

ADMINISTRATIVE LAW CONFERENCE—2011
PAPER 3.1

Administrative Law Remedies in the Aboriginal Law Context

These materials were prepared by Robin M. Junger and Nika Robinson, both of McMillan LLP, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, October 2011.

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ADMINISTRATIVE LAW REMEDIES IN THE ABORIGINAL LAW CONTEXT¹

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I. Introduction

The purpose of this paper is to examine the relationship between the disciplines of administrative and Aboriginal law, particularly in the context of judicial review and remedies. More specifically, it will consider how the courts have applied a somewhat novel or flexible approach to the use of administrative law remedies in this context, and to assess whether and to what extent such approaches have been duly grounded in relevant legal principles.

The focus will be on decisions from the BC courts that involve Aboriginal consultation duties derived from s. 35 of the *Constitution Act, 1982* (“*Constitution Act*”) (as per *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 74 (“*Haida*”) and related case law). This paper does not consider judicial review under the *Federal Court Act*.

II. Judicial Review Generally

Judicial review is, of course, a fundamental aspect of our legal system and the Rule of Law more generally. It can take different forms and apply in different contexts.

¹ Robin Junger is a partner and Nika Robinson is an associate in the Business Law Group of McMillan LLP. The authors would like to thank David Jones, QC, Tom Isaac, Lorne Sossin, and Paul Yearwood for reviewing and commenting on an earlier draft of this paper. The authors would also like to acknowledge the assistance of Brittnee Russell, who is an articling student at McMillan LLP, in assisting with research for this paper. All positions stated and any errors or omissions are, of course, our own.

A. Judicial Review of Legislative Acts

One category of judicial review is the court's supervision of the passage of legislation by legislators. In such cases, the courts have a role to playing in "reviewing" whether legislation is passed in accordance with the constitutional powers (and constraints) that apply to a particular level of government and a particular matter. Claims in this regard are based on s. 52 of the *Constitution Act* which provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and or effect."

There is no need for the Constitution or a statute to expressly state that the courts have this role. Rather the courts' power is inherent in the role and function of the superior courts as set out in the Judicature sections (101-106) of the *Constitution Act*, 1867 respecting superior courts (Peter W. Hogg, *Constitutional Law of Canada*, Looseleaf, 5th ed, Vol 1 (Scarborough: Thomson Carswell, 2007) ("Hogg") at 7-1 to 7-3).

Similarly, the common law has long recognized a right of courts to declare regulations invalid if they are made outside of the authority conferred by their enabling act. This is again part of the inherent role of the superior courts discussed above.

In any case, where a court finds that a law or regulation is not within the authorities provided under the constitution or enabling act (i.e., it is *ultra vires*), the remedies that a court may give would generally include a declaration of invalidity, a quashing of decisions made pursuant to any such legislation and potentially some creative things like temporary "suspension" of legislation while a defect is remedied or replacement legislation passed (e.g., *Reference re Manitoba Language Rights*, 1985 CanLII 33(SCC)).

B. Judicial Review of Non-Legislative Acts

Another category of judicial review involves oversight of statutory decision makers—those people who are entrusted by law or regulation to make decisions and orders that affect the rights and interests of people. This is by far the more common type of judicial review today and is again based on the role of Superior courts under our constitutional history and Parliamentary supremacy. Put simply, government actors, when exercising their functions, are to be held accountable to relevant principles of law.

The grounds on which judicial review may occur in this context are somewhat broader than judicial review of legislative action discussed above. It would include instances where the action is beyond the authority conferred by the act or regulation (but the act or regulation itself is fine), as well as other common law bases such as breach of principles of administrative fairness, or where a decision is considered "unreasonable."

C. The Judicial Review Procedure Act

Although some types of judicial review can be achieved through actions (e.g. a declaration of constitutional invalidity), most judicial review proceedings in BC occur under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c.241 ("*JRPA*"), and in common parlance a "judicial review" is usually taken to mean a petition to the BC Supreme Court under the Act. The *JRPA* was passed in 1976 and was intended to simplify what was a long and somewhat archaic history of judicial review process involving the prerogative Crown writs and various complicated procedural questions that had arisen in respect of them.

To some extent the *JRPA* achieved its purpose, but its success was limited. The statute itself contains a number of provisions that are not easy to reconcile with one another, and it is not always entirely clear how and to what extent the new provisions are still affected by common law developments.

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This is unfortunate for a number of reasons, not the least of which is that judicial review in the Aboriginal law context inevitably adds an additional degree of complication as we will discuss below.

But before doing so, it may be useful to set out our understanding the general principles that apply in respect of the *JRPA* and which are relevant to this paper.

- The *JRPA* is a procedural statute and does not establish substantive rights (*Cook v. British Columbia (Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722 (“*Cook*”).
- In terms of remedies, while the prerogative writs of mandamus, prohibition or certiorari may no longer be issued (s. 12), the court may (pursuant to s. 2(2)(a)) grant relief “in the nature of” those writs under the *JRPA*.
- There is some confusion and disagreement in the case law as to whether s. 2(2)(a) allows relief in the nature of certiorari, mandamus or prohibition in respect of decisions or actions that do not involve a statutory power. Section 2 states:
 - 2(1) An application for judicial review must be brought by way of a petition proceeding.
 - (2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
 - (a) relief in the nature of mandamus, prohibition or certiorari;
 - (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.

Southin J. appeared to say (in *Mohr v. CJA Vancouver, New Westminster and Fraser Valley District Council of Carpenters*, 1988 CanLII 3189 (B.C.C.A.)) that the s. 2(2)(a) remedies could be invoked in the absence of a statutory power (i.e., against government action more generally). However, that was *obiter dicta*. And nearly 20 years later, in *Cook*, Justice Garson stated that “... Justice Southin, cannot be taken to have intended to say that section 2(2)(a) of the *JRPA* is disconnected from any statutory enactment.” At para. 50, she went on to say that if indeed any such power existed it was limited, stating:

There is some authority for the proposition that the scope of prerogative writs has been expanded somewhat to enable their use to restrain government power exercised by bodies created pursuant to its prerogative power, where the public decision maker owes a duty of fairness to, and the decision affects, the rights of individuals.

- By contrast, the law is relatively clear that under s. (2)(2)(b) the ability to issue a declaration or injunction under the *JRPA* (i.e., in a proceeding brought by petition) applies only in respect of the exercise of a statutory power.²
- Traditionally, courts have not used their powers under the *JRPA* for the purposes of reviewing legislative decisions for anything other than the question of whether such legislative actions are made in accordance with applicable jurisdictional limitations.

2 Even here the law is not entirely clear. See, for example, *L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique*, 2011 BCSC 89 where the petitioner sought declaratory relief pursuant to the *JRPA* (in addition to declaratory relief pursuant to s. 24 of the *Charter*) in respect of a ministerial funding decision. The Court undertook judicial review of the ministerial decision but did not identify any specific statutory power of decision.

III. Judicial Review in the Aboriginal Law Context

Judicial review in respect of Aboriginal rights does not, unfortunately, fit neatly and squarely into either of the two broad categories of judicial review discussed above, or into the procedures set out in the *JRPA*.

On the one hand, most judicial review in this context is premised upon allegations of failure on the part of government to comply with obligations contained in s. 35 of the *Constitution Act*. This may seem, in first instance, like a claim within the first category of judicial review discussed above—essentially arguing that government action is unconstitutional. But most such cases do not allege that a “law” is inconsistent with s. 35 rights, and as such s. 52 of the *Constitution Act, 1867* has no role to play in such cases. Similarly, while s. 24 of the *Constitution Act* gives the court authority to supervise government actions (not limited to laws) and to award remedies for breaches of *Charter* rights, it applies only in respect of *Charter* breaches. Given that s. 35 is not part of the *Charter*, this section also does not have application to claims based on Aboriginal rights.

