INTRODUCTION
On November 18, 2004, the Supreme Court of Canada released its decisions in Haida Nation v. British Columbia (Minister of Forests) and Weyerhaeuser (Haida) and in Ringstad v. Taku River Tlingit (Taku River). These appeals are of great significance to government, First Nations and industry doing business in large parts of Canada where aboriginal treaties have not yet been concluded.

Haida and Taku River both deal with the obligations of the Crown and industry in respect of aboriginal rights and title claims pending treaty. The appeals address whether there is a duty on the Crown and private industry to consult with aboriginal groups who claim, but have not yet established, aboriginal rights or title and an infringement of these interests.

In brief, the Supreme Court of Canada affirmed the existence of a legal duty on the Crown to consult and, in certain circumstances, accommodate asserted aboriginal interests on an interim basis pending final resolution by treaty or otherwise. The duty to consult and accommodate does not, however, extend to private industry proponents who seek governmental approval to conduct activities on Crown land. Moreover, the duty does not require that the First Nation agree to the proposed accommodation.

BACKGROUNDER – B.C. COURT OF APPEAL DECISIONS IN HAIDA AND TAKU RIVER
In British Columbia, where both cases originate, the issue of aboriginal title has not been settled by the conclusion of treaties in the case of many First Nations. Both the Haida and Taku River cases arose when a First Nation objected to government decisions regarding the use of land in the First Nation’s traditional territory. In each case, the land in question was subject to pending treaty negotiations between the Crown and the First Nation.

In Haida, the provincial Crown granted a forestry company an exclusive right to harvest trees in an area over which the Haida Nation claimed aboriginal title and rights. Over a period of several years, the Crown renewed the tree farm license and transferred the license to Weyerhaeuser, the successor of the original forestry company. The Haida challenged the Minister of Forest’s decisions in respect of the license on the basis that there is a legal obligation on the Crown and Weyerhaeuser to consult with the Haida before authorizing logging operations over land to which the Haida claim aboriginal title.

In Taku River, the dispute centred on ministerial approval of a Project Approval Certificate in relation to a mining project. The industry proponent, Redfern Resources Ltd. (Redfern), sought approval to reopen a mine. The controversial aspect of the project centred on Redfern’s plan to build a 160 km access road to the mine site. The proposed road would traverse land claimed by the Taku River Tlinglit First Nation (Taku Tlinglit) as their traditional territory and the subject of on-going treaty negotiations.

Redfern, the Taku Tlinglit, and other stakeholders participated in the environmental review process over a period of three and one-half years which resulted in recommendations to the responsible ministers. The Taku Tlinglit participated in the process as a member of the Project Committee charged with conducting the review process. The Committee prepared a Recommendations Report to the responsible Ministers; the Taku Tlinglit disagreed with the recommendations of the majority of the Committee and issued a minority report. The responsible Ministers issued a Project Approval Certificate very shortly thereafter.

After the decision was made, the Taku Tlinglit sought to quash the Ministers’ decision to approve the Project on the basis the Project would unjustifiably infringe both their aboriginal title to the site and their aboriginal rights to use the area for traditional

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activities. The B.C. Court of Appeal upheld the lower court’s decision to quash the Project Approval Certificate issued by the Ministers in Taku River, which it said was issued without regard to the Crown’s constitutional and fiduciary obligations to the First Nation, and remitted the matter for reconsideration by the Ministers.

In Haida, the Court of Appeal refused to quash the tree farm license granted to Weyerhaeuser on the basis it would extensively disrupt existing operations, but granted court orders setting out the consultation obligations of the Province and of the third party, Weyerhaeuser, in respect of the Haida’s interests in the land as an alternative remedy.

The Court of Appeal held in both cases that, before making a decision, the Crown had a constitutional and fiduciary duty to consult and accommodate affected First Nations where their rights may be infringed. That is, the Court required the Crown decision-makers to be mindful of the possibility that their decision might infringe aboriginal rights and, accordingly, take care to ensure that the substance of the First Nations’ concerns have been addressed. These were interim obligations: the First Nation did not have to definitely prove title or rights for the Crown’s duty to arise but were required to provide enough evidence to support a prima facie case.

The Crown’s failure to satisfy this duty to consult and accommodate constituted a reviewable legal error which may justify quashing the impugned decision. Further, the Court held in Haida that a third party might have consultation and accommodation obligations where, without the third party’s cooperation, the Crown’s duty to consult would be rendered completely hollow.

