

Recognition and Reconciliation: An Alberta Fact or Fiction?

The Duty to Consult in Alberta and the Impact on the Oil and Gas Industry

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The centre of the Aboriginal people's livelihood and worldview is their special relationship with the land and its resources. However, increasingly rapid resource development threatens their future relationship with the land and the environment. Despite the Governments of Canada owing both private and public fiduciary duties to Aboriginal people, the devastation of the land continues without their rights and views being fully considered. Nowhere is this more prevalent than in the province of Alberta. While the

law regarding the duty to consult has been spoken to by the Supreme Court of Canada and various courts and tribunals outside of Alberta, establishing that the duty exists within Alberta in the natural resource context continues to be a battle.

The author examines the law accumulating in surrounding jurisdictions regarding the duty to consult Aboriginal groups in the natural resource context; how the Alberta government, courts and tribunals have responded to the developing law; and what impact this may have on the oil and gas industry. The author infers that the profitability of Alberta's plentiful resources and the conservativeness of the territory, exemplified most strongly by the government, have thus far prevented recognition of the duty. The law and justice demand more.

I INTRODUCTION

Canada's Aboriginal people have enjoyed a special relationship with the land and its resources since time immemorial. Over the past century the Aboriginal lifestyle has sustained severe damage because of natural resource development despite the Crowns' fiduciary obligations to Aboriginal peoples. *The Constitution Act, 1982* protects Aboriginal rights and has given rise to a large body of common law that interprets these rights and sets the standard that the Crown is required to meet to fulfill fiduciary obligations towards Aboriginal groups. A necessary procedural requirement of meeting the Crown's obligation is the duty to consult Aboriginal groups that may be affected by legislation or projects that have the potential to infringe their constitutionally protected rights.

Oil and gas exploration and land development impacts all aspects of Aboriginal rights because the land is central to First Nations' identity. The recent *Report of the Royal Commission on Aboriginal Peoples* devotes substantial time to the relationship Aboriginals have with the land and its resources. The core of the Aboriginal worldview is the belief that the land and resources are living things that deserve and require the utmost respect and protection.¹

Land is absolutely fundamental to Aboriginal identity ... land is reflected in the language, culture and spiritual values of all Aboriginal peoples. Aboriginal concepts of territory, property and tenure, of resource management and ecological knowledge may differ profoundly from those of other Canadians, but they are no less entitled to respect.²

1. Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (Ottawa: Communication Group, 1996) at 436 [hereinafter *Royal Commission*].

2. *Ibid.* at 425.

Unfortunately, these concepts have historically not been honoured. Resource development has caused damage, displacement and distress resulting in the increasing difficulty of maintaining Aboriginal lands and livelihoods as development expands.³ Because of the extreme importance of the land to Aboriginal people and the fact that the governments of Canada owe fiduciary duties to Aboriginal groups, the developing duty to consult must be strictly adhered to.

The focus of this article is on Alberta, where unique conditions exist making an examination of the developing duty to consult in the natural resource context a worthy endeavour. The Conservative Klein government is riding a high tide of support, now in its third consecutive term, enjoying access to billions of dollars in yearly oil and gas revenue.⁴ Increased technology and government desire have tremendously increased the amount of development going on in Alberta, especially in the North where conflict with the Aboriginal way of life is inevitable.⁵ The government and industry have strong financial reasons for maintaining the status quo. The disparity in the wealth and resources of Aboriginal groups as opposed to non-Aboriginal stakeholders is formidable, as are the implications for both government and industry when the duty to consult is more fully recognized.

The purpose of this article is to examine what the law is, how Alberta has responded and what impact this may have on the oil and gas industry. Not only does the duty to consult exist in Alberta, but the Alberta government's failure to meet this duty could have potentially disastrous effects for the future of Aboriginal people, private industry and the environment itself. Part II of the article outlines the origin of the duty to consult and what triggers the duty. Part III explores the nature and scope of this duty by reference to the developing case law in neighbouring treaty jurisdictions, with a particular focus on the natural resource sector. Part IV examines the development of the doctrine in Alberta and discusses the failure to recognize the duty to consult Aboriginal peoples within the province. Finally, Part V of the article outlines the potential consequences to

3. *Ibid.* at 425 and 849.

4. See Alberta Government, News Release, "Alberta remains in a strong position to handle global economic slowdown" (21 November 2001), online: <http://www2.gov.ab.ca/home/news/dsp_feature.cfm?lkFid=72>; TD Economics, "Government Finances" (12 October 2001), online: <<http://td.com/economics/finances/ab01.html>> which reports \$10.6 billion in resource revenue for the year 2000 and an average yearly revenue of \$5-6 billion. On Premier Klein's support see: B. Duckworth, "Main Story" *The Western Producer* (1 March 2001), online: Forest Watch web site <http://www.producer.com/articles/20010301/special_report/20010301/klein_main.html> (all date accessed: 19 February 2002).

5. For a look at the increase in and distribution of conventional oil and gas development in northern Alberta see: "Conventional Oil and Gas Wells," online: <<http://www.forestwatchalberta.ca/oil/wells.html>> which reports well over 100,000 active wells as of 1998. These figures do not include the development of an estimated 1.6 trillion barrels of crude bitumen in the northern oil sands region. See Alberta Energy web site, online: <<http://www.energy.gov.ab.ca>> (date accessed: 19 February 2002).

third parties involved in the oil and gas industry and offers some helpful suggestions to ensure their investments are as secure as possible.

II ORIGIN OF THE DUTY

A Private Law Fiduciary Duty

Damage to the Aboriginal way of life has occurred despite the fiduciary duty owed to Aboriginals by the federal and provincial governments. Before 1982 it was undisputed that the federal government owed a private law fiduciary duty to Aboriginal peoples because of its special relationship with them. The source of this is the *Royal Proclamation of 1763*,⁶ which has been interpreted by the courts as a Crown undertaking to protect Aboriginal peoples by mandating that Aboriginal land interests are inalienable except to the Crown. Thus the Crown established a unique fiduciary relationship, requiring of itself the highest responsibility known in law.⁷ The same private duty has also been held to apply to the Alberta provincial Crown since the *Alberta Natural Resources Act, 1930*.⁸ In *R. v. Badger* the Supreme Court held that “the effect of para. 12 of the *NRTA* is to place the provincial government in exactly the same position which the federal Crown formerly occupied.”⁹ Therefore, the province has had the same private law duty not to unjustifiably infringe Aboriginal rights protected by treaty since 1930. This private duty continues to exist and applies to the Alberta government and on federal reserve lands. In the context of oil and gas, Indian Oil and Gas Canada attempts to meet the federal duty on reserve land. Breaches of this private fiduciary duty have resulted, and will continue to result, in astronomical compensation to affected Aboriginal groups.¹⁰ In Alberta the government has, for the most part, either denied the existence of the duty or ignored it.

6. *Royal Proclamation, 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1.

7. *R. v. Guerin*, [1984] 2 S.C.R. 335 at 376, 382-384. See also M. McDonald, “The Fiduciary Duty in Aboriginal Law and Crown Considerations” (Conference on Business with First Nations and the Fiduciary Duty, Pacific Business & Law Institute, 5 June 2000) 3-1 for general discussion.

8. *Alberta Natural Resources Act, 1930* (U.K.), 20-21 Geo. V, c. 3 s. 12, reprinted in *Constitution Act, 1930*, Sch. II [hereinafter *NRTA*]. This document has constitutional protection.

9. *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 96, online: QL (SCJ) [hereinafter *Badger*].

10. See *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344 where \$147,000,000 was awarded to the Band when the federal government conveyed the Band’s reserve land not withholding the mineral rights for lease. See also N. Bankes & L.D. Rae, “Recent Cases on the Calculation of Royalties on First Nations Lands” (1999) 38 Alta. L. Rev. 258 at 260.

B Public Law Fiduciary Duty

In 1982 the *Constitution Act* created a public law fiduciary duty that requires the Governments of Canada to protect and preserve Aboriginal rights:

s. 35(1) The existing [A]boriginal and **treaty rights** of the Aboriginal peoples of Canada are hereby recognized and affirmed.¹¹

Section 35 has been held to protect various types of Aboriginal rights, including distinctive customs and practices integral to an Aboriginal group's culture engaged in prior to European contact;¹² Aboriginal title to land exclusively occupied and in continuous use since 1867;¹³ and treaty rights encompassing cultural and territorial interests.¹⁴

The public law fiduciary duty implies both negative and positive duties to fulfill the obligation. The government must restrain itself from enacting legislation or acting in a manner that infringes upon Aboriginal rights. And it must take positive steps to protect these rights when any regulation or third party proposal threatens to interfere with them.¹⁵ The courts have confirmed

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11. *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter Section 35] [emphasis added].
 12. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, online: QL (SCJ). Collectively called "Aboriginal rights," which vary along a spectrum in their connectedness to the land, see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 138ff, online: QL (SCJ) [hereinafter *Delgamuukw*]. Aboriginal rights that are asserted must be proven in court. See discussion of Aboriginal and treaty rights in T. Campbell & M. Wyatt-Sindlinger, "Consultation: The Law and Process" (Conference on Oil and Gas Development and Exploration and Aboriginal Interests, Pacific Business & Law Institute, Calgary, 29 November 2001) at 1-5; and P. Macklem, "The Crown's Duty to Consult: The Current Legal Landscape" (Conference on First Nations, The Environment and Development: The Emerging Duty to Consult, Canadian Bar Association, 29 January 1999) at 3-5.
 13. A form of Aboriginal right, Aboriginal title is the collective right to the exclusive use and occupation of a tract of land; see *Delgamuukw, ibid.* at paras. 112-117. Again, Aboriginal title must be proven in Court.
 14. Most of Ontario, portions of British Columbia and the Northwest Territories, and all of Manitoba, Saskatchewan and Alberta are covered by numbered treaties. They generally provide that the Aboriginal adherents will "cede, release and surrender" the described land in exchange for a set-aside reserve for the group's use and benefit and treaty rights over the *whole tract of ceded land*, which include "the right to pursue their usual vocations of hunting, trapping, and fishing." The wording also indicates that treaty rights may be subject to government regulation for conservation purposes or the excepting of tracts, "as may be required or taken up from time to time for settlement, mining, lumbering, trading." See discussion of Treaty 6 in *R. v. Horse*, [1988] 1 S.C.R. 187; Treaty 7 in *R. v. Breaker* (2001), 280 A.R. 201 at para. 361 (Prov. Ct.), online: QL (AJ) [hereinafter *Breaker*]; and Treaty 8 in *Badger, supra* note 9. Treaty rights involve mutually binding obligations, in writing and oral understanding, specifically recognized in Section 35; the existence of which, should not have to be proven in court.
 15. M.M. Litman, (Fiduciary Duty Lecture, Faculty of Law, University of Alberta, 8 October 2000) [unpublished].

that the public law fiduciary duty applies to the provincial Crown regarding Section 35 rights.¹⁶

