Response of Nunavut Tunngavik Inc. to the Federal Interim Consultation Guidelines

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Introduction

The interplay between common law consultation principles and modern treaty rights has, to date, received very limited judicial consideration. Modern treaties such as the Nunavut Land Claims Agreement ("NLCA") raise unique issues, driving home the point made in *Haida Nation v. British Columbia (Minister of Forests)*[1] and other consultation cases that the duty to consult is a very fact-driven, context-specific obligation.

In this paper, Nunavut Tunngavik Inc. ("NTI") responds to Canada's proposal to adopt general federal consultation and accommodation guidelines by emphasizing three main points:

1. the duty to consult applies differently in the modern treaty context than in the context of historical treaties or Aboriginal rights;
2. the application of the duty to consult to modern treaty rights will depend on the provisions of the particular modern treaty;
3. nevertheless, there are some general principles which should guide the application of the common law duty to consult to modern treaties.

NTI's submissions are organized as follows. First, a summary of NTI's understanding of what the duty to consult actually entails is provided. Second, general principles for guiding the application of the common law duty to consult to modern treaty rights are proposed. Third, various consultation issues specific to the NLCA are reviewed. Fourth, NTI makes a number of suggestions for modifying the *Aboriginal Consultation and Accommodation Interim Guidelines for Federal Officials* ("Interim Consultation Guidelines") based on the general principles and specific consultation issues that it has raised. Fifth, a number of more limited, miscellaneous suggestions for modifying the Interim Consultation Guidelines are proposed.

As the law of consultation is still evolving and this paper aims to inform government policy, NTI is not bound by the statements of law contained in this paper.

Part I: NTI's Position on the Duty to Consult

A. NTI's Understanding of the Content of the Duty to Consult

It seems appropriate to begin by setting out NTI's understanding of what is involved in the Crown's discharge of the duty to consult. This way, where the duty to consult applies, it is clear which principles NTI expects the consultation process to reflect.

In discharging the duty to consult, the Crown must respect a number of general principles, including the following:

[1] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73.

- It must enter into consultation in good faith, with an open mind and the intention of substantially addressing the affected Aboriginal group's concerns (i.e. not just to provide the Aboriginal group with the opportunity to blow off steam).[2]

- It must begin consultation early on in the decision-making process.[3]

- There may be a duty to consult about the decision-making process itself, particularly for major project approvals that require a custom-tailored review process.[4]

- It must directly notify the affected Aboriginal group of the proposed Crown decision or action.[5]

- It must give the Aboriginal group a reasonable amount of time to respond to any referral,[6] which includes taking into account the volume of referrals that the Aboriginal group is faced with and the capacity of the Aboriginal group to engage in consultation.[7]

- It must let the Aboriginal group know who is responsible for consultation, particularly where there are many Crown decision-makers, ministries and/or agencies involved.[8]

- It must share all necessary information with the Aboriginal group.[9] Information about a proposed decision or activity is necessary if it helps the Aboriginal group understand the nature of the proposed decision or activity and/or the possible impacts of the decision or activity on any proven or asserted s. 35 rights.

- It must not shut the Aboriginal group out of a final stage in the decision-making process where that stage has the potential to have an impact on s. 35 rights.[10]

- The Crown must not abort the consultation process if it is apparent that further discussions are still necessary to explore the Aboriginal group's concerns and, where appropriate, discuss possible ways of accommodating those concerns.[11]

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[2] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at paras. 42 and 46; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 64.

[3] *Musqueam Indian Band v. British Columbia*, 2005 BCCA 128 at para. 95 (per Justice Hall); *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management),* 2004 BCSC 1320 at para. 74.

[4] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at paras. 107-110.

[5] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at para. 116.

[6] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 at para. 116.

[7] *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700 at para. 1138.

[8] *Hupacasath First Nation v. British Columbia (Minister of Forests),* 2008 BCSC 1505 at para. 147.

[9] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 64.

[10] *Chicot v. Canada (Attorney General),* 2007 FC 763 at paras. 123-124.

[11] *Homalco Indian Band v. British Columbia (Minister of Agriculture, Food and Fisheries)*, 2005 BCSC 283 at para. 108.