The B.C. Court of Appeal concluded that the content of the duty to consult and accommodate varied from case to case depending on the nature of the aboriginal rights asserted by the First Nation. That is, the legal strength of the First Nation’s aboriginal title or rights claim informed the degree to which the Crown must take the First Nation’s interests into account in making its decision. Where the evidence of aboriginal rights or title was very strong and the impact of the proposed infringement severe, the Crown might need to obtain the First Nation’s consent. Even where the evidence of aboriginal rights was not strong, the Crown must consider the First Nation’s interests in making its land use decisions.

The aim of the duty to consult and accommodate interim First Nation interests was to protect the interests of all parties pending the final determination of the nature and scope of aboriginal title and aboriginal rights in a court of law or by concluding a treaty.

The Crown (and Weyerhaeuser in the Haida case) appealed the Court of Appeal judgment in both cases to the Supreme Court of Canada.

THE SUPREME COURT OF CANADA AND THE DUTY TO CONSULT

The Supreme Court of Canada unanimously concluded that the provincial Crown has a legal duty to consult in good faith with First Nations about decisions that may impact the First Nation’s interests in land before the First Nations have proven title or rights. While the Crown is bound by the duty to consult and accommodate by virtue of common law and constitutional principles, the Court found that industry partners, like Weyerhaeuser, do not owe any independent duty to consult with or accommodate First Nations’ concerns.

Haida and Taku River are significant for this is the first time the highest Court has established a general framework for the duty to consult and accommodate First Nations interests before aboriginal title or rights claims have been finally determined through litigation or the conclusion of a treaty.

The Crown’s Duty to Consult and Accommodate First Nation Interests. The Supreme Court of Canada in Haida sets out how the Crown’s duty to aboriginal people finds its roots in Canadian history and the Canadian Constitution. It flows from the historical relationship between First Nations and the Crown in circumstances where the First Nation peoples in Canada were never conquered, did not concede their title and rights to their land, and, in many cases, have not reconciled their interests with the assertion of Crown sovereignty by way of a treaty.

The honour of the Crown gives rise to different duties in different circumstances; the Supreme Court concluded that the honour of the Crown gives rise to a fiduciary duty only where the Crown has assumed discretionary control over specific aboriginal interests.
The Supreme Court held that the honour of the Crown both implies and requires a duty to consult and accommodate the First Nation's interests. The Court specifically held that it is not honourable for the Crown to unilaterally exploit resources claimed by a First Nation during the process of resolving an aboriginal claim to that resource.

When the Duty to Consult Arises. The process of consultation arises when the Crown has knowledge of the potential existence of an aboriginal right or title and contemplates conduct which may adversely affect it. The Crown may learn of aboriginal rights or title claims through the treaty process. Equally, the Supreme Court noted that First Nations should outline their rights (including aboriginal title) clearly, focussing on the nature and scope of their aboriginal interests, and on how the Crown’s conduct may infringe these rights.

The Supreme Court concluded that to limit the duty to a time when rights and title are proven risks treating reconciliation as a distant legalistic goal, devoid of the meaningful content mandated by the Crown’s solemn commitment in constitutionally recognizing and affirming aboriginal rights and title.

What is Required? The Supreme Court concluded that the content of the duty to consult and accommodate varies in the circumstances and will be determined on a case by case basis. Generally, the scope of the duty to consult and accommodate is proportionate to a preliminary assessment of the strength of the First Nation’s claimed rights and how serious an impact the Crown’s proposed conduct may have on those rights.

The consultation process involves information gathering and an assessment of the strength of the rights claimed and the seriousness of the potential infringement. This process may lead to a duty to change government plans or policy in order to accommodate the First Nation’s interests.

What consultation is required lies along a spectrum. In the case of a weak or limited claim to aboriginal rights or where the potential infringement of those rights is minor, the Crown may only be required to give notice, disclose information, and discuss any issues arising with the First Nation. However, where there is a strong case for the asserted right, the right and its infringement is very significant to the First Nation, and there is a risk that infringement of the asserted right is not compensable in damages, the Crown may be required to “consult deeply” with a view toward finding an interim solution satisfactory to the First Nation.

Accommodation. In all cases, the honour of the Crown requires that the Crown act in good faith to provide meaningful consultation with affected First Nations. Where the consultation process discloses a strong case supporting the asserted right and the consequences of the proposed government decision may adversely affect the right in a significant way, the issue of accommodation arises. That is, the Crown may have to take steps to avoid irreparable harm or minimize the effects of its decision on the First Nation’s asserted rights.

The Supreme Court concluded that accommodation requires a process of seeking compromise in an attempt to harmonize the conflicting interests of the Crown and the First Nation. The duty to consult and accommodate does not require the Crown to reach an agreement with the First Nation; instead it requires a good faith effort to understand the First Nation’s concerns and move to address them in a meaningful way.