C Triggering the Duty

The courts recognize that Aboriginal rights are not absolute and must be reconciled with other rights, but have held that any infringement must be justified. Since 1982 neither level of government may infringe upon Aboriginal rights unless the infringement furthers a compelling and substantial objective, and the infringement must be consistent with the fiduciary relationship that exists between the Crown and Aboriginal people.¹⁷ To be consistent with the governments' fiduciary obligation, certain procedures follow to uphold the honour of the Crown. These procedures include: giving priority to the Aboriginal right in relation to other rights; minimal impairment of the right to achieve the desired objective; fair compensation in situations of expropriation; and the duty to consult affected Aboriginal groups.¹⁸

The Supreme Court of Canada as well as some of the lower courts and tribunals have discussed the duty to consult at length. The duty arises whenever a Crown action would have the effect of infringing constitutionally protected Section 35 rights. If the facts of a given set of circumstances demonstrate the existence of an Aboriginal right and a possibility of infringement, the Crown is bound by the duty to consult.¹⁹ The

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16. *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] B.C.J. No. 1880 (C.A.), online: QL (BCJ) [hereinafter *Halfway Appeal*]. See also *Gitanyow First Nation v. Canada*, [1999] B.C.J. No. 659 at para. 46 (S.C.), online: QL (BCJ) [hereinafter *Gitanyow*]. Held "there is only one Crown" and that the Crown is not, nor has it ever been, divisible.
 17. First acknowledged by the Supreme Court of Canada in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, online: QL (SCJ) [hereinafter *Sparrow*] and most recently in *Delgamuukw*, *supra* note 12 at paras. 160-162 and often referred to as the "*Sparrow*" test of justification. First, the claimant must establish that the Crown action has the effect of interfering with an existing Aboriginal right, that is, the action is unreasonable if it imposes undue hardship, or it denies the holder of the preferred means of exercising the right. Second, the Crown must prove that the infringement is justified by establishing (1) valid government objectives and (2) that fiduciary and procedural duties are met. Conservation and resource management are considered valid objectives (*Sparrow*, *ibid.* at paras. 73-74), as well as forestry, mining and general economic development (*Delgamuukw*, *ibid.* at para. 165), but economic interests rank behind Aboriginal rights (*Sparrow*, *ibid.* at 1115).
 18. *Sparrow*, *ibid.* at 1113-1119, paras. 62-82. See also T. Campbell, "Understanding the Consultation Process" (Conference on Structuring Joint Ventures and Resource Development Arrangements Between Aboriginal Communities and the Petroleum Industry, Calgary, 1 December 1998) Insight Press 240 at 240-42; T. Campbell & M. Wyatt-Sindlinger, *supra* note 12 at 6-8.
 19. J. Woodward & R. Janes, "The Promise of Consultation: Strategies and Tactics" (Conference on First Nations, The Environment, and Development: The Emerging Duty to Consult, Canadian Bar Association, 29 January 1999) at 4. It will be seen below that Alberta denies the existence and extent of Aboriginal rights regarding land in the natural resource context.

province of Alberta is covered by treaty, mainly Nos. 6, 7 and 8 and small portions by No. 4 and No. 10.²⁰ Section 35 unquestionably protects treaty rights.

The Supreme Court has held that the provincial government is under a clear duty to consult Aboriginal groups about the potential infringement of a treaty right affirmed by Section 35.²¹ In *Badger* the Court said a treaty is “an exchange of solemn promises between the Crown and the various Indian nations ... whose nature is sacred ... The honour of the Crown is always at stake in its dealing with Indian people,” and “no appearance of ‘sharp dealing’ will be sanctioned.”²² Because a treaty is “a solemn agreement ... it is equally if not more important to justify *prima facie* infringements of treaty rights.”²³ The issue in *Badger* was whether Treaty 8 protected the right to hunt and whether it, therefore, provided a defence to hunting without a licence and out of season under Alberta’s *Wildlife Act*. The Treaty 8 right to hunt was held to be a treaty right within the meaning of Section 35 and was a valid defence. Specifically, Treaty 8 protected hunting for food on private property (“white area” under a grazing lease) that was not put to a “visible, incompatible use.”²⁴ Alberta argued that a treaty right could not operate on land “taken up” by the province, but the argument was to no avail. The Court will determine whether privately owned land permits a right of access for Aboriginals to hunt on a case-by-case basis, dependant upon the factors indicating a visible incompatible use. It would seem that the duty to consult is not only triggered by possible infringement of treaty rights on the scarcely inhabited forested “green areas” of Alberta, but also, under the right circumstances, by infringement of treaty rights on private land or the “white areas” allotted for settlement and agricultural development.²⁵

20. For a view of and information on the treaties and reserves in Alberta see First Nations and Métis web site, online: <http://collections.ic.gc.ca/Alberta/fn_metis/treaty_map.html> and the Aboriginal Affairs and Northern Development web site, online: <http://www.aand.gov.ab.ca/pages/resources/maps/indian_reserve.html> (date accessed: 8 March 2002).

21. S. Lawrence & P. Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 79 Can. Bar Rev. 252 at 256. See also P. Macklem, *supra* note 12 at 6.

22. *Badger*, *supra* note 9 at 793-94.

23. *Ibid.* at 814. See also the discussion in S. Lawrence & P. Macklem, *supra* note 21 at 256-57.

24. *Badger*, *ibid.* at para. 66.

25. For a view of the land management divisions within Alberta into white area (managed by Public Lands, Alberta Agriculture, Food and Rural Development) and green area (managed by Alberta Environment, Land and Forest Services) see the Alberta government web site, online: <<http://www.agric.gov.ab.ca/images/publiclands/regions.gif>>. See also the statistics indicating the current distribution of oil and gas development within the white/green managerial districts at <<http://www.agric.gov.ab.ca/publiclands/publan21.html>> (date accessed: 8 March 2002).

III REQUIREMENTS OF THE DUTY

The nature and scope of the duty to consult will vary with the nature of the right involved and the seriousness of the infringement. In *Delgamuukw* the Court stated that

[t]here is always a duty of consultation ... the nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions ... Of course, even in these 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. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting or fishing regulations in relation to Aboriginal lands.²⁶

The Court's aim appears to be the fostering of negotiation rather than litigation between the Crown and Aboriginal groups, but the requirements of the duty to consult have been difficult to develop within the lower courts.²⁷ Aside from some acknowledgment of the duty in the context of treaty land entitlement claims and non-resource threatening contexts, the province of Alberta has given little attention to the practicalities of the duty to consult, preferring to argue whether the duty exists at all when it concerns the profitable natural resource sector.

A British Columbia Developments

Treaty 8 covers nearly a third of the province of British Columbia and is located in the northeast corner adjacent to Alberta. Here the case law regarding the duty to consult has been developing rapidly from litigation arising out of the infringement of Aboriginal rights within the Treaty 8 area. The law from British Columbia is highly relevant to Alberta, which is covered by treaties, mainly by Treaty No. 8. Judy Maas, a Tribal Chief of the Treaty 8 Tribal Association with much experience dealing with

26. *Delgamuukw*, *supra* note 12 at 1113, as quoted by S. Lawrence & P. Macklem, *supra* note 21 at 257. *Liidlii Kue First Nation v. Canada (A.G.)*, (2000) 187 F.T.R. 161, F.C.J. No. 1176, online: QL (FCJ) [hereinafter *Liidlii Kue*] dealt with Treaty 11 and a land use permit granted to test drill for a mining claim that interfered with trapping by three Aboriginal families. The Court held that this consultation requirement undeniably applied to Section 35 treaty rights to hunt, trap, and fish at paras. 48-50. Of significance is that the duty to consult issue was heard by application for judicial review, unlike the Queen's Bench in Alberta; see *Ahyasou v. Lund*, *infra* note 91 and accompanying text. See also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2001] F.C.J. No. 1877 (T.D.), online: QL (FCJ) [hereinafter *Mikisew*] which held on the constitutional ground through an application for judicial review to set aside approval to construct a winter road (at paras. 185-86).

27. S. Lawrence & P. Macklem, *ibid.* at 257-58.

consultation conflicts in northeast British Columbia, warns, “the troubles experienced in B.C. are coming your way.” She predicts the problems for the natural resource sector will be even worse in Alberta because “the provincial government does not acknowledge even a token obligation.”²⁸ Fortunately, industry stakeholders have not been so steadfast, likely motivated by a need for security over their investments. The developing requirements to fulfill the duty should impact the manner in which they conduct their business.

It will be noticed that many of the following cases involve challenges based on the combination of administrative law principles through judicial review and/or the constitutional route for failed duty inherent in Section 35. Clearly, from the Aboriginal perspective the constitutional route is preferred because the scope of the Section 35 duty to consult is much broader and conceivably could range to the requirement of Aboriginal consent.²⁹ The courts and tribunals of British Columbia take the duty to consult seriously, developing and clarifying the doctrine along both constitutional and administrative principles.

Constitutional and Doctrinal Development

Provincial Obligation At Common Law

It is clear in British Columbia that the provincial government owes a fiduciary duty to Aboriginal groups and a procedural duty to consult. In *Halfway River First Nation v. British Columbia*³⁰ the Supreme Court dealt with an application for judicial review regarding a cutting permit granted by the provincial Ministry of Forests. The cutting permit granted to Canadian Forest Products (“CanFor”) covered an area within Treaty 8, off reserve, that the First Nation claimed they used for traditional purposes, including hunting, ceremonies and gathering plants for food and medicine. The Court quashed the permit because the District Manager failed to meet the Crown’s fiduciary duty to the First Nation by not adequately consulting with them prior to issuing the permit; thus it failed to justify the infringement of Treaty

28. Judy Maas, “What Oil and Gas Activities Infringe on Aboriginal Interests” (Conference on Structuring Joint Ventures and Resource Development Arrangements Between Aboriginal Communities and the Petroleum Industry, Calgary, 1 December 1998) Insight Press 97 at 101.

29. See *Delgamuukw* quote above at note 26 and discussion in C. Corcoran, “Recent Developments in the Duty to Consult with First Nations” (Conference on Oil and Gas Exploration and Development and Aboriginal Interests, Pacific Business & Law Institute, Calgary, 23 November 2000) at 75.

30. *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] B.C.J. No. 1494 (S.C.), online: QL (BCJ) [hereinafter *Halfway*]. Note that this decision was released prior to *Delgamuukw* in favour of the First Nation without the benefit of the most recent pronouncements of the Supreme Court of Canada regarding the duty to consult. See also the three-part “test,” discussed below in Part III.B.