- There may be a duty to give written reasons[12], and at minimum good faith requires that the Crown explain any decision not to address a concern raised by the Aboriginal group or not to adopt accommodation measures proposed by the Aboriginal group.

- It may be appropriate to provide capacity funding to create a "level playing field" and enable the Aboriginal group to participate in meaningful consultation.[13]

These principles may, of course, evolve with the consultation case law.

B. General Principles to Guide the Application of the Duty to Consult to Modern Treaties and to the NLCA Specifically

NTI believes it is possible and important to develop a systematic approach to the interaction between modern treaties and the common law duty to consult. Accordingly, this paper recommends the adoption of some general principles to guide the understanding of how the Crown's duty to consult and accommodate, as described in *Haida*,[14] *Mikisew*[15] and other related cases, applies to modern treaties generally. In addition, this paper recommends the adoption of some principles that are specific to the established rights of Inuit under the NLCA and their asserted rights (i.e. rights neither covered nor released in the NLCA).

1. In determining the interplay between modern treaties and the common law duty to consult, the underlying intention of the treaty must be respected

Modern treaties, including the NLCA, are a type of contract: "Treaties are analogous to contracts, albeit of a very solemn and special, public nature."[16] As with any contract, it is the duty of the parties to respect their agreement, and if the courts become involved in any dispute, they will seek to uphold the intention of the parties as embodied in the agreement.

Thus, to determine whether the Crown may owe modern treaty beneficiaries a common law duty to consult with respect to any particular treaty right or any particular type of Crown decision, the first question is whether the treaty discloses any intention in this regard. Any clear intention must be respected.

2. If the modern treaty reveals no clear and plain intention to preclude the common law duty of consultation, the duty should apply

Where the modern treaty reveals no clear and plain intention to preclude the application of the Crown's common law duty to consult, it is appropriate to hold that this duty applies and reinforces the Aboriginal group's modern treaty rights. The Yukon Territorial Court of Appeal adopted this logic in *Little Salmon*. The Court's central inquiry in that case was whether the provisions of the *Little Salmon/Carmacks Final Agreement* revealed any intention by the parties

[12] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 44.
[13] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* [2007] 3 C.N.L.R. 221 (Ont. S.C.J.) , at para. 27.
[14] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73.
[15] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),*2005 SCC 69.
[16] *R. v. Badger* [1996], 1 S.C.R. 771 at para. 76.

to preclude consultation about proposed sales of Crown land having the potential to affect the harvesting rights of the Little Salmon/Carmacks First Nation.[17] The Court reviewed the provisions of the Agreement, and found that the duty to consult on this issue was "not precluded from application by the terms of the treaty."[18] Accordingly, it held the common law duty to consult to be applicable to the Crown's land disposition decisions.

The Court of Appeal's reasoning in *Little Salmon* is entirely consistent with the general principles established in *Haida* and *Mikisew*. These cases affirm that the honour of the Crown infuses not only treaty-making, but also the subsequent process of treaty interpretation and implementation.[19] *Mikisew* also confirms that treaty-making furthers Crown-Aboriginal reconciliation, but that reconciliation is an ongoing process, which must carry on under the treaty.[20]

The honour of the Crown would be breached, and the reconciliation process undermined, if the Crown were completely free to exercise its discretionary powers in a way that could seriously impair the exercise of treaty rights, rights which were the product of hard bargaining and major compromise. Thus, the consultation and accommodation process acts as an essential check on the Crown's wide discretionary powers, and serves to ensure the continuation of the reconciliation process under modern treaties.

It is particularly just, and in keeping with the honour of the Crown, that the duty to consult applies to treaties such as the NLCA, which were drafted *prior* to the *Haida* litigation. This is because the parties to the NLCA negotiated the NLCA at a time when they did not know that the Crown has a legal duty to consult prior to making decisions that stand to impair treaty rights. Since the parties developed the NLCA provisions with no awareness of that legal *status quo*, the duty to consult may only be ousted with clear and plain treaty language. There should be a clear and plain indication that the Crown's related treaty obligations are exhaustive before such treaties should be construed as ousting the duty to consult. No such indication is present in the NLCA. [21]

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[17] *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources),* 2008 YKCA 13 at paras. 37 and 74.

[18] *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources),* 2008 YKCA 13 at para. 90.