When the Crown Fails to Meet its Duty. The Crown’s duty to consult and accommodate is a legal duty subject to judicial review. The Supreme Court set out in Haida the standards of review applicable in such cases.

Where a First Nation challenges the Crown’s conduct on the basis that the Crown failed to meet its duty to consult and accommodate, the existence of and scope of the duty is a question of law which will be assessed against a standard of correctness. If the Crown errs in assessing the seriousness of the First Nation’s claim or the impact of the infringement, the Court may set aside the Crown’s decision.

The consultation process itself is subject to scrutiny on a reasonableness standard. This means the Crown need not be perfect on procedural matters: so long as every reasonable effort is made to inform and to consult First Nations such
The consultation process itself is subject to scrutiny on a reasonableness standard. This means the Crown need not be perfect on procedural matters: so long as every reasonable effort is made to inform and to consult First Nations such that government action or regulatory action, viewed as whole, accommodates the aboriginal right in question, this suffices. The focus is on the reasonableness of the consultation process and accommodation.

Private Industry – No Duty to Consult and Accommodate. The Supreme Court reversed the B.C. appeal court's finding in *Haida* that the forestry company, Weyerhaeuser, had a legal duty to consult and accommodate the Haida Nation in respect of the licensing of their logging operations in Haida territory. The Court concluded that the Crown alone is legally responsible for its interaction with third parties that affect aboriginal interests. The Crown may delegate the procedural aspects of consultation to industry proponents seeking a particular license or approval. Further, the Crown may require private industry to specify measures it will take to identify and consult with First Nations who claim an aboriginal interest in or to the project area. However, the Supreme Court held that the honour of the Crown cannot be delegated to private actors and so the ultimate legal responsibility for consultation and accommodation rests with the Crown.

The Supreme Court's Application of the Duty to Consult. The content of the duty to consult and accommodate is case specific. In *Haida*, the Supreme Court concluded that the province had knowledge of the Haida's claims and that the contemplated tree farm license could adversely impact them. This triggered a legal duty to consult. Further, the available evidence clearly supported the Haida's claim to both aboriginal title and rights over the area in question. As the tree farm license was an exclusive, long-term license to harvest timber, the decision to transfer and renew the license potentially infringed Haida's asserted rights. The Supreme Court concluded that the strength of the case for both the Haida title and the right to harvest red cedar, coupled with the serious impact of incremental strategic licensing decisions on those interests suggest that the honour of the Crown requires significant accommodation to preserve the Haida's interests pending the resolution of their claims. Since the Province had not consulted with the Haida about the tree farm license at all, the Province had failed to meet its duty. In the result, the B.C. Court of Appeal orders in respect of the Crown were upheld. Given that the Supreme Court found no independent duty on private industry to consult and accommodate aboriginal interests, the orders against Weyerhaeuser failed.

In *Taku*, the Court concluded that the Taku Tlinglit's claim was relatively strong, relying in part on the fact that their title claim had been accepted for treaty negotiation. The potential for infringement of the Taku Tlinglit's rights and title was also high: there was evidence the proposed road would pass through an area critical to the Taku Tlinglit's social and cultural life, as well as its domestic economy. Accordingly, they were entitled both to be consulted and to have the Crown accommodate their concerns.

The Supreme Court concluded that the Crown's consultation with the Taku Tlinglit was adequate to satisfy the honour of the Crown: the First Nation was a full participant in the assessment process including the Project Committee decisions to deal with aboriginal issues and the road access proposal specifically. Further, the proponent Redfern's information gathering and analysis was shaped by the Taku Tlinglit's concerns, and the majority report which the Ministers reviewed in making their decision to issue the Project Approval Certificate identified the Taku Tlinglit's concerns and recommended measures to meaningfully address them. To be legally sufficient, the consultation process did not require that the concerns of the Taku Tlinglit be addressed to their satisfaction.

**CONCLUSION**

The Supreme Court's decisions *Haida* and *Taku River* are a welcome clarification on the existence and potential scope of the both Crown and industry's obligations in making decisions that affect First Nations where aboriginal rights and title is asserted and yet unresolved. The Supreme Court decision in *Taku River* sets out how, with an inclusive and thorough consultation process, the Crown may legally meet its obligations to consult and attempt to accommodate First Nation's interests. Through the duty to consult, the Supreme Court provides a general framework which lends support to the process of reconciling the question of unresolved aboriginal interests with the honour of the Crown. However, the Supreme Court states in *Taku River* that it is impossible to provide a prospective checklist on the level of consultation required. As such, the content of consultation and accommodation will have to develop on a case-by-case basis.
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