which bodies are responsible for which functions. Such certainty is vital for public confidence in the wildlife management system.

The duty to consult as it applies to treaty-based co-management boards such as the NWMB is a topic that is largely unexplored in both academia and jurisprudence. Traditional jurisprudence surrounding non-treaty-based boards and tribunals suggests that courts will look to certain factors to determine if responsibility for consultation should fall to the board or tribunal. The NWMB, as a board which arguably does not meet these criteria, requires that a court take a pragmatic approach. A court considering this question should undertake

an assessment of where consultation should take place in order to make the process effective and consistent with the Honour of the Crown. In the case of the NWMB, an analysis of where in the board's process consultation can practically and effectively take place indicates that the NWMB should have a duty to facilitate or operationalize consultation. Whether a court finds this duty to be constitutional or non-constitutional in nature, a pragmatic approach clearly suggests that a consultation process that maintains the Honour of the Crown requires such a duty be found.