8 rights. *Halfway* recognized the common law duty to consult as stated by the Supreme Court of Canada. The Court held the duty applies to the provincial government, which must consult with potentially affected Aboriginal groups *prior* to approving an action that may infringe treaty rights. Here, no representative of government was ever involved in the meetings that took place between CanFor and the First Nation before the permit was issued.³¹

The British Columbia Court of Appeal upheld the lower court decision on the appeal by the Crown. The province argued that the Treaty 8 right to hunt, by the words of the treaty, was subject to the Crown's right to "require" or "take up lands from time to time for settlement, mining, lumbering, trading or other purposes," which occurred when the logging permit was granted. The province's argument failed in favour of the broad treaty interpretation espoused in *Badger*. Consequently, the infringement of the First Nation's right to hunt was not justifiable. While the government action likely met a valid objective, the government failed to establish that the procedural duties were met.³²

Halfway was followed in *Kelly Lake Cree First Nation v. Canada*³³ where both levels of government were involved in granting permits to Amoco to cut trees; build an access road, camp and well site; and to drill an exploratory natural gas well. The land in question was within the Treaty 8 area between two mountains called the 'Twin Sisters' and was a spiritual sanctuary shared by many Aboriginal groups. On Kelly Lake's application for judicial review their non-treaty interest was found to be too geographically remote. Respecting the other applicant who had adhered to Treaty 8, the Court held that the Crown's fiduciary duty had been discharged because the duty to consult had been met.

The provincial government and Amoco initiated and funded an Ethnic Historical Study and Traditional Use Study that involved elders and other members from three tribal groups. The Court considered the range of consultation required by *Delgamuukw* and acknowledged the provincial duty to consult *before* making decisions that will affect Aboriginal rights. The Court concluded that approval was attained from all the relevant First

31. *Ibid.* at 136.

32. *Halfway Appeal*, *supra* note 16 at paras. 8, 89-91. Without consultation it would seem impossible to prove minimal impairment or that priority has been given to the affected Aboriginal right.

33. *Kelly Lake Cree First Nation v. Canada (Ministry of Energy and Mines, Ministry of Forests, Amoco)*, [1999] 3 C.N.L.R. 126, B.C.J. No. 2471 (S.C.), online: QL (BCJ) [hereinafter *Kelly Lake*].

Nations, with the exception of the Salteau who “sought to delay the decision.”³⁴

Full Information and Addressing Concerns

The British Columbia courts recognize that the province’s constitutional obligation cannot be met without fully informing the Aboriginal group of the project’s potential adverse effects. In *Cheslatta Carrier Nation v. British Columbia* an Aboriginal group failed at obtaining an injunction but succeeded in creating additional last minute work for the involved company. The Cheslatta Carrier Nation applied for judicial review to challenge government approval given to develop a copper mine. The First Nation sought an injunction and a declaration that it must be consulted in a meaningful and timely fashion. Huckleberry Mines Ltd. had failed to provide wildlife information and mapping as requested by the Project Committee relating to the proposal’s effect upon the First Nation’s traditional practices. This omission caused Cheslatta to drop out of negotiations. Approval was granted despite the lack of this information, leading Huckleberry to invest sixty million dollars before trial. The Court held that the consultation was inadequate because Huckleberry’s failure to disclose deprived the First Nation from fully considering the impact of the project, any protective measures that may be required and determining fair compensation.³⁵ The Court ordered a new committee be established and that relevant information be provided but stopped short of an injunction.

Recently, a majority of the British Columbia Court of Appeal upheld the lower Court’s decision to quash a permit because the provincial government failed to adequately inform itself fully of the Aboriginal group’s concerns or to meaningfully address them. In *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*³⁶ the developer, Redfern Resources (“Redfern”), applied under the *Environmental Assessment Act* for approval to reopen a mine and build an access road to haul ore. Redfern invested ten million dollars and made a genuine effort to comply with the *Act*, however,

34. *Ibid.* at para. 113. The consultation by Amoco and the government was ruled sufficient by the Court to discharge the duty. However, Priscilla Kennedy, Kelly Lake’s counsel, indicates that the consultation process lacked many of the requirements that would more accurately reflect that the duty had been fulfilled. See below, Part III.B.

35. *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director)*, [1998] 3 C.N.L.R. 1, B.C.J. No. 178 (B.C. S.C.) at para. 58, online: QL (BCJ) [hereinafter *Cheslatta*]. See also P. Macklem, *supra* note 12 at 13.

36. [2002] B.C.J. No. 155 (C.A.), online: QL (BCJ), aff’g (2000), 77 B.C.L.R. (3d) 310 (B.C. S.C.) [hereinafter *Taku River*]. This was not a Treaty 8 case, but the land was subject to the First Nation’s claim of Aboriginal title. The Ministers of Environment, Energy and Northern Development (“Ministers”) were also named in the action with Redfern. The previous mine owner had transported the ore by barge down the river. The First Nation had legitimate concerns that the road would destroy the habitat and their established traditional use of the land on the proposed route.

the Ministers halted consultation and approved the project without effectively addressing “the substance of the Tlingit’s concerns with respect to when, and on what terms and conditions, the mineral rights to be exploited by Redfern should be developed.”³⁷ The Court referred the decision back to the Ministers to reconsider the approval, this time, with the First Nation’s concerns in mind.

Crown’s or Industry’s Duty?

The courts and tribunals of British Columbia have generally held that the constitutional fiduciary obligation rests with the provincial Crown but that industry may play a large role in determining whether a provincial government has met its duty. In *Halfway*, CanFor and the First Nation had sixteen meetings over a four-year period, but no representative of government was involved. The Court held that the consultation was inadequate.³⁸ Due to the intricate and compartmentalized structure of modern government the duty to consult must fall on the Crown generally and not to any particular arm of government. The responsible Minister(s) must ensure the duty is fulfilled.

When a third party is involved whose proposal may interfere with Section 35 protected rights, government policy will often require that the third party consult with the affected Aboriginal group.³⁹ The *Royal Commission* recommended that provinces require companies to develop Aboriginal land use plans as part of their operating licence for the purpose of protecting significant sites and adequately compensating groups adversely affected by oil and gas development.⁴⁰ In consideration of this policy the courts recognize that, while a fiduciary cannot delegate its fiduciary duties at law, the third party will often be expected to engage in consultation, requiring good faith on their part and an obligation to disclose all relevant information about the proposed activity. In *Kelly Lake*, Amoco not only jointly funded studies with the government but they also conducted other studies and showed good faith and open communication with the involved First Nations. The Court recognized that

[t]he process of consultation cannot be viewed in a vacuum and must take into account the general process by which government deals with First Nation’s people including any discussions between resource developers such as Amoco and First Nations people the government knew occurred.⁴¹

37. *Ibid.* at paras. 133-34.

38. *Halfway*, *supra* note 30 at 136.

39. P. Macklem, *supra* note 12 at 10-11.

40. *Royal Commission*, *supra* note 1 at 1066.

41. *Kelly Lake*, *supra* note 33 at para. 154.

Tribunals have also recognized that the fiduciary duty ultimately rests with the Crown. In *Tsilhqot'in National Government v. British Columbia*, the First Nation requested that the Environmental Appeal Board rescind a pesticide use permit that would threaten their traditional use of plants and animals. The Board recognized the Ministry of Environment Lands and Parks' ("MELP") policy, "Avoiding Infringement of Aboriginal Rights," that required the permit applicant to take the lead role in consultation.⁴² In denying the application, the Board said that while delegating the duty to consult was "problematic," "the delegation of the responsibility to implement consultation may satisfy the government's fiduciary obligation in some cases but not in others"; the facts in each case, such as the sufficient involvement of government, will determine whether the obligation has been met.⁴³ The Board found that both MELP and the Ministry of Forests acted in good faith, chairing all of the meetings with the First Nation who were ultimately insisting on a veto of the project.

While the British Columbia courts appear to have consistently held that the duty ultimately belongs to the Crown, a recent Court of Appeal decision imposed an enforceable, legal and equitable duty to consult and accommodate Aboriginal concerns on an industry party. In *Haida Nation v. British Columbia (Minister of Forests)* the Haida petitioned for judicial review, disputing the province's renewal of a tree farm licence under the *Forest Act* granted to Weyerhaeuser concerning red cedar on the Queen Charlotte Islands. The Haida had previously claimed Aboriginal title and both the government and Weyerhaeuser knew that the red cedar was integral to the Haida's culture. The Court held that both the provincial government "and Weyerhaeuser were in breach of an enforceable, legal and equitable duty to consult with the Haida people."⁴⁴ While making no order on the validity of the licence until the extent of infringement could be determined, the Court was clear that however the government and Weyerhaeuser chose to deal with the Court's declaration would impact any remedy sought later.⁴⁵ Lambert J.A. was unclear as to how Weyerhaeuser came to share with the Crown the legal and equitable duty to consult except to say that both had

42. *Tsilhqot'in National Government v. British Columbia (Ministry of Environment, Lands, and Parks)*, [1998] B.C.E.A. No. 23 at para 51, online: QL (BCEA) [hereinafter *Tsilhqot'in*]. See also P. Macklem, *supra* note 12 at 10-11. See also the three-part "test," discussed below in Part III.B.

43. *Tsilhqot'in*, *ibid.* at para. 56. In *Mikisew*, *supra* note 26 at para. 156, the Federal Court stated that any consultation undertaken by a third party cannot relieve the Crown of their fiduciary obligations, nor can the duty be delegated.

44. [2002] B.C.J. No. 378 at para. 52, online: QL (BCJ) [hereinafter *Haida Nation*]. Neither the Crown nor Weyerhaeuser sought to accommodate the Haida's concerns despite knowledge of the facts pertaining to the Haida claim for Aboriginal title and the facts related to Aboriginal rights concerning red cedar.

45. *Ibid.* at paras. 58-60.

knowledge of the facts and ought to have known that infringements were occurring.⁴⁶

Provincial Statute Does Not Affect Fiduciary Duty

The British Columbia courts have repeatedly stated that the duty to consult as described in *Delgamuukw* exists irrespective of the provincial government's environmental legislation. The Supreme Court first expressed this opinion in *Cheslatta*, which could have been easily decided on the basis that the British Columbia *Environmental Assessment Act*⁴⁷ specifically mandates consultation with affected Aboriginal groups; however, the Court explicitly stated that the common law duty to consult exists separately from the statutory obligation and that the statutory "obligation in no way lessens the common law duty but it focuses on the issues of project approval."⁴⁸ In other words, relevant legislation may supplement the common law duty to consult, but it does not alter the common law requirements.

The Court of Appeal recently chose to make even stronger statements regarding the relevance of provincial environmental legislation. In *Taku River*, Southin J.A. stated that if the *Environmental Assessment Act* does not meet the requirements of *Delgamuukw*, "then the statute, if not *ultra vires*, is at least constitutionally inoperative insofar as it purports to give persons appointed under it power to permit a project to proceed which is not accepted by the Indian Band."⁴⁹ Southin J.A. ultimately concluded that the *Act* "does meet the demands of *Delgamuukw*. It provides a process sufficient to the purpose."⁵⁰

Administrative Law Access

Relief Through Administrative Tribunals

The British Columbia Environmental Appeal Board has not had issue with recognizing or affirming Aboriginal rights in resource matters. In *Tsilhqot'in* the Board heard the First Nation's duty to consult claim, although it did hold

46. *Ibid.* at para. 54. This decision seems to be a stretch of known sources of fiduciary duties to include Weyerhaeuser as having a duty, and it will surely be appealed. The natural resources industry should be deeply disturbed by this decision. Knowledge of the facts and "participation" in a breach of the duty to consult will ensure industry liability if this decision stands.