[19] *Haida Nation v. British Columbia ("Minister of Forests)* 2004 SCC 73 at para. 19; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 57.

[20] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 54.

[21] An example of treaty language that is intended to limit the application of the common law duty to consult can be found in the *Tsawwassen Final Agreement,* initialed in 2006, two years after the Supreme Court of Canada rendered its decision in *Haida Nation.* Chapter 2, section 45 of the *Tsawwassen* agreement sets out an "exhaustive list of the consultation obligations of Canada and British Columbia" and section 46 provides that governments may exercise their powers in accordance with the listed obligations without infringing the Section 35 Rights of the Aboriginal party. For pre-*Haida* treaties whose parties could not be expected to address the common law duty, it is reasonable to apply the common law duty unless the treaty clearly and plainly indicates that the Crown cannot have any other related duties to the Aboriginal party.

3. Section 2.7.3(a) of the NLCA affirms the right of Inuit to be consulted and accommodated in relation to their modern treaty rights

The Crown's duty to consult was not known to the negotiators of the NLCA, as that agreement was concluded roughly one decade before the seminal case of *Haida.* However, the NLCA preserves for Inuit the ability to benefit from constitutional rights that were not in the contemplation of the signatories, as long as these were not released under s. 2.7.1. This is so by virtue of s. 2.7.3(a), which states:

> 2.7.3 Nothing in the Agreement shall:
>
> (a) be construed so as to deny that Inuit are an aboriginal people of Canada, or, subject to Section 2.7.1, affect their ability to participate in or benefit from any existing or future constitutional rights for aboriginal people which may be applicable to them; [emphasis added]

Section 2.7.3(a) affirms that regardless of whether any other provisions in the NLCA suggest differently, Inuit enjoy the common law right to consultation and accommodation with respect to Crown decisions that have the potential to adversely affect their NLCA rights.

One court ruling has rejected the view that consultation and accommodation is a *right*: in *Little Salmon,* the Yukon Territory Court of Appeal considered the issue in the context of an almost identical clause in the *Little Salmon/Carmacks First Nation Final Agreement* (s. 2.2.4), and concluded that there is only a "duty" to consult, without any corresponding right. [22] An appeal of that decision will be heard by the Supreme Court of Canada, and so this issue has not yet been resolved.

The Yukon Territory Court of Appeal's ruling that there is no right to consultation and accommodation is questionable, as other courts have characterized consultation and accommodation as a right. For example, the Supreme Court of Canada stated the following in *Mikisew*:

> As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well.[23] [emphasis added]

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[22] *Little Salmon/ Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources),* 2008 YCA 13 at paras. 87-89.

[23] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 57.

Some lower courts have also described consultation and accommodation as a right.[24]

Moreover, general legal theory firmly supports the logic that the duty to consult correlates to a right on the part of the affected Aboriginal groups to be consulted.

Wesley Hohfeld, in his theory of jural correlatives, concludes that where a right exists, there also exists a correlative duty, and where a duty exists, there is necessarily a correlative right.[25] A right cannot exist in a vacuum: "legal rights are not bare entitlements, but jural relations."[26] Duties placed on others create obligations to act in a certain manner, and exist as a consequence of a right held.[27] Similarly, where a party has a duty to do or not do a certain act, the corresponding party to whom the duty is owed has a right to the doing or not doing of the particular act.[28]

J.W. Singer offers a more recent articulation of this concept in the context of rights and duties:[29]

> Correlatives express a single legal relation from the point of view of the two parties ....If A has a duty toward B, then B has a right against A. The expressions are equivalent. Rights are nothing but duties placed on others to act in a certain manner.

Hohfeld's theory of jural correlatives was relied upon by the Supreme Court of Canada in *MacDonald v. Montreal (City)*:

> Hohfeld built upon Austin's analysis of rights and, adopting Hegel's theory of needs and reciprocal obligations as the constituent elements of a civil society (see G.W. Hegel, *Philosophy of Right* (trans. Knox, 1942)), developed an analytic framework breaking down the general term "right" into a number of specific "situations and relationships". He called these "jural correlatives". One such correlative was right/duty ... The significant concept is right/duty as a jural correlative. [30]

Following a survey of the development of the jural correlatives theory, the Supreme Court concluded:

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[24] See, for example, *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FCC 1354 at paras.3 and 104; *Labrador Métis Nation v. Newfoundland & Labrador (Minister of Transportation &Works),* 2007 NLCA 75 at para. 26; *Musqueam Indian Band v. Canada,* 2008 FCA 214 at para. 58; *Hewko (Guardian ad litem of) v. B.C. (A.G.)*, 2006 BCSC 1638 at para 350.