On the other hand, judicial review respecting asserted Aboriginal rights does not fit neatly and squarely within the traditional concept of judicial review of statutory decision-making, because not all First Nation concerns regarding impacts on asserted Aboriginal rights are related to the exercise of statutory powers or powers of decision. Moreover, the grounds for judicial review in this context are not limited to those that would apply to any other party seeking judicial review (e.g., breach of procedural fairness, unreasonableness, excess of jurisdiction). Rather there is an additional obligation that applies to statutory decision-makers in respect of asserted Aboriginal rights—and therefore an additional ground for judicial review—that is available only to Aboriginal groups. More specifically, in *Haida*, the Supreme Court of Canada established a legal obligation for statutory decision-makers to consult with and potentially accommodate Aboriginal interests in cases where government action or decisions can have adverse impacts on claimed (but not yet proven) Aboriginal rights. Further, the Court made it clear that while that duty to consult may bear some resemblance to general principles of administrative fairness, it was not limited to that.

These challenges were identified by Justice Southin where she expressed reservations about bringing this type of claim under the *JRPA* in her concurring judgment in *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 (“*Musqueam*”). In this case, the BC Court of Appeal considered whether the Crown has satisfied the duty to consult with respect to the sale by the Province of the UBC golf course lands to UBC. Justice Southin, in separate concurring reasons, granted the injunction and ancillary relief but made the following observations at paras. 16-19:

The *Judicial Review Procedure Act*, invoked below, is inapt to the claims asserted here because the appellant does not assert that the transaction in issue is not authorized by statute. To put it another way, no administrative grounds are asserted. I addressed this point of the scope of the *Judicial Review Procedure Act* in my judgment in *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* (2002), 98 B.C.L.R. (3d) 16, 2002 BCCA 59, rev’d. 2004 SCC 74, at 28-30 (B.C.L.R.), and I shall not repeat what I there said.

These cases arising from aboriginal land claims address themselves, in substance, not to whether powers conferred by an enactment are lawfully exercised, but to an overarching constitutional imperative.

During argument in *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*, *supra*, Mackenzie J.A. felicitously described a claim of an aboriginal right as “upstream” of the certificate of indefeasible title.

I consider these claims of failure to consult and accommodate also to be upstream not only of the certificate of indefeasible title but also of the statutes under which the ministerial power has been exercised ...

All this leads to a number of questions. For example:

- When Aboriginal groups seek to judicially review government decisions or actions on the basis of the *Haida* duty, do different rules apply in terms of the scope and grounds of such review?
- Are there different remedies that may be provided?
- To the extent there are differences, are they adequately grounded in legal principle and duly articulated in individual cases?

These are important questions. While it may be completely legitimate for judicial review to develop in a somewhat different manner when it relates to asserted Aboriginal rights, it is equally true that any such difference and flexibility should be duly principled and clear, so that any deviations from established doctrine are not seen as arbitrary or unguided.

In 2010, the Supreme Court of Canada had occasion to expressly consider the relationship between administrative law and Aboriginal law principles. In *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (“*Little Salmon*”), the Court considered a land grant to a Yukon resident in the context of a modern treaty that was silent on the duty of consultation. The Court determined that there had been no breach of the duty to consult or administrative law principles. In so holding, the Court took the view that the principles of administrative law such as procedural fairness and natural justice are concepts that are flexible enough to take into account Aboriginal dimensions as well as the impact of decisions on the community or other individuals. The Court did not, however, discuss the marginal but important areas where judicial review in the Aboriginal law context differs from other areas. Rather, Justice Binnie, for the majority, rejected the assertion that they were wholly independent disciplines and discussed the commonality between them. He stated:

The LSCFN invited us to draw a bright line between the duty to consult (which it labelled constitutional) and administrative law principles such as procedural fairness (which it labelled unsuitable). At the hearing, counsel for the LSCFN was dismissive of resort in this context to administrative law principles:

[A]dministrative law principles are not designed to address the very unique circumstance of the Crown-Aboriginal history, the Crown-Aboriginal relationship. Administrative law principles, for all their tremendous value, are not tools toward reconciliation of Aboriginal people and other Canadians. They are not instruments to reflect the honour of the Crown principles. [transcript, at 62]

However, as Lamer C.J. observed in *R. v. Van der Peet*, 1996 CanLII 216 (S.C.C.), [1996] 2 S.C.R. 507, “aboriginal rights exist within the general legal system of Canada” (para. 49). Administrative decision makers regularly have to confine their decisions within constitutional limits: *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (S.C.C.), [1989] 1 S.C.R. 1038; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 (CanLII), 2000 SCC 69, [2000] 2 S.C.R. 1120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), 2002 SCC 1, [2002] 1 S.C.R. 3; and *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (CanLII), 2006 SCC 6, [2006] 1 S.C.R. 256. In this case, the constitutional limits include the honour of the Crown and its supporting doctrine of the duty to consult.

The link between constitutional doctrine and administrative law remedies was already noted in *Haida Nation*, at the outset of our Court’s duty to consult jurisprudence:

In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to

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the procedural safeguards of natural justice mandated by administrative law. [Emphasis added; para. 41.]

The relevant “procedural safeguards” mandated by administrative law include not only natural justice but the broader notion of procedural fairness. And the content of meaningful consultation “appropriate to the circumstances” will be shaped, and in some cases determined, by the terms of the modern land claims agreement. Indeed, the parties themselves may decide therein to exclude consultation altogether in defined situations and the decision to do so would be upheld by the courts where this outcome would be consistent with the maintenance of the honour of the Crown.

The parties in this case proceeded by way of an ordinary application for judicial review. Such a procedure was perfectly capable of taking into account the constitutional dimension of the rights asserted by the First Nation. There is no need to invent a new “constitutional remedy.” Administrative law is flexible enough to give full weight to the constitutional interests of the First Nation. Moreover, the impact of an administrative decision on the interest of an Aboriginal community, whether or not that interest is entrenched in a s. 35 right, would be relevant as a matter of procedural fairness, just as the impact of a decision on any other community or individual (including Larry Paulsen) may be relevant.

(*Little Salmon* at paras. 45-47)

These comments are helpful in the sense that they make clear the two disciplines are interrelated, and that First Nations interests can at times be duly addressed through processes that would meet the tests of administrative law generally. But Justice Binnie does not go so far as to say they are exactly the same. To the contrary, he refers to administrative law being “flexible” enough give full weight to the constitutional interests of First Nations. From the cases discussed below, it appears he is indeed correct about this flexibility. What is less clear is whether the nature and extent of such flexibility has been duly considered and explained in the cases in which it has been invoked.

A. Courts’ Authority to Judicially Review a Particular Matter

As noted above in section II, the court’s ability to judicially review and potentially quash decisions of government and government officials under s. 2(2)(a) of the *JRPA* is generally considered limited to decisions or actions made pursuant to statutory power.

However, some judicial review cases that deal with asserted Aboriginal rights appear to expand the scope of decisions which may be reviewed.

For example, in *Da’naxda,xw/Awaetlala First Nation v. British Columbia (Environment)* (“*Da’naxda,xw*”), the petitioners felt aggrieved by the fact that the government had not introduced legislation to amend a conservancy boundary. The First Nation and its partner wanted to develop a hydroelectric facility which was prohibited by the conservancy designation, and they alleged that various ministers had previously promised they would pursue such an amendment but never did.