47. R.S.B.C. 1996, c. 119; see text accompanying note 114 below.

48. *Cheslatta*, *supra* note 35 at 14, para. 43. See also the discussion in C. Corcoran, *supra* note 29 at 7.10 and T. Campbell & M. Wyatt-Sindlinger, *supra* note 12 at 11-12.

49. *Taku River*, *supra* note 36 at para. 97. This reasoning will become significant in interpreting the relevance of Alberta's legislation to the Alberta government's fiduciary duty. See discussion below at note 119 and accompanying text.

50. *Ibid.* at para. 100.

that the duty had been met.⁵¹ In *Fort Nelson First Nation v. British Columbia* an injunction was granted in part to stay the same type of pesticide permits that were upheld in *Tsilhqot'in* until it could be determined whether Treaty 8 rights might be infringed, and if so, whether the duty to consult had been met. On appeal, the Environmental Appeal Board upheld the injunction and held that it was within their jurisdiction as an administrative tribunal to consider Aboriginal issues.⁵²

The British Columbia Court of Appeal has taken a different approach when the issue is affirming the existence of Aboriginal rights. In *Paul v. British Columbia (Forest Appeals Commission)*, Paul challenged the jurisdiction of the commission to hear his Aboriginal rights claim after he was found to have violated provincial forestry acts when he cut four red cedar to use for his house from non-treaty traditional territory. He had asked for and received permission from the Band but not the Crown. The majority held that the Province does not have the constitutional authority to empower a quasi-judicial tribunal to determine this issue because Aboriginal rights is a subject falling under federal jurisdiction. However, Huddart J.A. disagreed, stating that the Province had the authority to grant the power to operate this regime, and any consideration of Aboriginal rights in this context would only incidentally affect the federal matter. She also stated that the allocation of resources is complex with many stakeholders. The needs and rights of all parties must be considered, including First Nations, so there may be certainty in the regulation of resource use.⁵³

Relief Through Judicial Review

As is clear from the preceding review, British Columbia courts have shown a willingness to hear duty to consult claims expeditiously through judicial review. There has, however, been some reluctance when the Aboriginal group was asserting an Aboriginal right that had not yet been established by a court proceeding. In *Kelly Lake*, Taylor J. noted that the applicant Kelly Lake was not a Treaty 8 adherent and held that judicial review was not the

51. *Tsilhqot'in*, *supra* note 42.

52. *Fort Nelson First Nation v. British Columbia (Ministry of Environment, Land and Parks)*, [1999] B.C.E.A. No. 41, online: QL (BCEA). Appeal at [1999] B.C.E.A. No. 62, online: QL (BCEA) [hereinafter *Fort Nelson*]. Compare the situation in Alberta: see *Cheviot*, *infra* note 82 and *Whitefish Lake*, *infra* note 87.

53. [2001] B.C.J. No. 1227 (C.A.), online QL (BCJ) at paras. 164, 176. The majority decision seems to disregard the fact that the Supreme Court of Canada has mandated that the province has a duty to consult and accommodate when Aboriginal rights are involved. Note that leave to appeal has been granted by the Supreme Court, [2001] S.C.C.A. 639, online: QL (SCCA). The majority's reasoning should not be relevant in Alberta, where the existence of treaty rights is not at issue.

forum for determining the existence of Aboriginal rights.⁵⁴ The government has consistently argued that no obligation arises until the Aboriginal group first establishes that a right or title exists. However, the Court of Appeal in *Taku River* has clearly stated that the obligation to consult does *not* only arise after Aboriginal rights or title have been proved in court, to accept this argument would negate the purpose of Section 35 protection.⁵⁵

B Fulfilling the Duty

When litigation occurs, the Crown is ultimately responsible for proving its fiduciary duty has been met, but it is clear the court will scrutinize the efforts of both the government and industry. Thus it is vital that industry keep itself apprised of the direction the law is taking. Constitutional and Aboriginal lawyers, Aboriginal consulting firms and First Nations people themselves have extensively discussed what is required to fulfill the duty of consultation. The *Halfway* case and the *Tsilhqot'in* tribunal decision also provide a three-part "test."⁵⁶ The three criteria are a good step in the right direction if the spirit of the law, as set down in *Delgamuukw*, is to be achieved.

Full Information to Aboriginal Groups

The Crown must provide full information to Aboriginal groups potentially affected. More is required than mere notice to Aboriginal groups of legislation or a proposal the government is considering. Providing full information is more than the routine interagency referral process that occurs within today's modern governmental structure. First Nations are not "agencies" and many lack the resources to deal with the large amounts of paper that arrive at Band offices. Therefore, a lack of response within the thirty-to-sixty day reply period cannot imply consent.⁵⁷ The courts have held

54. C. Corcoran, *supra* note 29 at 7.11-7.12, citing *Kelly Lake*, *supra* note 33 at 133-34. In Alberta, despite being a treaty adherent, an Aboriginal group has not succeeded through judicial review to have a duty to consult issue heard.

55. This is clearly an expansion of the doctrine. Both the majority and dissent agreed on this point: *Taku River*, *supra* note 36 at para. 94 (dissent) and paras. 162, 184, 194 (majority).

56. See *Halfway*, *supra* note 30 at paras. 129-131 for discussion of the three general criteria. See also *Tsilhqot'in*, *supra* note 42 at para. 44 outlining the three-part test. See generally P. Macklem, *supra* note 12 at 13-16 and S. Lawrence & P. Macklem, *supra* note 21 at 264-67 for a discussion of the test.

57. J. Woodward & R. Janes, *supra* note 19 at 2.

that the government must take the initiative in a reasonable way.⁵⁸ Full disclosure of a project requires government and industry provide First Nation groups with the means to understand all information related to a project, and this may involve funding or explanation through a preferably Aboriginal advisor, so the Aboriginal nation can adequately determine the proposal's impact.⁵⁹ One consultant states:

[C]ontact **ANY** Aboriginal community that **MAY** be impacted by your project as early into your planning stage as possible and keep them informed throughout the projects development. Also have your staff 'do their homework' and be ready to have good faith negotiations with the Aboriginal community leadership.⁶⁰

A third party company will logically play a large role in providing full information and would not want to jeopardize their project as Huckleberry Mines Ltd. nearly did in *Cheslatta*.

Crown Fully Informed of First Nation Practices and Views

It is impossible for the Crown to fulfill its fiduciary duty and make informed decisions without having a clear understanding of the Aboriginal group's culture, history, practices and concerns. This knowledge should come from impact studies funded by either government or industry, and the First Nation should control the studies because only they have the necessary information.⁶¹ The courts will look at the materials produced through consultation and the decision made to gauge whether the decision-maker was adequately informed of the Aboriginal group's concerns. In *Halfway* the Cultural Heritage Overview Assessment identified the lack of information contained therein and thus failed, while the studies jointly funded by the provincial government and Amoco in *Kelly Lake* were found sufficient when litigation brought the consultation process under court scrutiny.

58. *Halfway*, *supra* note 30; *Kelly Lake*, *supra* note 33. See also *R. v. Breaker*, [1999] A.J. No. 754 at para. 9 (Prov. Ct.) [hereinafter *Breaker I*], online: QL (AJ). See also *R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 at 252 (C.A.). See analysis in T. Campbell, *supra* note 18 at 243.

59. J. Maas, *supra* note 28 at 119.

60. G. Favelle, Eagle Feather Consulting, "An Aboriginal Game Plan — A Plan for Success" (Conference on Structuring Oil and Gas Joint Ventures with Aboriginal Communities, Calgary, 7 October 1999) Insight Press 43 at 49 [emphasis in original].

61. J. Maas, *supra* note 28 at 120. See also *R. v. Jack* (1995), 16 B.C.L.R. (3d) 201 at 222 (C.A.) where the Crown failed its duty to inform itself of the First Nation's fishing practices and views on conservation.

Meaningful and Reasonable Consultation

The degree of consultation required varies with the circumstances according to *Delgamuukw*, but there must always be the intention of substantially addressing the First Nation's concerns. It is not enough to merely inform of or explain a project or new legislation. Any suggestions made by the Aboriginal group must be taken seriously and may require that a proposal be modified or prevented altogether.⁶² The British Columbia Environmental Appeal Board has also recognized how meaningful consultations occur. Building a trusting relationship and engaging in a well-thought-out, non-adversarial process that shows sensitivity to Aboriginal values is extremely important. Mere letters or phone calls to fulfill a bureaucratic requirement will not suffice.⁶³ There may be difficulties in communication, such as an inability to read, or sometimes, speak English, that must be addressed. In situations like this an Aboriginal conduit is a must. It should be noted the courts have also recognized a corresponding obligation on the part of Aboriginal groups to participate in good faith during the consultation process.⁶⁴

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62. J. Maas, *ibid.* See also *R. v. Noel*, [1995] 4 C.N.L.R. No. 78 at paras. 94-95 (N.T. Terr. Ct.), online: QL (CNLR). The government cannot ignore First Nation suggestions or forego consultation due to time pressure whether the action is a proposed regulation or a licence/permit (para. 87). See also *Taku River*, *supra* note 36. For an example of meaningful and reasonable consultation from an Aboriginal group's viewpoint, see Nishnawbe Aski Nation, "A Handbook on 'Consultation' in Natural Resource Development" (July 2001), online: <<http://www.nan.on.ca/lands/pubs/handbooknrdev.pdf>> (date accessed: 20 December 2001) [hereinafter *Nishnawbe Handbook*]. The aim of the handbook is twofold: to assist Ontario First Nations in ensuring meaningful consultation takes place and to provide a policy and procedural framework for government and industry. See also analysis in T. Campbell, *supra* note 18 at 243.
63. *Heiltsuk Tribal Council v. British Columbia*, [1997] B.C.E.A. No. 20 at paras. 36-37, online: QL (BCEA). The Deputy Administrator of the *Pesticide Control Act* and International Forestry Products Ltd. failed at meaningful consultation and the permit was cancelled. The description of the criteria for meaningful consultation was followed in *Tsilhqot'in*.
64. See *Halfway Appeal*, *supra* note 16 at para. 160 (they cannot refuse to participate or impose unreasonable conditions); *Kelly Lake*, *supra* note 33 at para. 113; *Cheslatta*, *supra* note 35 at paras. 36, 73. See also discussion in S. Lawrence & P. Macklem, *supra* note 21 at 276-78 and T. Campbell & M. Wyatt-Sindlinger, *supra* note 12 at 11.

IV SITUATION IN ALBERTA

While the law recognizing the provincial duty to consult develops throughout much of Canada,⁶⁵ the courts and tribunals in Alberta have made little to no strides in this area. Nearly every court and tribunal on Alberta soil (whether federal or provincial) has either avoided or delayed adjudication of the duty to consult Aboriginal groups. The Alberta government continues to resist, even blatantly ignore, these developments especially with regard to the profitable resource sector, leaving industry in a precarious position regarding their investments.