[25] W. N. Hohfeld, *Fundamental Legal Conceptions,* edited by W. W. Cook (New Haven, CT: Yale University Press, 1919) at 717.

[26] J.W. Singer, (1982), *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*. Wis. L. R 975-1059 at 987.

[27] J.W. Singer, (1982), *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*. Wis. L. R 975-1059 at 987.

[28] W. N. Hohfeld, *Fundamental Legal Conceptions,* edited by W. W. Cook (New Haven, CT: Yale University Press, 1919), generally.

[29] J.W. Singer, (1982), *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*. Wis. L. R 975-1059 at 987.

[30] *Montreal (City) v. MacDonald,* [1986] 1 S.C.R. 460 at para 162.

> It seems to me then that there is substantial support in legal theory for the appellant's submission that right and duty are correlative terms. [31]

The theory that a legal duty correlates to a legal right makes particular sense in the context of the duty to consult and accommodate, which exists in order to protect Aboriginal and treaty rights. The Aboriginal and treaty rights are the *substantive rights* of the Aboriginal groups. These rights are vulnerable when they are not yet actually proven or, in the case of treaty rights, where the Crown retains a great deal of discretion to make decisions and authorize activities that have the potential to severely compromise the value of those rights. Accordingly, the Supreme Court of Canada has developed procedural protections for Aboriginal and treaty rights in the form of consultation and accommodation. Those protections are best understood as *procedural rights*, designed to help ensure that the promise of s. 35 remains a meaningful one. Indeed, this is precisely the legal framework described in the above *Mikisew* passage.

Assuming that consultation and accommodation is indeed a "right", there is no doubt that it is constitutional in nature. The Supreme Court of Canada confirmed in *R. v. Kapp* that the duty to consult is a constitutional obligation,[32] and thus the corresponding right must share this character.

Finally, the limitation in s. 2.7.3(a) must be considered. Section 2.7.1(a) is the provision by which Inuit relinquish all of their claims and rights under s. 35 of the *Constitution Act, 1982* in and to lands and waters in Canada in exchange for the rights and benefits provided in the NLCA:

> 2.7.1 In consideration of the rights and benefits provided to Inuit by the Agreement, Inuit hereby:
>
> > (a) cede, release and surrender to Her Majesty The Queen in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada;

The right to consultation and accommodation is not a right in or to lands or waters, but rather a right to a proper decision-making process, i.e. one that is fair and that takes s. 35 rights into account. Moreover, Inuit would not claim consultation rights with respect to the rights which they have released under s. 2.7.1, but only to rights set out in the NLCA or other asserted rights that are not dealt with in the NLCA. Therefore, the right to consultation and accommodation is not one of the rights relinquished under s. 2.7.1(a), and that limitation in s. 2.7.3(a) does not apply.

In summary, by virtue of s. 2.7.3(a), nothing in the NLCA – either any provisions suggesting that there is no duty to consult or its silence on the subject – may be read as precluding or limiting the application of the common law duty to consult and accommodate in the context of s. 35 rights

[31] *Montreal (City) v. MacDonald,* [1986] 1 S.C.R. 460 at para 165.
[32] *R. v. Kapp,* 2008 SCC 41 at para. 6.

which Inuit hold under the NLCA or which they assert outside of the Agreement. Where those rights stand to be affected by a proposed Crown decision, the common law duty should apply as per the principles developed in *Haida, Mikisew* and other consultation cases.

In any event, the potential for conflict between specific NLCA provisions and the duty to consult ultimately seems to be more theoretical than real. For the consultation issues discussed below, the NLCA reveals no intention by the parties to preclude meaningful Crown consultation with Inuit about decisions that stand to affect Inuit rights under the NLCA, and in some cases, it expressly contemplates Crown-Inuit consultation akin to that described in *Haida.* Thus, although NTI relies first and foremost on s. 2.7.3(a) to assert the application of the common law duty to consult in relation to Inuit rights under the NLCA, it is also demonstrated for the issues discussed that the NLCA reveals no intention to preclude consultation or else expressly contemplates consultation that is essentially in keeping with the common law consultation principles. Even without s. 2.7.3(a), the duty to consult and the NLCA can apply harmoniously.