The Court obviously could not judicially review the fact that the Legislature had not passed the legislative amendments that the petitioners wanted, and indeed that is not how the petitioners framed the issue. The Court was, however, prepared to judicially review the Minister of Environment’s decision to decline to recommend to Cabinet that it in turn should propose a legislative amendment for consideration by the Legislature. It did so on the basis that the Minister’s decision to not recommend a legislative change respecting a conservancy boundary was made in the exercise of his statutory powers under s. 3 of the *Park Act*, R.S.B.C. 1996, c.344 (“*Park Act*”). The Court noted that this was “not disputed,” but s. 3 of the *Park Act* is not what one would immediately think of as

conferring a statutory power for judicial review purposes.³ Rather, it sets out the minister's general responsibilities respecting parks, stating:

Duties and responsibilities of minister

3(1) Except as otherwise provided in this Act, the minister has jurisdiction over, and must manage and administer, all matters concerning parks, conservancies and recreation areas and public and private use and conduct in them, including all of the following:

- (a) the rights, property and interests of the government in parks, conservancies and recreation areas;
- (b) natural resources in parks, conservancies and recreation areas;
- (c) wildlife and its habitats in parks, conservancies and recreation areas;
- (d) the preservation, development, use and maintenance of parks, conservancies and recreation areas and natural resources in them;
- (e) the regulation and control of public and private individuals in the use or exploitation of parks, conservancies and recreation areas and the natural resources in and on them, and of human activities, behaviour and conduct in parks, conservancies and recreation areas;
- (f) all other matters under this Act.

(2) The minister has, subject to an order under section 6, jurisdiction over and must manage and administer land or a trail, path or waterway comprised in an order under that section.

Using this line of reasoning, and changing the facts only slightly, one would have to think that a group that wanted to have a park created could request the minister to recommend such legislation to Cabinet and in turn the Legislature, and if the minister refused to do that, the decision would be subject to judicial review. Yet such a result would seem inconsistent with the history of judicial review, in that courts would almost certainly refuse to engage in judicial review of such a decision, likely calling it legislative and political in nature.⁴

Not only could the *Park Act* be used to initiate other judicial review applications, the same reasoning could be applied to other statutes which assign ministers with general responsibility. Consider the following examples:

- Pursuant to s. 9(2) of the *Ministry of Lands, Parks and Housing Act*, R.S.B.C. 1996, c.307, the minister may do one or more of the following:
 - (a) acquire land;
 - (b) improve Crown land;
 - (c) assist municipalities and regional districts to establish parks and to provide outdoor recreation facilities.

Following the reasoning of the *Da'naxda,xw*, if the minister declined to acquire a piece of land or to assist a municipality or regional district to establish a park, that decision might be subject to judicial review.

3 This section was previously held to provide a statutory power amenable to judicial review in *West Kootenay Community EcoSociety v. British Columbia*, 2005 BCSC 784. In that case, the matter at issue was a decision to relocate a park entrance.

4 The courts have, however, previously found authority to judicially review a decision as to whether to make a recommendation. In *Wade v. UBC*, [1994] 94 B.C.L.R. (2d) 354, the Court undertook judicial review of a decision by the president of UBC not to recommend to the Board of Governors that the petitioner be granted tenure. The president's powers were generally set out in the legislation.

- Pursuant to s. 9(2) of the *Ministry of Environment Act*, R.S.B.C. 1996, c.299, the purposes and functions of the ministry, under the direction of the Minister, include the following:
 - (a) to encourage and maintain an optimum quality environment through specific objectives for the management and protection of land, water, air and living resources of BC;
 - (b) to undertake inventories and to plan for and assist in planning, as required, for the effective management, protection and conservation of all water, land, air, plant life, and animal life;
 - (c) to manage, protect and conserve all water, land, air, plant life, and animal life, having regard to the economic and social benefits they may confer on BC;
 - (d) to set standards for, collect, store, retrieve, analyze, and make available environmental data;
 - (e) to monitor environmental conditions of specific developments and to assess and report to the minister on general environmental conditions in BC;
 - (f) to undertake, commission and coordinate environmental studies;
 - (g) to develop and sustain public information and education programs to enhance public appreciation of the environment;
 - (h) to plan for, design, construct, operate and maintain structures necessary for the administration of this Act or for another purpose or function assigned by the Lieutenant Governor in Council;
 - (i) to plan for, coordinate, implement and manage a program to protect the welfare of the public in the event of an environmental emergency or disaster.

If a minister were to decline to commission an environmental study on a certain subject area, decline to collect information on a species of plant, or decline to allocate funds to build a structure that might be used to collect such data, that decision might be subject to judicial review on the basis of the *Da'naxda,xw* approach.

Another case that appears to expand the scope of decision that may be reviewed is *Adams Lake Indian Band v. British Columbia*, 2011 BCSC 266 ("*Adams Lake*") where the Court had to consider whether it had a right to judicially review an Order in Council designating Sun Peaks Resort as a resort municipality. The relevant section of the *Local Government Act*, R.S.B.C. 1996, c.323 stated:

Incorporation of a mountain resort municipality

11(1) If a vote under section 8 is in favour of incorporation, the minister may recommend to the Lieutenant Governor in Council incorporation of a municipality as a mountain resort municipality.

(1.1) The minister may not recommend incorporation of a mountain resort municipality under subsection (1) unless the minister is satisfied that

- (a) alpine ski lift operations, year-round recreational facilities and commercial overnight accommodation are offered within the area of the proposed municipality, or
- (b) a person has entered into an agreement with the government with respect to developing alpine ski lift operations, year-round recreational facilities and commercial overnight accommodation within the area of the proposed municipality.

(2) Despite section 8, in the case of an area that is a mountain resort improvement district, the minister may recommend incorporation of a new mountain resort municipality to the Lieutenant Governor in Council, in accordance with the letters patent of the improvement district.

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(2.1) Despite section 8, in the case of an area that is not a mountain resort improvement district, the minister may recommend to the Lieutenant Governor in Council incorporation of the residents of the area into a new mountain resort municipality if the minister is satisfied that a person has entered into an agreement with the government with respect to developing alpine ski lift operations, year-round recreational facilities and commercial overnight accommodation within the area.

(3) On the recommendation of the minister under subsection (1), (2) or (2.1), the Lieutenant Governor in Council may, by letters patent, incorporate the residents of an area into a mountain resort municipality.

(3.1) Letters patent under subsection (3) that, on the recommendation of the minister under subsection (2.1), incorporate a mountain resort municipality may do one or more of the following:

- (a) include exceptions from statutory provisions;
- (b) specify the effective period or time for an exception;
- (c) provide for restriction, modification or cancellation by the Lieutenant Governor in Council of an exception or its effective period;
- (d) appoint or provide for the appointment of one or more individuals to be the members of the municipal council of the municipality.

(3.2) For a mountain resort municipality incorporated under subsection (3) on the recommendation of the minister under subsection (2.1), the Lieutenant Governor in Council may, on the recommendation of the minister and by letters patent, provide for further exceptions, conditions and appointments.

(3.3) Appointments may be made under subsection (3.1)(d) or (3.2) until the general voting day for the first election of members to the municipal council.

(4) [Repealed 2008-42-37.]

(5) Section 17 applies with respect to the incorporation of a mountain resort municipality under this section.

The municipality argued that the court lacked this authority on the basis that this was a legislative decision. The Court seemed to accept that the Order in Council was indeed a legislative instrument, but then made a number of statements confounding the legislative nature of the instrument with a statutory power of decision. For example, it stated at para. 124:

In my view, the duty to consult cannot be ousted on the basis that the exercise of a statutory power became law by the issuance of an order in council.

The Court concluded that there had been an exercise of a statutory power, notwithstanding the legislative nature of the Order in Council, and that the decision was open to judicial review pursuant to the *JRPA*.