A Aboriginal Perspectives

Many Aboriginal people are gravely concerned with the fact that much of Alberta's forest land has been destroyed by seismic testing, oil and gas activity; plant and animal species are in danger or have disappeared; and oil and gas, agricultural and forest cutting activities all seriously affect Aboriginal people, especially future generations.⁶⁶

Acrid fumes enmesh the air even in remote areas in Alberta. Seven years ago the air was clear. Now we see, taste and smell noxious gas and particles. Moose and fish grow tumours, species disappear from their former habitats, asthma in

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65. Aside from the case law already recognized, see *Yellow Quill First Nation v. Saskatchewan (Minister of Environment and Resource Management)*, [2000] 2 C.N.L.R. 359 (Sask. Q.B.), online: QL (CNLR); refused injunction but recognized duty to consult on province and serious issue to be tried. See *Lac La Ronge Indian Band v. Canada*, [2000] 1 C.N.L.R. 245 (Sask. Q.B.), online: QL (CNLR); successful treaty land entitlement claim against federal and provincial governments based on s. 10 *NRTA*. Identified breach of fiduciary duties by lack of full disclosure by government. This case reversed in part, [2000] S.J. No. 619 (C.A.), online: QL (SJ), because the trial judge calculated reserve allotment based on current population rather than former population. There is an action yet to be tried for damages related to the loss of use of reserve lands. See *TransCanada Pipelines Ltd. v. Beardmore (Township of)*, [1998] 2 C.N.L.R. 240 (Ont. Gen. Div.), online: QL (CNLR) [hereinafter *TransCanada Pipelines*]; Ministerial proposal and order quashed for failing duty to consult and high-handedness. This case was overturned on appeal, [2000] 3 C.N.L.R. 153 (C.A.), online: QL (CNLR), because the duty to consult is not an independent ground to challenge a government action and hold a lack of jurisdiction (para. 112). The Court added that the constitutional issue could be retried by first establishing infringement and then an analysis of whether the Crown was justified and the duty met. See *Nunavik Inuit v. Canada*, [1998] 4 C.N.L.R. (F.C.T.D.), online: QL (CNLR) where Newfoundland was held to have a duty to consult (in addition to the federal Crown) before establishing a park. See *Mushkegowuk Council v. Ontario*, [1999] 4 C.N.L.R. 76 (Ont. S.C.), online: QL (CNLR) [hereinafter *Mushkegowuk Council*]; duty to consult "read in" to *Ontario Works Act*. See *Union of Nova Scotia Indians v. Nova Scotia (A.G.)*, [1999] N.S.J. No. 270 (N.S. S.C.), online: QL (NSJ); injunction granted to prevent Maritimes and Northeast Pipelines from entering land until fiduciary duty met [hereinafter *Union of Nova Scotia Indians*].
66. Letter from Confederacy of Treaty Six First Nations to the Canadian Environmental Assessment Agency (21 March 2000), online: <http://www.ceaa.gc.ca/0007/0002/0004/0004/t6_e.htm> (date accessed: 24 December 2001) at 2.

our children is more and more common. With the introduction of new technology, the rate of environmental destruction in Alberta has skyrocketed. The Province's presence is marked in this process.⁶⁷

The acceleration of resource exploitation and the lack of recognition of their needs, views, values and traditional environmental knowledge alarm First Nations. Alberta's Aboriginal people feel their interests respecting the use of natural resources are frequently ignored and that they are "harassed" by the province when they attempt to exercise their treaty right to hunt.⁶⁸

Many Aboriginal people believe that their rights extend beyond those recognized by treaty or the *NRTA*. They believe their rights come from the Creator and exist as they have always been practiced. The treaties and the *NRTA* merely promise the continuation of the ability to practice their culture and tradition.⁶⁹ With the crystallization of entrenched Section 35 treaty rights in 1982, Aboriginal nations argue that the province has a legal fiduciary obligation to make resource decisions that accord priority to and achieve minimal infringement of their constitutionally protected rights.⁷⁰ They further argue that industry, while not having "a legal obligation to consult, they do have a *moral obligation* to consult—it's the right thing to do."⁷¹ This is a legitimate and sound viewpoint, consistent with the Supreme Court of Canada's pronouncements on the issue and the developing case law in neighbouring Treaty 8 British Columbia. Aside from acknowledgment from the federal court and provincial court (criminal division) within Alberta's territorial limits, there has been little recognition of provincial fiduciary obligations or the duty to consult.

B *R. v. Breaker*

In 1993 Stuart Breaker shot and put to use a bighorn sheep within the newly created Highwood Road Corridor wildlife sanctuary ("Corridor") contrary to the Alberta *Wildlife Act* and regulations. At the original trial, Cioni J. acquitted Breaker on the non-constitutional grounds of failed Crown burden and/or due diligence. However, in *obiter* he noted the government's failure to notify Breaker's nearby Treaty 7 group that would be adversely affected

67. *Ibid.* at 1. See graphic distribution of conventional oil and gas wells on Forest Watch web site, *supra* note 5.

68. *Ibid.* at 4.

69. *R. v. Breaker*, *supra* note 14 at para. 91.

70. See SSIMICRO, "Resource Development on Aboriginal Land: The Duty to Consult," online: <http://www.ssimicro.com/~nsma/total-02,htm#1050_157664> (date accessed: 24 December 2001) citing from C. Sharvit, M. Robinson & M. Ross, "Resource Development on Traditional Lands: The Duty to Consult" (Occasional Paper No. 6, Canadian Institute of Resources Law, 1999) [unpublished].

71. *Nishnawbe Handbook*, *supra* note 62 at 11 [emphasis in original].

by a new amendment to the *Act*. Cioni J. recognized the province's fiduciary duty as flowing out of the *NRTA* and stated the *Sparrow* test for infringement applied. The Crown could not meet the justification requirement due to not having consulted with the Treaty 7 group involved.⁷²

The Court of Queen's Bench overturned Breaker's acquittal. The Court of Appeal affirmed the reversal and directed that Cioni J. complete the trial by addressing the Section 35 constitutional issue. In a lengthy and passionate judgment, Cioni J. held true to the *obiter* of the first trial, formulating detailed evidence and analysis to support his opinion.⁷³ The Province argued that the Corridor was "validly taken up for conservation purposes, thereby clearly extinguishing the Aboriginal right to hunt there"; that the Corridor is now "occupied"; and that "there is no legal or fiduciary obligation on the Alberta government to consult with First Nations before establishing corridor wildlife sanctuaries."⁷⁴ Cioni J. blasted the Crown's argument by calling it "bootstrap logic"⁷⁵ to say there are no rights to be breached because of the very effect of the Crown's action, which ignores the jurisprudence in the first place. Cioni J. found as fact that any wildlife population decline was caused by excessive non-Aboriginal permits and cattle grazing, not Native food hunting;⁷⁶ that one of the government objectives was to increase wildlife visibility for tourist traffic;⁷⁷ and that there was a fear of backlash from non-Native hunters if Native hunting was allowed to continue in the Corridor, all of which led to the conclusion of a lack of valid legislative objective. He also found that there was no consultation with Breaker's Siksika First Nation⁷⁸ and that consistent with *Badger*, the *NRTA* expands the treaty right to hunt for food. In the end, Cioni J. held that the Corridor regulations did not apply to Breaker because of the "lack of recognition and reconciliation"⁷⁹ of his rights, and thus there was no basis for conviction. The judgment concludes with Cioni J. imploring the government to take their

72. *Breaker I*, *supra* note 58 at para. 14. This was unoccupied Crown land within tourist Kananaskis country.

73. *Breaker*, *supra* note 14. This judgment is 240 pages long and likely was written in anticipation of a Crown appeal. Oddly, an appeal by the Crown has not been forthcoming. However, this decision is consistent with *Badger* and likely would not result in a decision in favour of the Crown.

74. *Ibid.* at para. 9.

75. *Ibid.* at para. 440; recognizing *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 36; "the failure to recognize an Aboriginal right, and the failure to grant special protection to it, do not constitute the clear and plain intention necessary to extinguish the right" (as cited by Cioni J. at para. 449).

76. *Ibid.* at para. 511.

77. *Ibid.* at para. 145.

78. *Ibid.* at para. 83.

79. *Ibid.* at para. 520.

duty seriously, recognizing the benefits to be derived from First Nation practices and that both parties need to educate themselves about the other.⁸⁰

Both *Badger* and *Breaker* now stand strongly for the position that the Alberta government must justify wildlife legislation and consult with affected Aboriginal treaty groups. This is a step towards having the duty to consult recognized in the natural resource context when Aboriginal treaty rights are affected.

C Tribunal Decisions

Attempts by Aboriginal groups to have the provincial duty to consult recognized by the tribunals within Alberta have been avoided by the body claiming lack of jurisdiction. In *Treaty 8 Tribal Association v. Alliance Pipeline* the Tribal Association made a motion to stay the application proceedings of Alliance until the Crown's duty to consult had been met. The federal National Energy Board ("NEB") denied the motion indicating they were not equipped to deal with a constitutional question. The NEB said they were an impartial tribunal and would "not stand in the place of the executive for the purposes of discharging the obligations of the Crown to the Aboriginal Nations."⁸¹

Cheviot Coal Project

The Alberta Energy and Utilities Board ("AEUB") declined jurisdiction to deal with Treaty 8 members' desire to be consulted regarding the controversial Cheviot Coal Project in neighbouring Treaty 6 territory,⁸² despite the fact that the federal Court had allowed the Treaty 8 members to intervene in the judicial review of the same project under the *Canadian Environmental Assessment Act*.⁸³ The federal Court recognized the devastating impact of the project on Treaty 8 members' water quality, despite their reserves being located 1,000 kilometers downstream. The Alberta government again argued that neither treaty rights nor a duty to consult exist at all when it exercises its authority under the *NRTA* to take up lands for mining.⁸⁴ The AEUB ruled it did not have jurisdiction to determine

80. *Ibid.* at paras. 533, 534. Although this is a provincial court judgment, it should hold some persuasive value for the higher courts in Alberta.

81. *Treaty 8 Tribal Association v. Alliance Pipeline Ltd.*, [1999] 4 C.N.L.R. 257 at para. 28, online: QL (CNLR).

82. *Cheviot Coal Project* (12 September 2000), Decision 2000-59 (A.E.U.B.) at 130, online: <http://www.ceaa.gc.ca/0009/0001/0001/0005/0002/Chap09_e.pdf> [hereinafter *Cheviot*].

83. *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*, [1998] F.C.J. No. 540, online: QL (FCJ) [hereinafter *Alberta Wilderness Association*].

84. *Supra* note 82 at 129. The same argument that Cioni J. called "bootstrap logic".

either Aboriginal or constitutional rights of Treaty 8 members, preferring to leave this issue's resolution to the courts.⁸⁵ The AEUB did note all Treaty 8 members reported that no consultation had taken place, and it believed that

the persistence of this issue—an issue of tremendous significance not only to Aboriginal peoples but to industry as well—does not foster a positive environment within which industry and First Nations can develop a good-neighbour policy.⁸⁶

While appearing to at least recognize the plight of Alberta's Aboriginal groups, the AEUB refused to take a stand on the consultation issue within the natural resource context.