4. The common law duty to consult and accommodate does not replace the Crown's obligation to respect modern treaty rights and to refrain from infringing those rights

The *Haida* consultation and accommodation framework has an important role to play in relation to modern treaties. It does not, however, do away with the Crown's obligation to refrain from infringing the rights held by an Aboriginal group under a treaty. To understand the limits of *Haida* and *Mikisew*'s application to treaty rights, it is best to start by reviewing the nature of the s. 35 rights which were at stake in those cases and the reasoning of the Supreme Court of Canada.

The Haida Nation sought consultation and accommodation based on its *asserted* Aboriginal title and an *asserted* right to harvest red cedar. The Haida Nation had good evidence to substantiate both of these claims, but had not yet proven either right in court. The Supreme Court of Canada ruled that the Haida Nation is entitled to consultation and accommodation in respect of forestry decisions which have the potential to affect those asserted rights.

In *Haida,* the Supreme Court of Canada recognized the duty to consult and accommodate as an *interim* approach to Crown decision-making about land and resources. The Court strongly suggested that, ultimately, s. 35 rights claims should be resolved by means of a modern treaty:

> ¶ 20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6….This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.
>
> …
>
> ¶ 25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the

> sovereignty of the Crown through negotiated treaties**.** Others, notably in British Columbia, have yet to do so. …The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.
> …
>
> ¶ 27 …The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim…. [emphasis added]

Thus, in *Haida,* the Court described the consultation and accommodation framework as a way to ensure that the Crown deals fairly with reasonably asserted s. 35 rights before the status of those rights is properly resolved via "proof" (i.e. litigation) or, preferably, a modern treaty. In contrast, once rights have been established through litigation or recognized in a treaty, they must be "respected."

The Supreme Court of Canada also emphasized in *Haida* that the duty to consult was *not* fiduciary in nature because the rights at issue were unproven:

> Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.[33]

This is in contrast to *proven* rights, which trigger a fiduciary duty on the part of the Crown. In cases such as *R. v. Sparrow*[34] and *R. v. Gladstone*,[35] the Supreme Court of Canada has stated that in order to justify the infringement of a s. 35 right, the Crown must have adopted the infringing measure or course of action in a manner consistent with its fiduciary obligations (and the nature of these obligations is discussed below).

The Supreme Court of Canada also emphasized in *Haida* that the Aboriginal group has no veto in the consultation process:

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[33] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 18.
[34] *R. v. Sparrow,* [1990] 1 S.C.R. 1075 at pp. 116-119.
[35] *R. v. Gladstone,* [1996] 2 S.C.R. 723 at paras. 54-55.

> This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.[36]

Just as it reasoned that the duty to consult is not fiduciary because the rights are unproven, the Court rejected that Aboriginal groups have any veto on the basis of unproven rights.

The lack of any fiduciary obligation and the inability of an Aboriginal group to flatly oppose an activity that could infringe its *asserted* Aboriginal rights point to the fact that, ultimately, the consultation and accommodation framework serves to steer the parties to a middle ground. This process will almost certainly lead to compromise on both sides, and the Aboriginal group cannot rely on the *Haida* framework - at least, as developed by the courts so far - to fully protect its rights.

This approach would be a problematic one for rights which are in fact proven or which the Crown expressly agreed to respect in a treaty. Indeed, as can be seen from the above passage (para. 25), the Court states in *Haida* that once they are proven, Aboriginal rights should be "respected."