Similarly, in *Musqueam*, the BC Court of Appeal had to determine whether it had the right to review an Order in Council which authorized the transfer of the UBC golf course. The statutory provisions in the *University Endowment Land Act*, R.S.B.C. 1996, c.469 under which the order was made read as follows:

2(1) Subject to the regulations [and with the approval of the Lieutenant Governor in Council], the minister may do one or more of the following:

- (a) survey, resurvey and subdivide into lots, blocks, streets, lanes, boulevards, recreational courts, parks and other areas all lands that are held by the government within the University Endowment Land;

...

- (d) advertise and otherwise provide for the disposition by sale or lease, and sell or lease, any of the land so subdivided into lots or blocks and any of the land subdivided under the British Columbia *University Loan Act*, 1920, S.B.C. 1920, c. 49, in the manner, at the prices and on the terms and conditions the minister considers proper;

[The phrase in brackets was removed by SBC 2003-66-57.]

Land Act, R.S.B.C. 1996, c. 245 –

51(1) Despite any other provision of this Act, Crown land may, with the approval of the Lieutenant Governor in Council and subject to the terms, reservations and restrictions that the Lieutenant Governor in Council considers advisable, be disposed of by Crown grant under this Act, free or otherwise, to a government corporation, municipality, regional district, hospital board, university, college, school board, francophone education authority as defined in the *School Act* or other government related body or to the Greater Vancouver Transportation Authority established under the *Greater Vancouver Transportation Authority Act* or any of its subsidiaries.

(2) A disposition under subsection (1) may be limited to a specific public purpose.

...

(3) A power under any Act, other than the *Ministry of Lands, Parks and Housing Act*, to dispose of the fee simple in Crown land as defined in this Act, must be exercised in compliance with this Act.

In this case, the Court did not address or question the nature of the statutory power of decision but accepted that it had jurisdiction to review the decision pursuant to the *JRPA*.

While drawing the line between what is a legislative act and what is a statutory decision is not an exact science (especially in the case of Orders in Council), the traditional law of judicial review seemed to accept that such a distinction did matter at least in concept. But the above decisions, by contrast, seem to almost do away with any such distinction, and it is difficult to understand how this line of reasoning will not now be extended to virtually any other cases where a person does not like a decision by government (even a broad and high level policy decision) that is implemented by an Order in Council, given that most Orders in Council are done pursuant to some provision in a statute (Paul Salembier, *Regulatory Law and Practice in Canada* (Markham: LexisNexis Butterworths, 2004) at 9-10).⁵

On the other hand, some decisions examine this issue carefully and in a satisfactory way, and do provide some limitations in terms of what decisions will be subject to judicial review. In *Cook*, a judicial review petition was filed by the Semiahmoo First Nation, seeking an order in the nature of prohibition, to prevent the Minister of Aboriginal Relations and Reconciliation from signing a treaty with another First Nation (the Tsawwassen Final Agreement). The Semiahmoo argued that the proposed treaty would infringe on their asserted rights in respect of overlapping territories, and that they were not adequately consulted about this potential impact. The Court in that case gave extensive and very careful consideration to whether it had authority to engage in such judicial review, including the specific question of whether an order under s. 2(2)(b) of the *JRPA* must be tied to the exercise of specific statutory powers. The Court rejected the view that an Order in Council that confers general authority on a Minister may be used to ground a power of decision in a statutory enactment. In so holding, Justice Garson made the following observation at para. 66:

5 Note that the Alberta Court of Appeal has recognized a duty to consult in regard to proposed decisions that will become law by Order in Council (*R. v. Lefthand*, 2007 ABCA 206, leave to appeal to SCC refused, [2007] S.C.C.A. No. 468 at para. 38). It is not clear whether this approach will be upheld by the Supreme Court of Canada. At para. 44 in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, the Supreme Court of Canada left open the issue as to whether there is a duty to consult in respect of legislative decisions. We also note that in *Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137 at paras. 48-57, the Alberta Court of Appeal considered this issue and concluded that even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions.

These enactments must be considered in the context of the general structure of the executive of government. These Orders in Council are like many others—they describe the portfolios of a Minister. The *Constitution Act* requires a government on taking office to appoint an executive and define their portfolios. It does not follow that everything every Minister does in the performance of his ministerial duties is an exercise of a statutory power and reviewable under the *JRPA*.

Justice Garson concluded at para. 72 that “this Court does not have jurisdiction pursuant to the *JRPA* to grant the remedies sought herein.”

Another case that addresses the limits of judicial review in the context of a statutory power of decision is *Upper Nicola Indian Band v. British Columbia (Environment)*, 2011 BCSC 388 (“*Upper Nicola*”). In this case, the Court considered whether the Crown had met its *Haida* duty to consult with respect to a decision to issue an Environmental Assessment Certificate for construction of a transmission line. The petitioner First Nations also asserted that the Crown had breached commitments which it had made regarding how consultation would proceed. The Court found that the Crown had not made such commitments, but that such commitments would not be subject to judicial review pursuant to the *JRPA* in any event because they were not made pursuant to an underlying statutory power of decision. The Court stated:

Arguably, the discussions offered by the MARR and/or the MEMPR do not reflect on the performance of a specific statutory power, but rather the exercise of prerogative or natural person powers: see the decision of Garson J., as she then was, in *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722 at paras. 68-72.

In the usual course the statutory enactment circumscribes and provides a framework for the analysis. In the absence of the exercise of a statutory power, one is driven back to an analysis on the constitutional duty to consult. As that is confined to prospective actions, a proceeding under the *JRPA* seems singularly inappropriate to proffered consultation of a non-constitutional nature outside of a statutory process. In my view the courts are ill-equipped to peer over the shoulders of the participants in such a process.

(*Upper Nicola, ibid.*, at paras. 146-47)

Given all the above, it remains unclear whether a judicial review application based on the duty to consult can only occur in cases where the duty is triggered by a statutory power of decision. To the extent it has been addressed to date, little guidance has emerged and it seems the cases are pushing the “flexibility” of traditional administrative law close to the breaking point.⁶

For our part, we believe that the best approach is not to attempt to shoehorn these cases into traditional judicial review doctrine, or to try and contort the doctrine to make the cases fit. Rather, we believe that it is open to a court to expressly hold that judicial review in this context is somewhat different, and the role of the courts somewhat broader, than traditional grounds. Such an expansion could be based expressly on the fact that s. 35 rights (and related obligations respecting asserted but unproven rights) require judicial oversight to have meaning, they are premised upon constitutionally protected rights, and they do not fit neatly and squarely within the two traditional categories of

6 In fairness to the courts, it should also be noted that there are cases (outside of the aboriginal law context) where the courts also do not expressly discuss the statutory power that is at issue on the judicial review, and which may be open to criticism on this basis. This includes, for example, cases in which courts have judicially reviewed the actions of voluntary organizations (see Robin Junger and Chilwin Cheng, *Judicial Oversight of Voluntary Organizations*, Continuing Legal Education Society of BC, Administrative Law Conference (Vancouver, 2004)).

judicial review discussed above.⁷ At the same time, if they were to go down that route, the courts would also need to develop clear principles and limitations to clarify exactly how far its role does go in terms of judicially reviewing government action in this context, assuming there are at least some decisions that should not be subject to the court's oversight even in this context.

This may be what is meant by some of the decisions that refer to the duty of consultation to be "upstream" of the *JRPA*, but for all the reasons noted above, we believe that a more principled and detailed legal test must be established if a different rule is to apply in this context. To say the duty is "upstream" in and of itself is not enough.

B. Suspension of Decisions/Approvals

In most judicial review cases, the court either finds that it has grounds to quash a decision (and remit it back) or it allows the decision to stand. There are many decisions out there where the court indicates that these are the only choices before it, and there are many more where the court declines to quash a decision even if the court itself might have made a different decision on the merits.