Whitefish Lake First Nation v. Alberta⁸⁷

The Alberta Environmental Appeal Board took the same stance as did the AEUB in *Cheviot* when it decided *Whitefish Lake* based on the Alberta *Environment Protection and Enhancement Act*.⁸⁸ Tri Link Ltd. received Director approval to increase emissions of nitrogen oxides by over 20 percent at its sour gas plant located in north-central Alberta. Whitefish appealed the Director's approval pursuant to s. 92.1 of the *EPEA*, stating that the increase in pollution had the potential to impair their treaty rights to safely hunt, fish, trap, gather plants and hold sacred ceremonies; therefore, the Director had a duty to consult them. Again counsel for Whitefish urged the Board to follow the decision in *Halfway* but to no avail.

The Board said there are problems applying *Halfway* in the Alberta context even though both cases deal with Treaty 8 rights off reserve—the legislation is different.⁸⁹ In Alberta the Director's responsibilities are “less express and less direct” than the District Manager of Forests in *Halfway*. The Director was told that the existence and scope of Aboriginal rights are not conceded by the Alberta government as they are in British Columbia so he had little choice but to follow official policy.⁹⁰ The Board indicated the same questions over the existence and extent of treaty rights are before the court, which is more appropriate than either this Board or the Director of the *EPEA* to deal with.

85. *Ibid.* at 130.

86. *Ibid.* at 131.

87. *Whitefish Lake First Nation v. Alberta (Department of Environmental Protection)*, [2000] A.E.A.B. No. 39, online: QL (AEAB) [hereinafter *Whitefish Lake*].

88. *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 [hereinafter *EPEA*].

89. Recall the Supreme Court of British Columbia's opinion that provincial environmental legislation is distinct from the common law duty to consult. See notes 43, 44 above and accompanying text.

90. *Whitefish Lake*, *supra* note 87 at paras. 27, 46-47.

D *Ahyasou v. Lund*

Both *Cheviot* and *Whitefish Lake* allude to the consultation issue being before the court. Here the Aboriginal group failed at being heard expeditiously through judicial review. In *Ahyasou v. Lund* the Alberta Queen's Bench considered an application for judicial review by the Athabasca Tribal Council ("ATC"). The Ministers of Environment Protection and Energy, the Alberta government and Rio Alto Exploration Ltd. ("Rio Alto") were named in the action. The ATC challenged the approval given to Rio Alto in 1997 for oil development within their members' registered trapping areas. ATC alleged the Alberta government has a policy to "deliberately ignore" its Section 35 rights and also based their challenge on the Ministers' breach of fiduciary duty, seeking a remedy under s. 52 of the *Constitution Act, 1982*. The ATC demanded that exploration cease, the approval be set aside, there be a declaration of the duty to consult and urged an impact study. ATC asked the Court to consider the decision in *Halfway*, which was also a judicial review involving Aboriginal rights under Treaty 8.

It was alleged that no consultation occurred by the government whatsoever. However, Rio Alto did send letters to the trappers informing them of their intention to apply to "construct wellsites, pipelines, road and facilities on some lands within your Registered Trapping Area" with a sketch of the locations.⁹¹ Then, Rio Alto crews arrived with their bulldozers and permit. Later, after conflict arose, Rio Alto ceased its plans to explore of its own volition. The Ministers objected to judicial review and asked for an order that a trial be granted. The Canadian Association of Petroleum Producers ("CAPP") had just successfully applied for leave to intervene. The Court held that the government had not acted "unreasonably" in granting approval to Rio Alto and granted the Ministers' request for a trial because this matter was beyond the scope of judicial review.⁹²

This decision focuses on the perceived magnitude of the constitutional issue's implications for the Alberta government in how it conducts business in the oil and gas industry. The Court stated that this is "a most important issue that will affect many First Nations peoples, provincial government policy and procedures,"⁹³ and the oil and gas industry as a whole. CAPP

91. *Ahyasou v. Lund*, [1998] A.J. No. 1157 at para. 3 (Q.B.), online: QL (AJ) [hereinafter *Ahyasou*].

92. Unlike Taylor J. in *Kelly Lake* who only refused judicial review as the forum for the determination of one applicant's Aboriginal rights (*supra* note 33), this Court was considering established and constitutionally recognized treaty rights and conservatively denied consideration of the claim via judicial review, which was allowed in *Halfway* and *Cheslatta* (Supreme Court) and in the Federal Court in *Liidlii Kue* and *Mikisew* (*supra* note 26).

93. *Supra* note 91 at para. 28.

received intervener status due to the effect a decision in favour of ATC would bring to its members' operations.⁹⁴ This trial action will force the Alberta Queen's Bench to decide (1) whether granting an exploration permit satisfactorily extinguishes Treaty 8 and *NRTA* protected rights, or (2) whether this action amounts to a *prima facie* infringement of these rights engaging Section 35 and the *Sparrow* analysis of government justification and the duty to consult. Dixon J. described the implications if the province fails in the upcoming action: "If the Applicants claims are meritorious, the presiding jurist will be ordering the Alberta Government to engage in a process it has not chosen and, further, to define the parameters of that process."⁹⁵ There is still no firm date set for the trial of this action; rather it appears that the trial may be delayed for some time.

E Federal Court Developments

In contrast to the Alberta Queen's Bench, the federal Courts have not been as reluctant to provide an expeditious forum and acknowledge the Section 35 rights of Aboriginal groups located within the province of Alberta. As early as 1998 the Edmonton-based federal Court acknowledged that traditional use of lands extends far beyond reserve boundaries.⁹⁶ Additionally, a nearby federal Court in the Northwest Territories set aside a permit to test drill a mining claim on judicial review, expecting that Treaty 11 trapping rights would be acknowledged on reconsideration of the permit.⁹⁷ Most recently, the federal Court in Calgary fully recognized Treaty 8 constitutionally protected rights and engaged in a complete *Sparrow* analysis. The Court found that the Crown (albeit federal) had failed to justify building a road because it did not consult with affected Aboriginal groups.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)⁹⁸

Treaty 8 Mikisew First Nation ("Mikisew") challenged Parks Canada and the Minister of Canadian Heritage's ("Minister") approval to construct a winter road applied for by the Thebacha Road Society ("Thebacha") through northern Alberta's Wood Buffalo National Park ("WBNP"). Mikisew has reserve lands situated both near and within WBNP, which is a UNESCO designated world heritage site. Mikisew trappers and a Chief sent letters to Parks Canada and the Minister indicating numerous concerns with the proposed road and that they had not been consulted. Within a few months a

94. *Ahyasou v. Lund*, [1998] A.J. No. 1154 at para. 8 (Q.B.), online: QL (AJ).

95. *Supra* note 91 at para. 28. See discussion of the immense implications of this case: C. Corcoran, *supra* note 29 at 7.14, 7.16-7.17 and also Part V of this article.

96. *Alberta Wilderness Association*, *supra* note 83, relating to the Cheviot coal project.

97. *Liidlii Kue*, *supra* note 26.

98. *Supra* note 26. This decision was released on December 20, 2001.

notice posted on a web site indicated the road had been approved despite continued protest by the Mikisew and *before* any formal meeting on the issue.⁹⁹

In June 2001, Mikisew challenged the approval by application for judicial review based on both administrative law grounds and the constitutional ground, receiving first an injunction and then a hearing of their claim on October 26, 2001. Initially to be built right through their reserve, the Mikisew argued that the 118km, 200m wide road would interfere with their Section 35 rights to hunt and trap and that the road would increase poaching, wildlife mortality and would result in destruction of the plant habitat.¹⁰⁰ By approving the road without consulting them, the Crown breached its fiduciary duty and unjustifiably infringed their Treaty 8 rights. The Crown argued that “Mikisew’s treaty rights in WBNP have been extinguished, therefore, consultation is not required”¹⁰¹ or, in the alternative, that the *Sparrow* test had been met.

The Court embarked on a thorough discussion of Treaty 8, including oral promises made through the admission of extrinsic evidence.¹⁰² The Court held that Mikisew’s treaty rights had not been extinguished by establishing WBNP in 1922 or unilaterally by federal statute prior to 1982,¹⁰³ and any “taking up” of lands by the Crown since 1982 must be justified according to the *Sparrow* analysis.¹⁰⁴

Through the *Sparrow* analysis the Court held that first, Mikisew had clearly established adverse impact on their treaty rights.¹⁰⁵ Second, that the Crown’s legislative objective was to meet regional transportation needs, but this was not a “sufficiently compelling and substantial” objective to justify infringement of constitutionally protected rights.¹⁰⁶ The Court, however, continued with the second branch of the justification analysis to consider whether the Crown’s fiduciary duty had been met. Significant here regarding the duty to consult are the Court’s findings that providing standard information on the road proposal was not enough;¹⁰⁷ providing a public “open house” does not accord priority to Aboriginal rights over other

99. *Ibid.* at paras. 17-20. Note the speed of this action through the Federal Court; approval was posted on May 25, 2001 and a judgment already rendered by year-end. The Crown is appealing this decision.

100. *Ibid.* at paras. 10-12, 16. Hunting would be prohibited near the road, and the destruction of the habitat was supported by an independent report.

101. *Ibid.* at para. 4.

102. *Ibid.* at paras. 40-50. An 1899 Treaty Commissioner’s Report and a 1937 affidavit were discussed as evidence of oral promises.

103. *Ibid.* at para. 57.

104. *Ibid.* at para. 86.

105. *Ibid.* at para. 106.

106. *Ibid.* at paras. 115, 123.

107. *Ibid.* at para. 141.

stakeholders nor is it adequate;¹⁰⁸ Thebacha's interviews with some Mikisew members did not relieve the Crown of its fiduciary duty, which cannot be delegated to a third party;¹⁰⁹ and there can be no minimal impairment of rights or possibility of adequate compensation where there was no consultation with the Mikisew whose rights were at issue.¹¹⁰

The Court ultimately held on the constitutional law ground that the Crown's decision to approve the winter road was an unjustifiable infringement of Mikisew's treaty rights because the Minister failed to consult, and it then set aside the approval. Although this is a federal Court decision dealing with the federal Crown, Alberta's courts and tribunals should see *Mikisew* as persuasive.

F Alberta's Perspective

Based on the various arguments made during actions in the courts or tribunals and a brief viewing of *Alberta's Aboriginal Policy Framework*,¹¹¹ the position of the Alberta government concerning its constitutional fiduciary duty becomes clear. Equally clear, based on the survey above of developing law, is that its position cannot be sustained.