In *Mikisew*, the Supreme Court of Canada applies the *Haida* consultation and accommodation framework in a different context, namely to proven treaty rights in a historical treaty. However, the Court's reasons for applying the duty in *Mikisew* are different than in *Haida*. *Mikisew* concerned Treaty 8. Treaty 8 states that the Aboriginal signatories surrender their territory but continue to hold hunting, trapping and fishing rights in that territory. The harvesting rights clause also states that the Crown may take up lands that the Aboriginal signatories use for those activities:

> And Her Majesty the Queen hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing <u>throughout the tract surrendered</u> as before described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, <u>and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes</u>. [<u>emphasis added</u>]

The dispute in *Mikisew* arose because Canada approved the construction of a winter road which would have been built through the traditional territory of the Mikisew First Nation, in an area where its members hunt and trap. Canada denied that it held any *Haida*-style duty to consult and accommodate about that proposed road, maintaining that it already had the right to take up these lands under the very terms of Treaty 8. The Supreme Court of Canada agreed that Canada had the power to take up lands, but disagreed that there was therefore no duty to consult. It is important to understand the Court's reasoning on this issue.

[36] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 48.

The Court held that because Treaty 8 expressly contemplates the taking up of land, the harvesting rights are inherently limited by the Crown's taking up power, and a taking up will not normally constitute an *infringement* of the harvesting rights. The Court acknowledged that there may be a point at which there has been so much land taken up that further taking ups do actually cross the line into an "infringement,"[37] but this was not the situation in *Mikisew*. Although the proposed winter road stood to interfere with Treaty 8 hunting and trapping rights, the Supreme Court of Canada ruled that the taking up would not *infringe* Mikisew's rights.

Nevertheless, the Court held that consultation was necessary in order to ensure the honourable implementation of Treaty 8:

> Both the historical context and the inevitable tensions underlying implementation of Treaty 8 demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not). The content of the process is dictated by the duty of the Crown to act honourably.[38]
>
> …
>
> The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (*Delgamuukw*, at para. 168).[39]

Thus, *Mikisew* establishes that where the Crown has the authority to make decisions or adopt a course of action that could adversely affect a treaty right, the Crown must consult the Aboriginal group and potentially accommodate the right, even if there will not be any actual *infringement* of the treaty right.

Haida and *Mikisew* both have practical application in the modern treaty context. Inuit assert certain s. 35 rights which are not defined in the NLCA and which they did not cede via s. 2.7.1 – most notably, certain cultural rights, such as the right to speak Inuktitut and to pass that language on to younger generations. Inuit are in the same position as the Haida Nation insofar as these rights are concerned, and the logic of *Haida* will apply where Inuit's asserted rights stand to be affected by a potential Crown decision.

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[37] "If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response." (*Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69, at para. 48.

[38] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 33.

[39] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 55.

In addition, the Governments of Canada and Nunavut have the power to make certain decisions and adopt certain courses of action which could adversely affect certain Inuit rights under the NLCA without actually infringing those rights. A perfect example is the Article 5 harvesting rights, which may be adversely affected by the Crown's power to designate lands for military purposes, thereby making them unavailable for harvesting (a power which is recognized in s. 5.7.17(a)(i)). This taking up of land for a purpose that is incompatible with harvesting is precisely the type of situation that arose in *Mikisew*.[40] In those cases, it is the reasoning of *Mikisew* that explains the need for consultation with Inuit.

There is a third situation that can arise in the context of a treaty, and in particular a detailed, modern treaty such as the NLCA: the Crown may propose to do something that would violate a promise in the NLCA -- i.e. an "infringement" within the meaning of *R. v. Sparrow*. This situation is fundamentally different from the situations which arose in *Haida* or *Mikisew*.

In some situations, the Crown will lack any authority to infringe modern treaty rights. Like most modern treaties, the NLCA is paramount over any inconsistent laws:

> 2.12.2 Where there is any inconsistency or conflict between any federal, territorial and local government laws, and the Agreement, the Agreement shall prevail to the extent of the inconsistency or conflict.

This rule has statutory force under the *Nunavut Land Claims Agreement Act*.[41] The Crown will not be able to rely on consultation and accommodation to override this provision.[42]

Even where s. 2.12.2 does not apply, however, the Crown does not have a general authority to infringe NLCA rights. In *Mikisew*, the Supreme Court of Canada acknowledges the Crown's duty to *respect* its explicit treaty obligations:

> One variable will be the specificity of the promises made. Where, for example, a treaty calls for certain supplies, or Crown payment of treaty monies, or a modern land claims settlement imposes specific obligations on aboriginal peoples with respect to identified resources, the role of consultation may be quite limited. If the respective obligations are clear the parties should get on with performance.[43]

Thus, the Crown is not free to infringe treaty rights simply by consulting with the Aboriginal group and proposing some kind of reasonable accommodation of the right. Rather, it must actually respect those rights and refrain from making any decision that would lead to an infringement. This is entirely appropriate, since the treaty itself represents a compromise by both

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[40] This is one of the specific consultation issues discussed in the next section (Part C) of this Response.