In the Aboriginal law context, the situation is rather different. In many cases, where the court finds that the Crown has failed to meet its consultation and accommodation obligation, the court does not quash the decision, but rather "suspends" it for a period of time while further consultation occurs. For example:

- In *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 SCSC 1320 ("*Squamish*") discussed in detail in Section C below, the Court declined to quash the decisions at issue but adjourned them generally, with the right of the petitioners to re-apply in the event they believed the Minister did not fulfill the duties declared in the order. (The order also included a number of declarations, orders for reconsideration of decisions and orders respecting consultation.)
- In *Musqueam*, Justice Hall suspended the operation of the Order in Council selling the UBC Golf Course lands for 2 years while the Province and the Musqueam negotiate an agreement which would accommodate Musqueam's Aboriginal title interests (para. 101).
- In *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642 ("*Klahoose*"), Justice Grauer stayed all further operations under the disputed Forest Stewardship Plan pending deep consultation and the negotiation of an interim solution that would preserve the Klahoose Aboriginal claims (para. 150).
- In *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359, the Court stayed the effect of the issuing of the amendments of the advanced exploration permit and suspended the effect of the cutting permit for 90 days during which time the Crown was directed to put in place a program to protect and augment the Burnt Pine caribou herd. (The directions regarding the caribou augmentation plan were overturned on appeal, as discussed below.)

⁷ Given that the *Haida* duty to consult cases do not fit neatly into the traditional categories of judicial review, an express doctrine could be developed for these cases based on the "constitutional imperative" line of reasoning. This doctrine has been applied in other areas where the courts have been required to oversee decisions to ensure that they are made within constitutional constraints. One example is the constitutional imperative that courts must be free from political interference through economic manipulation by other branches of government (e.g., *R. v. Campbell*, 1997 CanLII 317 (S.C.C.) at para. 138).

- In *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (“*West Moberly*”), the BC Court of Appeal stayed the implementation of, or action under, the Amended Bulk Sampling Permit and the Advanced Exploration Permit pending meaningful consultation (para. 167).⁸
- In *Halalt First Nation v. British Columbia (Environment)*, 2011 BCSC 945 (“*Halalt*”), the Court stayed implementation of any actions or decisions pursuant to the Environmental Assessment Certificate pending adequate consultation and accommodation regarding a proposed project for water extraction (para. 753).⁹

Although this is relatively common practice, it does not appear that the courts have spent a great deal of time discussing the source of authority for such an order, or how it fits with the provisions of s. 2(2)(a) which allows a court to issue a remedy in the nature of certiorari, or with ss. 5 and 6, which state:

Powers to direct tribunal to reconsider

5(1) On an application for judicial review in relation to the exercise, refusal to exercise, or purported exercise of a statutory power of decision, the court may direct the tribunal whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of a specified matter, the whole or any part of a matter to which the application relates.

(2) In giving a direction under subsection (1), the court must

- advise the tribunal of its reasons, and
- give it any directions that the court thinks appropriate for the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.

Effect of direction

6. In reconsidering a matter referred back to it under section 5, the tribunal must have regard to the court’s reasons for giving the direction and to the court’s directions.

The recent *West Moberly* decision by the BC Court of Appeal considered ss. 5 and 6 of the *JRPA* in the context of a decision by the Court to suspend the effect of the permits in question while ordering specific accommodation measures. At trial, the Court concluded that it is open to a court to stay the effect of the impugned decisions for a period of time to allow for accommodation measures to be put in place. The Court imposed a 90 day stay and, at para. 82, ordered that within the 90 day period:

The Crown, in consultation with West Moberly, should proceed expeditiously to put in place within that period a reasonable, active plan for the protection and augmentation of the Burnt Pine herd, a plan that takes into account the views of West Moberly, including the reports of the Crown’s wildlife ecologists and biologists with the Ministry of Environment referred to by West Moberly.

However, on appeal, the BC Court of Appeal overturned the directions as to accommodation measures by the trial judge but left open the possibility that a court may make specific directions as to accommodation as follows:

8 Note that the Crown and Xstrata Coal (which has purchased First Coal) have applied for leave to appeal this decision to the Supreme Court of Canada.

9 Note that the Crown has appealed this decision to the BC Court of Appeal. It should also be acknowledged that one of the authors of this paper (Robin Junger) was Associate Deputy Minister responsible for the Environmental Assessment Office during part of the environmental assessment process for this project.

... it is not in my respectful view necessary to reach a final conclusion on whether the judge erred in declaring a specific form of accommodation. The *Judicial Review Procedure Act* would appear to grant a sufficiently broad discretion to make such an order but this, and other courts, have shown a reluctance to do so, so as not to impair further consultation.

For the reasons expressed above, I have concluded that the judge was correct in holding that the consultation process was not meaningful, although for somewhat more expansive reasons than he gave on that issue. For that reason, it seems to me the proper remedy is to remit the matter for further consultation between the parties, having regard for what the scope of the consultation ought properly to include.

I make no further comment on the ambit of a judge's discretion to give specific directions as provided for in ss. 5 and 6 of the *Judicial Review Procedure Act*. However, it is preferable in this case that the specific direction be set aside so that the parties may resume consultation as indicated, and unfettered.

(*West Moberly* at paras. 155-65)

These cases reflect a desire on the part of the courts to remain flexible and encourage ongoing discussion between the parties. However, it may also be argued that the best way for the courts to facilitate reconciliation is with a clear statement as to the legal rights of the parties. After all, the parties have, in most cases, spent considerable time in discussions before coming to the court to make a determination as to their legal rights. In addition, the suspension of a decision can lead to other complexities going forward.

Consider, for example, *Halalt*, where, rather than quashing an Environmental Assessment Certificate, the Court suspended the effect of the Certificate for two years pending appropriate consultation and accommodation. Presumably, the suspension of the decision rather than quashing of the Certificate is intended to balance the interests of the parties, and (subject to addressing the First Nation issues) protecting the rights otherwise acquired by the Certificate holder. However, it is not clear whether the ministers will have the ability to amend the certificate in such circumstances, as s. 19 of the *Environmental Assessment Act*, S.B.C. 2002, c.43 expressly provides that a certificate may only be amended, after if it is issued, on request of the certificate holder.¹⁰

Similar concerns also arise about the application of the *functus officio* doctrine, in cases where decisions have been suspended rather than quashed. If a decision is not quashed, it is not clear on what basis the decision maker has the ability to "reconsider" it following further consultation. For example, in the *Squamish* case, the Court ordered three decisions to be "reconsidered," but it did not quash any of them. In such circumstances, does the decision-maker really have the ability to "reconsider" them? If so, does he or she have the ability to add new terms and conditions that may be necessary to implement accommodation measures? While one would have to think that common law respecting the doctrine of *functus officio* is quite capable of developing an exception to for these purposes (as it has in other contexts), it does not appear that this has been done or even expressly considered to date. As such, one

10 We note that it is common practice for courts to grant a period of temporary validity to an otherwise unconstitutional statute when the courts review a legislative decision. However, the courts have been explicit about the reasons for such a remedy. Initially, this practice was limited to addressing exigent situations where danger, disorder or deprivation would be caused by an immediate order of invalidity (see *Schachter v. Canada*, 1992 CanLII 74 (S.C.C.) and *Hogg* at 40-9). Examples include a declaration that would have left Manitoba with a vacuum of law in the province and a declaration that would have left BC without means to hold an election. More recently, the use of the delayed declaration of invalidity has been used fairly frequently when the courts review legislation to allow an opportunity for dialogue between the courts and the Legislature (*Hogg* at 40-9). In our view, the rationale above for the delayed declaration of invalidity in the context of legislative decisions cannot be applied to judicial review of non-legislative acts.

is left to wonder exactly when, where and to what extent an exception should apply in this context. This issue need not stand in the way of such remedies, but it does need to be addressed.