The Legislation is Different

The Alberta Environmental Appeal Board in *Whitefish Lake*¹¹² relied on the differences between Alberta's *EPEA*¹¹³ and the *Environmental Assessment Act* of British Columbia.¹¹⁴ Section 2(e) of the *EAA* specifically provides for First Nation participation in assessment, and any applicants for project approval must describe their consultation with First Nations (s. 7(2)(k)). Project Committees (s. 9(2)(d)) must include First Nation members whose "traditional territory includes the site of the project or is in the vicinity." The *EAA* also provides for continuing consultation with First Nations (s. 23). Similarly, s. 2(1) of the *Canadian Environmental Assessment Act* provides

108. *Ibid.* at paras. 144, 155. A public forum is not adequate to deal with constitutionally protected treaty rights. Note that when dealing with this issue, this Court cited Cioni J. in *Breaker*, *supra* note 14 (at paras. 159, 165). Parks Canada admitted in writing a failure to consult (at para. 147) and when a formal meeting was set up, the decision had already been made (at para. 150).

109. *Ibid.* at para. 156.

110. *Ibid.* at paras. 174, 180. As this Court noted, the second branch under the *Sparrow* justification analysis rested solely on the adequacy of consultation.

111. Alberta, *Strengthening Relationships—The Government of Alberta's Aboriginal Policy Framework* (September 2000, PDF 555K), online: <http://www.aand.gov.ab.ca/media/final_strengthrelations.pdf> (date accessed: 4 January 2001) [hereinafter *Aboriginal Framework*].

112. See text accompanying notes 87-90, above.

113. *Supra* note 88.

114. *Environmental Assessment Act*, S.B.C. 1996, c. 119 [hereinafter *EEA*].

for consideration of how development affects “current use of lands and resources for traditional purposes by Aboriginal persons.”¹¹⁵ The *Canadian Environmental Protection Act* also ensures that Aboriginals are involved and that their interests are heard.¹¹⁶

In contrast, the Alberta *EPEA* does not use the words “First Nation” or “Aboriginal” anywhere in the *Act*, but it does include Métis Settlements under the *Métis Settlement Act* as a “local authority.” Section 40(c) describes one of the purposes of assessment as predicting “environmental, social, economic and cultural consequences,” and under s. 44(6) “[a]ny person who is directly affected by a proposed activity” may submit “a written statement of concern.” It is odd that legislation such as this contains no reference to Aboriginal persons in a province covered by treaty where so much resource development occurs.¹¹⁷ The government can argue that the generality of these statements includes Aboriginal rights. However, *Mikisew* held that when asserting a constitutionally protected treaty right, “[a]t the very least, Mikisew [was] entitled to a distinct process if not a more extensive one.”¹¹⁸ Without provision in the *EPEA* one can assume that the government is not acknowledging any distinct or more extensive process than that accorded other stakeholders.

Denying its fiduciary duty to Aboriginals in the natural resource context by claiming it is not mandated by provincial legislation is not a sound argument. The province’s fiduciary obligations are constitutional in nature and exist irrespective of the legislation. Legislation such as the *EAA*, *CEAA* and *CEPA* only reinforce the obligation and provide a procedure for

115. *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [hereinafter *CEAA*].

116. *Canadian Environmental Protection Act*, S.C. 1999, c. 33 [hereinafter *CEPA*].

117. It is this writer’s opinion that there is a deliberate governmental policy in Alberta to avoid any wording in legislation that may acknowledge the existence of Aboriginal rights. See also the *Water Act*, R.S.A. 2000, c. W-3, another comprehensive *Act* that one would assume would include a reference to Aboriginal persons. Additionally, Alberta has a history of reacting strongly and swiftly to any perceived threat to its natural resources. In 1975 the Isolated Communities Advisory Board, which included the Lubicon Lake band, attempted to file a *caveat* at the registration office declaring a legal hunting and trapping interest in 33,000 square miles, containing oil sands rich unpatented land. The registrar refused, and the legal battle began. The Alberta government lawyer succeeded in continued adjournments of the proceeding until the *R. v. Paulette*, [1977] 2 S.C.R. 628 decision had been rendered. Laskin C.J.C. indicated that ss. 136, 141 (formerly s. 86) of Alberta’s *Land Titles Act* allowed a *caveat* to be placed on unpatented Crown land. Bill 29 was rushed through to amend the *Act* to prohibit *caveats* on unpatented Crown land, and the law was to be applied retroactively to defeat the Advisory Board’s claim. This indicates “what extraordinary lengths the Lougheed government was prepared to go to subvert [N]ative rights over the Athabasca Tar Sands.” See J. Goddard, *Last Stand of the Lubicon Cree* (Vancouver: Douglas & McIntyre, 1991) at 42-47.

118. *Supra* note 26 at para. 153. This view is indicated in *Breaker* (*supra* note 14) as well. Recall that the Supreme Court of Canada has accorded Aboriginal rights priority over economic development interests (see *Sparrow*, *supra* note 17).

discharging the duty.¹¹⁹ Omitting references to Aboriginal concerns within the legislation does not overrule the fact Alberta owes fiduciary obligations to Aboriginal peoples and a procedural duty to consult. The absence of Aboriginal references only serves as evidence of Alberta's avoidance of its constitutional obligations as recognized by the common law.¹²⁰ It also escapes logic for the government to acknowledge Aboriginal rights and the duty to consult in land claims or the wildlife regulatory context (by virtue of no appeal in *Breaker*), but not concerning permits and licences regarding land in the natural resource context.

No Fiduciary Duty

Governmental Policy

The Alberta government has somewhat abandoned its strict stance that only the federal Crown owes a fiduciary duty to the Aboriginal groups within the province of Alberta. The *Aboriginal Framework* acknowledges that the government is "committed to meeting all of its treaty, constitutional and legal obligations."¹²¹ However, this statement is qualified by the Aboriginal Framework indicating that there is a disagreement in the interpretation of "rights and responsibilities of Aboriginal people and the federal and provincial governments,"¹²² and that "courts are [still] defining provincial governments' obligations to consult with Aboriginal people."¹²³ Additionally, the *Aboriginal Framework* only acknowledges consultation "where

119. Recall the British Columbia Supreme Court's opinion in *Cheslatta* that the statute "in no way lessens the common law duty but focuses on the issues of project approval," and the fiduciary duty is separate, *supra* note 35 and accompanying text. See also the strong pronouncements from the British Columbia Court of Appeal regarding the constitutionality of a provincial statute that does not meet the requirements of *Delgamuukw*: see *Taku River* above at note 49 and accompanying text. Note that this Court also pointed out that Section 35 is not subject to s. 1 of the *Charter* or to the s. 33 provincial legislative override (at para. 156).

120. Alberta has attempted this tactic before. The Province avoided acknowledging homosexual rights by deliberately omitting reference to sexual orientation in its then *Individual Rights Protection Act*. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [hereinafter *Vriend*], the deliberate omission was held to be an unjustifiable violation of s. 15 of the *Charter*, and the Court imposed the rare remedy of "reading-in" the words effective immediately as a just remedy under s. 52 of the *Constitution Act, 1982*. Avoiding the acknowledgment of Aboriginal rights and fiduciary obligations by legislative omission is clearly analogous to the *Vriend* situation and may warrant a similar remedy once this state of affairs reaches the Supreme Court of Canada. See also *Mushkegowuk Council*, *supra* note 65.

121. *Supra* note 111 at 14.

122. *Ibid.* Also interesting is that the *Framework* focuses on the special relationship and the responsibilities the *federal* government has with First Nations (at 19).

123. *Ibid.* at 15. It is obvious from the review above that provincial governments' obligations have become clearly defined in other jurisdictions.

appropriate” in regulatory and development decisions, including the natural resource context.¹²⁴

In contrast, the current British Columbia *Guide to the BCEA Process: Aboriginal Issues and Consultations* states that the *EAA* obligations are only “minimum requirements” when it comes to Treaty 8 rights in the environment assessment process; they are “in addition to the common law obligation to consult [and help the government] to meet its common law obligations.”¹²⁵ The British Columbia government has also created other guides for utilization by its agencies and other industry stakeholders that describe the case law and process involved to meet the duty to consult obligation.¹²⁶ Additionally, case law has made it clear that the provincial Crown has a fiduciary duty to Aboriginal people akin to that of the federal Crown.¹²⁷ And important regarding the Alberta Crown is a statement by the Court in *Mikisew*: “As a fiduciary, the Crown can *not* be permitted to allow the interests of *third parties*, or its *own* interests, to obscure its obligations to First Nations.”¹²⁸

Treaty Rights are Extinguished

This argument can take various forms, none of which have been or should be given any credence by the courts. First, the “ceding” of lands by the Aboriginal people when the treaties were entered does not equate with giving up all rights to the tract surrendered or a valid “taking up” of lands by the government. The “taking up” of land, by the words of the treaty, is meant to be something that may “happen gradually, perhaps temporarily, and deliberately” not something that was “intended to occur automatically on all the land surrendered.”¹²⁹

Second, the argument that the province validly “takes up” land when granting project approval for natural resource development, thereby extinguishing treaty rights, cannot be sustained. Prior to 1982 only a federal law could have unilaterally altered or extinguished Aboriginal rights through

124. *Ibid.* at 18. This phrase can only be interpreted as implying the government’s subjective opinion.

125. Environment Assessment Office (July 2000) at 2.4, online: <<http://www.eao.gov.bc.ca/GUIDE/07-000/fnguide.htm>> (date accessed: 4 January 2001).

126. See also *Delgamuukw Consultation Guidelines* (September 1998) and the *Crown Land Activities and Aboriginal Rights Policy Framework*, online: <<http://www.aaf.gov.bc.ca/consult/consult.stm>> (date accessed: 4 January 2001). Query if the availability of this information contributes to an industry stakeholder having a duty to consult Aboriginal groups as was found in *Haida Nation*, *supra* notes 44-46 and accompanying text.

127. See *Halfway Appeal* and *Gitanyow*, *supra* note 16 and above discussion of *Badger* at text accompanying note 22.

128. *Supra* note 26 at para. 161 [emphasis added]. In essence, it is this writer’s belief that this is exactly what is happening in Alberta, partly for the benefit of “all” Albertans and our resulting strong economy, but to the detriment of the future of Aboriginal groups and the environment.

129. *Mikisew*, *supra* note 26 at para. 39.

a clear and plain intention to do so.¹³⁰ Section 88 of the *Indian Act*,¹³¹ which allows provincial laws of general application to apply to “Indians,” never allowed the province to extinguish Aboriginal rights. In fact, s. 88 is subject to the terms of a treaty or act of the federal government pursuant to their authority to legislate over “Indians” in s. 91(24) of the *Constitution Act, 1867*.¹³² Since 1982 the federal Crown has been unable to unilaterally defeat treaty rights through statute without meeting the *Sparrow* test, and the provincial Crown never had such powers.

Third, the argument that land is “occupied” when there is a natural resource project, and thus no treaty rights or duty to consult, is difficult to prove. *Badger* held that the *NRTA* creates a provincial fiduciary duty. While being interpreted as having extinguished the treaty right to hunt commercially, it expands the right to hunt for food to all unoccupied Crown land in the province *and* any other private or “occupied” land that has not been put to a visible use that is incompatible with hunting.¹³³ In *Halfway Appeal* the Court found that the so-called “taking up” of land for resource development was not a visible incompatible use with the Treaty 8 right to hunt but a “temporary use of some land for a specific purpose, compatible with the continued long-term use of the land for Halfway’s traditional hunting activities.”¹³⁴ Thus resource development does not put a geographical limitation on treaty rights and should be interpreted as a shared use. There is also the fact that since 1982, any “taking up” or conversion from “unoccupied” to “occupied” lands must meet the *Sparrow* test of justification; to hold otherwise would make the entrenchment of Section 35 rights meaningless.