[41] Subsection 6(1) of the *Nunavut Land Claims Agreement Act,* S.C. 1993, c. 29 essentially mirrors the language of s. 2.12.2 of the NLCA: "In the event of an inconsistency or conflict between the Agreement and any law, including this Act, the Agreement prevails to the extent of the inconsistency or conflict."

[42] Under s. 2.12.2, a law will be legislatively inoperative to the extent that it is inconsistent or conflicts with any NLCA provisions. The courts also may endeavour to avoid interpreting legislation in a way that would permit Crown actors to act inconsistently or in a manner that conflicts with the NLCA.

[43] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 63.

parties of what they understand to be their full legal rights; the Aboriginal group may not be expected to make *further* compromises of its treaty rights through a process of consultation and mere "accommodation" of those rights.

The implications of treaty right infringements have yet to be elaborated by the courts, but the Supreme Court of Canada's focus on treaties as the main avenue for Crown-Aboriginal reconciliation suggests that treaty promises will be strictly enforced.[44] It is likely that material treaty infringements qualify as breaches of contract that attract remedies, including injunctive relief and damages. Material treaty infringements may also attract private law fiduciary liability. Finally, although the Supreme Court of Canada has held that the Crown may have constitutional authority to justify infringements of treaty rights in certain cases, the Court has not applied this reasoning in a modern treaty context, and, it would likely be particularly difficult for the Crown to justify infringements of the clear and comprehensive terms of modern treaties, as these bargains were so carefully negotiated by the parties.

It is critical to keep in mind that the common law duty to consult complements, but does not replace, the *Sparrow* framework, and that *Haida* and *Mikisew* do not provide the Crown with a licence to *infringe* Inuit rights that are protected under the NLCA.

C. Specific NLCA Consultation Issues

To understand how the general principles described above apply in practice, it is useful to consider some concrete examples. Accordingly, this part of the paper examines some of the consultation issues that arise in the context of particular NLCA provisions. The first issue concerns Article 11, the Land Use Planning Chapter, and the remaining six issues concern Article 5 and Inuit harvesting rights under that chapter ("Harvesting Rights").

1. Is Crown-Inuit consultation required as part of land use planning under Article 11 of the NLCA?

The central function of Article 11 is to establish a process for developing land use plans "that guide and direct resource use and development in the Nunavut Settlement Area" (s. 11.4.1). Projects proposed for the Nunavut Settlement Area are to be reviewed for consistency with the applicable land use plan (s. 11.5.10). Those which do not conform to the plan will require a ministerial exemption in order to even be considered (s. 11.5.11), whereas those which do are sent to the Nunavut Impact Review Board for review (s. 12.3.1). Moreover, pursuant to s. 11.5.9, the requirements of land use plans must be implemented by all federal and territorial regulators and other government agencies.

Therefore, as a practical matter, land use plans are critical to determining the nature and extent of development in the area covered by the plan, which in turn means that they have the potential to

[44]The following statement by Justice Cory in *R. v. Badger,* [1996] 1 S.C.R. 771 at para. 82 supports this proposition: "[I]t is clear that a statute or regulation which constitutes a prima facie infringement of aboriginal rights must be justified. In my view, it is equally if not more important to justify prima facie infringements of treaty rights. The rights granted to Indians by treaties usually form an integral part of the consideration for the surrender of their lands."

indirectly affect Inuit Harvesting Rights and Inuit Owned Lands, as well as Inuit rights to establish and maintain outpost camps (Article 7).
Strategic level decisions trigger the Crown's common law duty to consult with Aboriginal people.[45] Land use planning represents a higher level, strategic decision about land use, and thus should normally require consultation on the part of the Crown with affected Aboriginal groups.

It is NTI's position that the common law duty to consult applies to the development of land use plans pursuant to s. 2.7.3(a) of the NLCA. However, it is also important to note that Article 11 establishes a detailed process for the approval of land use plans, and it is one which expressly contemplates meaningful consultation with Inuit. Thus, as is explained below, the application of *Haida* common law principles is consistent with the provisions and intent of Article 11.