C. Court Supervision of Remedies

As noted above, ss. 5 and 6 of the *JRPA* provide a court with limited authority to provide directions to a decision-maker when a decision must be reconsidered. In traditional judicial review cases, if and when such directions were given, the courts would not retain any supervisory role in respect of the reconsideration. Rather, the court would give its direction, and if the decision-maker did not make his decision in a manner that corrected the error in first instance, the petitioner would be required to bring a new judicial review application.

In the case of judicial review brought on Aboriginal rights grounds, the situation is often different. Similar to the points discussed above regarding the court's willingness to suspend rather than quash decisions, the courts have also evidenced a willingness to retain supervisory authority over the matter while the duty to consult is further undertaken and the decision reconsidered. Moreover, not only do they retain oversight, but they have been prepared to make unconventional directions, such as orders for mediation even where the parties had not agreed to that.

For example, in *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 1712 ("*Hupacasath 2005*"), Justice Smith ordered at paras. 321-25:

The following will be terms of this Court's order and will be in effect for two years from the date of entry of this order or until the province has completed consultations with the HFN, whichever is sooner:

1. Brascan will maintain the current status of "managed forest" on the Removed Lands and will keep the land under the *Private Managed Forest Land Act*, subject to all of its provisions and regulations governing planning, soil conservation, harvesting rate and reforestation;
2. Brascan will maintain variable retention and stewardship zoning on old growth areas in the Removed Lands;
3. Brascan will fulfill its commitments in the Minister's letter regarding maintenance of water quality on the Removed Lands;
4. Brascan will maintain all current wildlife habitat areas on the Removed Lands;
5. Brascan will maintain ISO or CSA certifications and will continue to subject the Removed Lands to the public advisory process as per CSA standards;
6. Brascan will maintain current access for aboriginal groups to the Removed Lands;
7. Brascan will provide to the HFN seven days notice of any intention to conduct activities on the land which may interfere with the exercise of aboriginal rights asserted by the HFN.

This order will apply to Brascan, Island Timberlands, and their successors in interest.

The parties will exchange positions as to what kinds of activities might interfere with the exercise of aboriginal rights and if there is a failure to agree on a framework, the matter will go to mediation.

The Crown will facilitate the operation of this term of the order, including, if requested by the petitioners and Brascan, providing the services of independent mediators at Crown expense.

The petitioners also seek orders for disclosure of information relevant to the consultation.

I will order that the Crown and the petitioners provide to each other such information as is reasonably necessary for the consultation to be completed. Counsel for the Crown suggested that there should be discussion between the parties as to the exact type and extent of the information to be provided, as in *Homalco* (at para. 124) and *Gitksan First Nation #1* (at para. 113). I agree. I direct that the Crown and the petitioners attempt to agree on the information exchange. If they are unable to agree, the matter will go to mediation.

The parties returned to court in 2008 in *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 (“*Hupacasath 2008*”) where Justice Smith found that the consultation pursuant to the 2005 order over the last two years had not been reasonable. She went on to make an order appointing a mediator, empowering that mediator to set timelines, direct the flow of information and report any difficulties to the court, and ordered that the Crown would bear the mediator’s fees and expenses as follows:

... A mediator will be appointed by agreement of the parties or, failing agreement, the parties may apply to the Court with respect to the naming of the mediator. The fees and expenses of the mediator will be borne by the Crown. The mediator will be empowered to set timelines, direct the exchange of information and report to the court if there are difficulties.

The mediation will address appropriate accommodation for the effects of the Removal Decision on HFN asserted aboriginal rights on their claimed territory, both with respect to Crown land and the Removed Lands. The parties will specifically consider ways of including the Hupacasath in discussions with Island Timberlands regarding ongoing environmental, watershed and wildlife protection on the Removed Lands. They will address possible measures to assist the HFN in obtaining the co-operation of the landowner to enable the HFN to exercise ongoing access to their sacred sites and areas where they have traditionally gathered medicinal plants on the Removed Lands, and possible measures that will enable such access on the Crown lands within the asserted traditional territory. In that regard, they will address ways of respecting HFN cultural practices while providing information sufficiently specific for the landowner’s and the Crown’s needs. They will consider possible accommodation from resources on the Crown lands for the access to cedar, other plants and wildlife previously available to the HFN on the Removed Lands. They will consider possible measures to provide ongoing HFN access by land to their reserves. They will consider possible accommodation from resources on the Crown lands for the overall impact of the Removal Decision on the HFN asserted traditional territory, including both the Removed Lands and Crown land.

If it would be of assistance to the parties, they may return to court to address the definition of the issues they are required to address in the mediation, or for further clarification as to the Crown’s duty of consultation. If consultation and accommodation have not been accomplished through mediation after six months from the date of entry of this Order, the parties may return to Court. I will remain seized of this matter.

(*Hupacasath 2008* at paras. 255-57)

The 2004 *Squamish* case involved a challenge by the Squamish First Nation to several actions and decisions by a provincial agency (Land and Water BC) regarding the development of a proposed resort at Brohm Ridge.¹¹ The facts were quite complicated but, in brief, the Squamish First Nation alleged that certain agreements signed between the province and the proposed developer were done in a manner that failed to meet the Crown’s duty to consult and accommodate asserted Aboriginal rights.

11 It should be acknowledged that one of the authors of this paper (Robin Junger) was counsel to the Province in respect of the implementation of the Court’s order in this case.

The agreements related to re-instating a lapsed agreement, allowing a change of control of the proponent and allowing an expansion of the project proposal.

None of the agreements or decisions at issue would have themselves have authorized the project to proceed or result in any actual impact on Aboriginal rights. Nonetheless, Justice Koenigsberg stated, "... in my view, the duty to consult in this case arises at the earliest decision making by the government in an approval process leading to the possible infringement of claimed aboriginal rights." The Court also noted that in addressing its consultation and accommodation obligations the Crown was required to consider the "need and viability" of the proposed project.

Following the decision, the Court issued a multi-page order which included a number of declarations, orders for reconsideration of decisions and orders respecting consultation. Interestingly, despite these orders for reconsideration, the Court did not quash any of the three decisions at issue but rather adjourned them generally, with the right of the petitioners to re-apply in the event they believed the Minister did not fulfill the duties declared in the order. The order also provided that the parties were at liberty to apply to the Court "with respect to any question relating to the consultation and accommodation ... and the structure of the consultation and accommodation process." (A full copy of the order is attached as Appendix "A.")

The parties had difficulty reaching agreement on what was required to duly discharge the order. They therefore returned to court to seek further directions. The parties appeared on three days over a three week period and ultimately Justice Koenigsberg directed, among other things, that the parties engage in mediation.

Following this hearing, and prior to the time that the parties had settled a draft order, the Court issued a document entitled "Memorandum, Directions and Guidance." It addressed a variety of issues and stated, in part:

[16] I am going to direct that the parties begin the engagement in mediation. If you cannot agree on how this should take place and when it should take place, we can have a mid-trial or mid-hearing case management conference.

The parties were not able to reach agreement on the mediation terms and, again, returned to court in April 2005 for further directions.

Another recent example where the courts have retained supervisory authority is in *Adams Lake* at para. 214 where the Court directed to the Crown to consult further with the Adams Lake Indian Band and explicitly retained jurisdiction to deal with issues arising from the consultation process.