The Alberta government is also unlikely to succeed in any of the above arguments because of the broad interpretation of treaties that has been sanctioned by the Supreme Court of Canada: “[A]ny ambiguities or doubtful expressions in the wording of a treaty or document must be

130. *Ibid.* at paras. 77, 85.

131. R.S.C. 1985, c. I-5.

132. (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. See *Delgamuukw*, *supra* note 12 at paras. 179-83, 206. See discussion in T. Campbell, *supra* note 18 at 247. See also N. Bankes, “Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights” (1998) 32 U.B.C. L. Rev. 317.

133. *Badger*, *supra* note 9 at para. 96. The “effect of the *NRTA* is to place the Provincial government in exactly the same position which the Federal Crown formerly occupied,” and the “Provincial government has the same duty not to infringe unjustifiably the hunting right provided by Treaty No. 8.” See also Brian Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 Can. Bar Rev. 196 at 221.

134. *Supra* note 16 at para. 173. This interpretation is sound and in line with the spirit of the words of the *Alberta Natural Resources Act*, *supra* note 8. The Court also held that the treaty words to “take up lands ... for mining” did not extinguish treaty rights. Note that s. 10 of the *NRTA* requires the provincial government to set aside “unoccupied” Crown lands to fulfill treaty obligations. *Breaker*, *supra* note 14, also found that the right to hunt granted by the *NRTA* is broader than that given by treaty, consistent with *Badger*, *ibid.*

resolved in favour of the Indians.¹³⁵ *Delgamuukw* held that the oral history of an Aboriginal group should be placed on equal footing with traditional evidence and be given independent weight.¹³⁶ *R. v. Marshall* recently added that the “historical and cultural context” of the treaty must be considered even if the treaty “purports to contain all the terms.” This context requires considering the conduct of the parties, the rationale for the treaty, prior negotiations and what the First Nation understood the treaty to mean through the introduction of extrinsic evidence.¹³⁷ In *Benoit v. Canada*, Campbell J. relied heavily on Commissioner’s Reports and oral history in upholding an oral tax exemption promise “unintentionally” made to Treaty 8 signatories.¹³⁸ The treaties and *NRTA* in Alberta will likely be interpreted broadly in favour of Aboriginal rights, and it will probably be easier to establish both the existence and infringement of a treaty right invoking the *Sparrow* test.

V CONSEQUENCES FOR THE OIL AND GAS INDUSTRY

At minimum, a decision ultimately in favour of an Aboriginal group regarding the duty to consult within the natural resource context would necessitate the alteration of the regulatory scheme that grants future resource rights within Alberta. Worse still, the state of the law and the Alberta government’s position could prove to have dire consequences for third parties currently involved in the oil and gas industry. If the Crown is held to have breached its fiduciary duty and its action led to a violation of a Section 35 treaty right, one available remedy is that the action itself be declared unconstitutional and therefore void.¹³⁹ Also, permits and proposals have been quashed,¹⁴⁰ injunctions granted,¹⁴¹ and any litigation is costly and will often result in project delays.¹⁴² Additionally, the recent *Haida Nation* decision of

135. *Badger*, *ibid.* at 794.

136. *Delgamuukw*, *supra* note 12 at para. 107.

137. *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 11. See also C. Bell & K. Buss, “The Promise of Marshall on the Prairies: A Framework for Analyzing Unfulfilled Treaty Promises” (2000) 63 Sask. L. Rev. 667 at 670. Evidence of this nature was relied on in *Mikisew*, see note 98 above and accompanying text.

138. [2002] F.C.J. No. 257 (T.D.).

139. P. Macklem, *supra* note 12 at 23. A breach found by a tribunal could lead to *certiorari* on judicial review, see *ibid.* at 24-25. There is also the possibility of huge damage awards.

140. *Halfway*, *supra* note 30. See also *TransCanada Pipelines*, *supra* note 65; *Mikisew*, *supra* note 26; and *Taku River*, *supra* note 36.

141. *Fort Nelson*, *supra* note 52. See also *Union of Nova Scotia Indians*, *supra* note 65, and *Mikisew*, *ibid.*

142. *Cheslatta*, *supra* note 35, where the Court ordered a new Project Committee be established and information provided by Huckleberry. See also *Ahyasou*, *supra* note 91, where Rio Alto in 1997 voluntarily suspended exploration pending trial, which is not yet scheduled to occur. See *Taku River*, *supra* note 36, and *Liidlii Kue*, *supra* note 26, where the Court sent back the permits for reconsideration delaying the projects.

the British Columbia Court of Appeal should put industry on notice that a legal and equitable duty to consult can belong to industry as well as government. Knowledge of the facts of infringements occurring or knowing participation in a breach of the duty to consult could yield industry liability.¹⁴³

There is always the outside chance that the courts may accept the Aboriginal argument that the treaties were understood to be “of peaceful co-existence and sharing” contrary to what the treaty text says about a land surrender, making no reference to the true spirit or intent. Archival evidence and oral history indicate that one of the principle motives for making Treaty 8 was to pave the way for resource development and that there was a deliberate attempt to avoid assigning reserves that had any mineral potential.¹⁴⁴ Because oil and gas were not contemplated at the time, it was only by accident that some First Nations were assigned oil rich reserves. Many Aboriginal leaders also believe that the federal government did not have the authority to transfer mines and minerals to the provinces in the *NRTA*. Elders say the treaties pertain to the surface only, or “plough deep”; that is, that which was required to be used for agriculture for the incoming settlers—thus the mines and minerals remain a vested interest of the Aboriginal peoples.¹⁴⁵ If a court accepts either argument and finds that the federal Crown breached their fiduciary duty, today’s leases and permits from either Crown would mean nothing.

The oil and gas industry should not rely on what is required or not required by the legislation in Alberta when getting project approval or conducting their day-to-day business when Aboriginal interests may be involved. Industry can depend on neither the provincial government nor the courts to provide them with certainty or security of their investments anytime soon. Companies should develop their own strategies to be proactively involved with the Aboriginal community. Fortunately, many companies in the oil and gas industry have taken a proactive approach — usually just because it makes good business sense. The recent *Royal Commission* has even recognized this fact. There are mutual benefits to be gained by cooperating with the local Aboriginal groups.¹⁴⁶ Band councils are

143. See above notes 44-46 and accompanying text.

144. J. Maas, *supra* note 28 at 97. See also C. Bell & K. Buss, *supra* note 137 at 690. Evidence indicates that the words of Treaty 8 were on paper before any negotiation took place. See also *Royal Commission*, *supra* note 1 at 491. See generally discussion on First Nation views of prairie treaties J.Y. Henderson *et al.*, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000) at 439-42.

145. G. Favelle, *supra* note 60 at 54. See also “Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment” in *Royal Commission*, *supra* note 1 at 17.

146. *Royal Commission*, *ibid.* at 850-51. The *Report* also recommends the government require private sector initiatives to provide training and employment opportunities, preferred access to supply contracts and that the company show respect for Aboriginal environmental standards and traditional uses.

under immense pressure to improve the quality of life of their members and are willing to negotiate.¹⁴⁷ Being patient and building a trusting relationship based on mutual respect and open communication are sound measures to avoid conflict.

A prudent company should be aware of the legal developments outside Alberta and strive to adhere to the principles evolving regarding the duty to consult so that it can reduce the risk of its long-term investments. Just because this body of law is not presently applied in Alberta, it does not mean it will not be recognized in the near future. A company should be informed of Aboriginal issues, culture and traditional practices. It would be wise to fully inform Aboriginal groups that may be affected by a proposal, to listen to them and to accommodate their concerns. Only in this way can areas be identified that should not be disturbed or that require special attention so that reclamation will be more successful after the project is complete. A company should be prepared to engage in good faith negotiations, provide economic spin-offs to the community and fair compensation. A company that conducts their affairs accordingly reduces the chance that litigation will ever erupt at all, and if it does, the company can bring forth their good faith efforts as evidence when the actions of the parties come under judicial scrutiny.

VI CONCLUSION

Section 35 of the *Constitution Act, 1982* is making a dramatic impact on the depth and scope of Aboriginal rights. Supreme Court of Canada judgments have been increasingly sensitive to Aboriginal rights, giving them broad interpretation and specifying the duties governments must undertake to respect these rights. Procedural duties, such as the duty to consult Aboriginal groups, are constitutional in nature and form a part of the common law. They apply regardless of what standards are required in an individual province's environmental legislation. Additionally, procedural duties should apply across contexts when land and Aboriginal rights are involved, especially in a province such as Alberta that is covered by treaty. Indeed, Section 35 mandates this. The duty to consult is a procedurally fair way to respect the rights of a group of Canadians who have long shared a special relationship with the land—but for the most part have not been heard. Furthermore, waiting any longer to recognize the duty in Alberta is unjustifiable when the future of Aboriginal livelihood is in jeopardy, and when fulfilling the duty

147. Doug Halverson, West Coast Energy, "Sectoral Challenges of Oil and Gas and Pipelines" (Conference on Business With First Nations and the Fiduciary Duty, Pacific Business and Law Institute, 5 June 2000) 12-1 at 5-6.

can only mean good things for the environment in the long run when it comes to natural resource development.

It appears the Alberta government's position is intransigent, and it may indeed battle all the way up to the Supreme Court of Canada before it acknowledges the duty to consult applies within Alberta to decisions it makes regarding the natural resource sector. While the Alberta government is entitled to its philosophical viewpoint, and is within its right to wait to be told by the court that this body of law applies to the natural resource sector, justice demands that this issue be resolved soon—and in favour of Aboriginal Section 35 rights. The courts have been given the task of policing the government as the guardians of constitutional rights. *Ahysou v. Lund* represents a substantial, critical opportunity for the Alberta Court of Queen's Bench to decide in a way where it may have been ineffective in the past on analogous issues. One can only hope that the Court values the reasoned judgments before them and fulfils its duty, not swayed by the conservative nature of Alberta's territory boundary or the non-Aboriginal stakeholders desire to maintain the status quo.

Until this issue is resolved there will be much uncertainty. For now the oil and gas industry should be aware of the legal developments and conduct their affairs accordingly when an Aboriginal group is involved. While industry is not generally held to have a legal duty to consult, it does have options to reduce the risk of their investments and conflict with Aboriginal groups. Good faith consultation is a positive alternative to court action and will enable industry to mitigate the adverse impact oil and gas development causes to culturally important Aboriginal sites and the environment itself. As the oil and gas industry continues to expand into more remote areas of the province, the concern of affecting traditional Aboriginal territories increases—it is essential to have Aboriginal support or face legal sanction.