While there is no doubt that such orders from the court are well intentioned, they are rather atypical in the world of judicial review. One can argue that this is understandable, as the nature of the claim at issue in Aboriginal rights cases is different than other judicial reviews. But on the other hand, one may question why courts are content to simply quash and order reconsideration in cases where other grounds for judicial intervention exists (including cases where the decision-maker has been found to have been unfair) but are often not willing to do so in the Aboriginal rights context.

And even if one is prepared to embrace that novelty on the basis that Aboriginal law cases are different from other cases, one must ask whether the effect of such orders is in fact what the courts are hoping to achieve. While some may feel the increased and ongoing court vigilance disciplines the parties and makes greater incentive to resolve their differences, it may also be argued that it creates a lack of clarity, that it makes it even more difficult to determine whether and when sufficient consultation and accommodation has occurred, and that it invites the parties to position their dealings with a view to how the record will appear to the court rather than truly building stronger relationships between them.

One may also question whether this approach is the one that is most motivating when it comes to governmental conduct. In our view, officials may actually be more emboldened to take necessary action in support of Aboriginal consultation duties (and to be equally bold when saying enough

consultation and accommodation has occurred) if they know that their decisions will either be quashed or allowed to stand based on that determination. Where a fuzzy middle ground exists there may actually be less incentive to make those difficult and principled decisions about the adequacy of consultation (which decisions will usually upset either the Aboriginal group or a proponent). This is because there is less at stake, and also because officials may believe the courts will land in that fuzzy middle ground no matter what they do. If true, this would only have the effect of causing more delay, uncertainty and litigation.

IV. Conclusion

The concept of judicial review and the concept of rule of law generally are strong and flexible enough to shoulder the development of somewhat different principles for judicial review in the Aboriginal law context. But they are not strong enough to do so if such differences are not adequately articulated and duly principled. It is not enough just to say that Aboriginal rights are upstream of a statute, or that Aboriginal law is *sui generis*.¹² Rather, those are reasons to justify the development and articulation of slightly different legal principles in this context, and that work, in our view, remains to be done.

The right to adequate consultation and accommodation, as set out in *Haida*, is an important right and it requires a remedy. However, notwithstanding the comments by Justice Binnie in *Little Salmon*, the nature of the right requires further rationalization with existing legal framework for judicial review. There are three areas in particular where we see a divergence from a traditional judicial review and tremendous opportunity to clarify the law.

- What is the scope and grounds for such review? Is it limited to decisions where there is a statutory power of decision? If not, how broadly will judicial review be available in such cases?
- Can or should the courts suspend a decision or approval while consultation and accommodation occurs, as they have been doing? If so, when is it appropriate to do so? What is the implication of a decision by the court to suspend a decision or approval—may such a decision or be amended to reflect additional consultation and accommodation?
- Can or should the courts retain jurisdiction after issuing declarations as to the rights of the parties as they have been doing? If so, when is it appropriate to do so and how should it be done?

We do not believe that the courts should take a rigid approach to these cases, or that the remedies in duty to consult cases must be limited to existing judicial review principles. Rather, we believe that the law should be developed to reflect the areas in which these cases diverge from traditional judicial review.

Such changes could potentially occur by way of common law developments. Another approach would be for the Legislature to consider amending the *JRPA* to better clarify what types of Aboriginal law claims based on the duty to consult can be addressed under that act, how these claims may be

12 The Supreme Court of Canada in *Delgamuukw v. British Columbia*, 1997 CanLII 201(S.C.C.) stated that aboriginal title is “described as *sui generis* in order to distinguish it from ‘normal’ proprietary interests, such as fee simple ... [h]owever, it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference to common law rules of real property or to the rules of property found in aboriginal legal systems” (para. 112). The Court went on to state that the *sui generis* nature of aboriginal title is the unifying principle underlying its various dimensions: that Aboriginal title is inalienable, that it arises from the occupation of Canada by Aboriginal people before the Royal Proclamation of 1763 and that it is collective in nature.

addressed what issues do not appropriately fall within it and require some other form of judicial proceeding. Such an approach would seem to be consistent with the comments of the Supreme Court of Canada in *Haida*, where it stated at para. 51:

It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.

While these comments were directed to the regulatory processes in which asserted Aboriginal right are considered, there is no reason that they would not apply with equal relevance to the process for reviewing such matters on judicial review.

However, these are not simple issues and they do not admit of easy answers. There will be strongly held and divergent views by various parties regarding the role of the courts in such cases. As such, it will be interesting to see if, when and how the courts or the Legislature will be prepared to further tackle them.

V. Appendix A—Order

Appendix "A"

Form 42 (Rule 41(9))

NO. L032971
VANCOUVER REGISTRY



IN THE SUPREME COURT OF BRITISH COLUMBIA

THE SQUAMISH NATION, by the Chiefs and Council of the Squamish Indian Band, on their own behalf and on behalf of the members of the Squamish Indian Band

PETITIONERS

AND

THE MINISTER OF SUSTAINABLE RESOURCE MANAGEMENT on behalf of Her Majesty the Queen in right of the Province of British Columbia; LAND AND WATER BRITISH COLUMBIA INC. and THE ENVIRONMENTAL ASSESSMENT OFFICE, and GARIBALDI AT SQUAMISH INC.

RESPONDENTS

ORDER

| | | |
|---------------------------|---|------------------|
| BEFORE THE HONOURABLE |) | FRIDAY, |
| |) | the 15TH day |
| MADAM JUSTICE KOENIGSBERG |) | of October, 2004 |

THE APPLICATION of the Petitioners, coming on for hearing at Vancouver, British Columbia, on May 10, 11, 12 and September 10, 2004, and on hearing Gregory J. McDade, Q.C. and James Tate, counsel for the Petitioners, and Paul J. Pearlman, Q.C., counsel for the Repondents, Minister of Sustainable Resource Management, Land and Water British Columbia Inc. and the Environmental Assessment Office, and Craig D. Johnston, counsel for the Respondent Garibaldi at Squamish Inc., and on September 10, 2004 Howard Shapray, Q.C., counsel for Garibaldi Alpen Resorts (1996) Ltd., and upon hearing further submissions from all parties on September 27, 2004, and October 15, 2004 in respect of the Order herein:

THIS COURT ORDERS AND DECLARES:

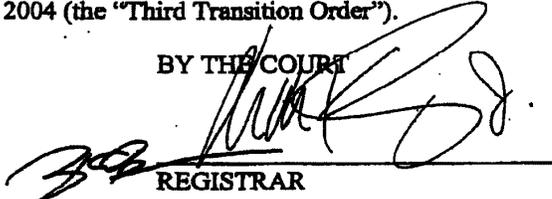
1. A Declaration that Land and Water British Columbia Inc. ("LWBC"), on behalf of the Minister of Sustainable Resource Management and Her Majesty the Queen in Right of the Province of British Columbia, with respect to the Reinstatement Decision made on September 19, 2002 to reinstate and modify the Interim Agreement and Licence and to enter into a Modification Agreement, had prior to the Decision in September 2002, and continues to have, a legally enforceable duty to the Squamish Nation to consult with them in good faith and to endeavour to seek workable accommodations between the interests of the Squamish Nation on the one hand, and the short-term and long-term objectives of the Crown with respect to the possible management or development of the lands at Brohm Ridge on the other hand;

2. **A Declaration that LWBC, on behalf of the Minister of Sustainable Resource Management and Her Majesty the Queen in Right of the Province of British Columbia, with respect to the Change of Control Decision made on or after September 23, 2002 to approve the Assignment of the Interim Agreement and Licence to a new controlling party, had prior to the Decision in or after September 2002, and continues to have, a legally enforceable duty to the Squamish Nation to consult with them in good faith and to endeavour to seek workable accommodations between the interests of the Squamish Nation on the one hand, and the short-term and long-term objectives of the Crown with respect to the possible management or development of the lands at Brohm Ridge on the other hand;**
3. **A Declaration that LWBC, on behalf of the Minister of Sustainable Resource Management and Her Majesty the Queen in Right of the Province of British Columbia, with respect to the Expansion Decision made on September 17, 2003 authorizing the expansion of the study area for the Interim Agreement and Licence, prior to the Decision in September 2003, had and continues to have, a legally enforceable duty to the Squamish Nation to consult with them in good faith and to endeavour to seek workable accommodations between the interests of the Squamish Nation on the one hand, and the short-term and long-term objectives of the Crown and Garibaldi at Squamish Inc. with respect to the possible management or development of the lands at Brohm Ridge on the other hand;**
4. **A Declaration that the Reinstatement Decision, the Change of Control Decision, and the Expansion Decision were each made without complying with the fiduciary and constitutional duties of the Crown to the Squamish Nation;**
5. **An Order that the Expansion Decision be remitted for reconsideration by the Board of Land and Water British Columbia Inc., in accordance with the Reasons for Judgment herein, following the completion of the consultation and accommodation process in respect of the Reinstatement Decision and the Change of Control Decision as outlined in this Order;**
6. **An Order directing LWBC to consult in good faith and endeavour to seek workable accommodations with the Squamish Nation in respect of the Reinstatement Decision and the Change of Control Decision, in accordance with the Reasons for Judgment herein, as if those Decisions had not been made;**
7. **An Order that the relief in the Amended Petition seeking to quash the Reinstatement Decision, the Change of Control Decision, the Expansion Decision and the Third Modification Decision and the application for prohibition in respect of the Environmental Assessment process be adjourned generally, with liberty to reapply in the event that the Petitioners do not believe that the Minister is fulfilling the duties which are declared herein;**
8. **A Direction that the parties have liberty to apply to this Court with respect to any question relating to the duty of consultation and accommodation, including the production of documents and other provision of information, and the structure of the consultation and accommodation process;**

9. An Order that the consultation process commence as soon as is reasonably practicable and in any event no later than October 8, 2004, and, subject to any further Orders of this Court:
- (a) that each of the Squamish Nation, the Province of British Columbia and Garibaldi at Squamish Inc. (within 7 days from commencement) appoint a representative or representatives with decision-making capacity, or ready access to their respective decision makers;
 - (b) that the Squamish Nation provide information to the other parties in respect of its asserted aboriginal title and rights in the Brohm Ridge area, and that the parties meet and consult in good faith for the purpose of identifying the nature and scope of the aboriginal title and rights in the area of the proposed project (within 14 days from commencement);
 - (c) that the Province provide all relevant information to the Squamish Nation to ensure that it is able to effectively participate in the consultation processes described in this Order (within 14 days from commencement);
 - (d) that the parties meet and determine whether the project as proposed on September 2002 could cause a potential infringement of the Squamish Nation asserted aboriginal rights and title interests (within 21 to 28 days from commencement);
 - (e) that if it appears that the project could cause a potential infringement of the Squamish Nation asserted aboriginal rights and title interests in the Brohm Ridge area, the Province will consult with the Squamish Nation and determine whether the project should proceed, with consideration of the legislative objective of economic development in relation to the project, the need for and viability of the project and the potential infringement (within 35 days of commencement);
 - (f) that if LWBC determines that the project should proceed, the Province will consult with the Squamish Nation with respect to each of the Reinstatement and Change of Control Decisions, and endeavour in good faith to determine reasonable accommodations with respect to those Decisions, and the Province will consider the issues raised by the Squamish Nation as if those Decisions had not been made (within 50 days of commencement);
 - (g) that LWBC reconsider each of Reinstatement and Change of Control Decisions (within 60 days of commencement);
 - (h) that if it continues to be relevant and necessary, the Squamish Nation and the Province will consult with respect to the Expansion Decision, including endeavouring in good faith to determine reasonable accommodations respecting that Decision (within 85 days of commencement);
 - (i) that the Board of LWBC reconsider the Expansion Decision (within 85 to 90 days of commencement);

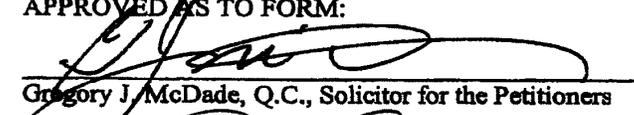
- (j) that Garibaldi at Squamish Inc. has the right, but not the obligation to participate in the consultations, where its interests are affected;
 - (k) that the time lines for consultation processes herein provided may be extended or varied by agreement between the Squamish Nation and LWBC, and Garibaldi at Squamish Inc. without further order of this Court.
10. an Order for costs to the Petitioners at Scale 4;
11. an Order to adjourn the following relief *sine die*:
- (a) a declaration that the Transition Order issued by the Environmental Assessment Office pursuant to s. 51(5) and (6) of the *Environmental Assessment Act*, SBC 2002, c. 43 on December 30, 2002 (the "Transition Order") applies only in respect of the ski hill project as set out in the original Interim Agreement and Licence as it existed at February 28, 1997, or alternatively as of December 30, 2002; and
 - (b) a declaration that the Reinstatement Decision and the Expansion Decision were contrary to law and not made in accordance with the requirements of the *Land Act* or in accordance with the procedures set out in the provincial policies governing commercial alpine ski developments on land owned by the Province.
 - (c) An Order quashing the Transition Order issued by the Environmental Assessment Office pursuant to s. 51 (5) and (6) of the *Environmental Assessment Act*, S.B.C. 2002, c. 43 on July 30, 2004 (the "Third Transition Order").

BY THE COURT

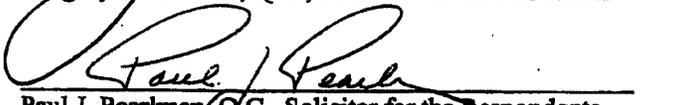


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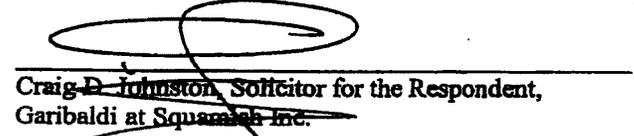
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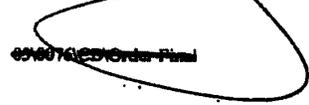
Gregory J. McDade, Q.C., Solicitor for the Petitioners



Paul J. Pearlman, Q.C., Solicitor for the Respondents,
The Minister of Sustainable Resource Management on
behalf of Her Majesty the Queen in Right of the Province
of British Columbia; Land and Water British Columbia and
The Environment Assessment Office



Craig D. Johnston, Solicitor for the Respondent,
Garibaldi at Squamish Inc.



09/07/04 CD Order Final

ENTERED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

**THE SQUAMISH NATION, by the Chiefs and Council of
Council of the Squamish Indian Band, on their own behalf and
on behalf of the members of the
Squamish Indian Band**

PETITIONERS

AND:

**THE MINISTER OF SUSTAINABLE RESOURCE
MANAGEMENT on behalf of Her Majesty The Queen in Right of
the Province of British Columbia; LAND AND WATER BRITISH
COLUMBIA INC. and THE ENVIRONMENTAL ASSESSMENT
OFFICE and GARIBALDI AT SQUAMISH INC.**

RESPONDENTS

ORDER

**BEFORE THE HONOURABLE MADAM
JUSTICE KOENIGSBERG
OCTOBER 15, 2004**

**RATCLIFF & COMPANY
BARRISTERS & SOLICITORS
Suite 500, 221 West Esplanade
North Vancouver, B.C.
V7M 3J3**

**Attention: GREGORY J. MCDADE, Q.C.
File No.: 03-0076**

OCT 26 2004

DYE & BURNHAM COMPANY INC.