Article 11 establishes general principles and objectives to guide land use planning, some of which confirm the relevance of Inuit rights and interests under the planning process as well as the need for meaningful participation by Inuit in the land use planning process. Section 11.2.1 is particularly helpful:

> 11.2.1 The following principles shall guide the development of planning policies, priorities and objectives:
>
> > ...
> > (b)...special attention shall be devoted to protecting and promoting the existing and future well-being of Inuit and Inuit Owned Lands;
> >
> > (c) the planning process shall ensure land use plans reflect the priorities and values of the residents of the planning regions;
> >
> > (d) the public planning process shall provide an opportunity for the active and informed participation and support of Inuit and other residents affected by the land use plans; such participation shall be promoted through various means, including ready access to all relevant materials, appropriate and realistic schedules, recruitment and training of local residents to participate in comprehensive land use planning;
> > ...
> > (g) an effective land use planning process requires the active participation of both Government and Inuit.
> > [emphasis added]

Section 11.3.1 also sets the stage for consideration of Inuit rights - including Harvesting Rights - by identifying a number of factors which land use plans must take into account:

> ...

[45] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; *Brown v. Sunshine Coast Forest District (District Manager),* 2008 BCSC 1642; *Dene Tha' First Nation v. Canada (Minister of Environment),* 2006 FC 1354. The trial level decision was affirmed by the Court of Appeal but that decision appears to be unreported.

(b) the natural resource base and existing patterns of natural resource use;

(c) economic opportunities and needs;

...

(g) environmental considerations, including Parks and Conservation Areas, and wildlife habitat;

(h) cultural factors and priorities, including the protection and preservation of archeological sites and outpost camps; and

(i) special local and regional considerations.

It can be seen that factors (b), (c) and (g) all indirectly require the land use planning process to take into account Inuit Harvesting Rights -- including the right to engage in commercial harvesting activities. Factor (h) indicates that the planning process should have as one of its priorities the protection of Inuit archeological sites and outpost camps. Factor (i) requires the planning process to take special local and regional issues into account, and the preamble to s. 11.3.1indicates that the list of factors is not exhaustive since the plans should take into account factors "such as" those listed.

Section 11.8.1also states: "Land use plans shall be developed and implemented in a manner consistent with Articles 5 and 7," ensuring that both the development and implementation of land use plans take into account Inuit Harvesting Rights and the right to maintain and establish outpost camps.

In sum, there is no doubt that both in terms of process and outcome, land use planning under Article 11 is intended to be inclusive of Inuit and their rights, interests and priorities.

Article 11 provides for the establishment of the Nunavut Planning Commission ("NPC"), whose members are to be nominated by Canada, Nunavut, and the Designated Inuit Organization ("DIO"), which in this case is NTI. NTI is entitled to nominate as many members as the total number of government nominees.[46]

The NPC is charged with developing land use plans (s. 11.4.1(b)) and submitting them to the Ministers for approval (s. 11.5.5). The Ministers may accept a plan submitted to them by the NPC (s. 11.5.6(a)), or they may refer it back to the NPC with issues for reconsideration (s. 11.5.6(b)). The NPC must then resubmit the draft plan to the Ministers (s. 11.5.7). The Minister may not unilaterally modify the land use plans. The NPC is responsible for finalizing the contents of draft land use plans.

[46] The NPC is a Crown entity which shares the Crown's consultation obligations in making decisions that have the potential to affect Inuit rights. NTI provides reasoning for this premise insofar as it concerns the Nunavut Wildlife Management Board below, under issue #6, most of which applies to the NPC as well.

In addition to the general principles that guide the NPC's work and call for meaningful participation by Inuit in the planning process, and the express requirement in s. 11.8.1 that the planning process take Harvesting Rights and outpost rights into account, Article 11 also imposes some express consultation requirements. Section 11.5.3 obliges the NPC to solicit oral and written comments on draft land use plans, not only from the general public, but also from DIOs and communities. This is consistent with the common law principle that Aboriginal groups must be notified directly of potential decisions.

Section 11.5.4(a) obliges the NPC to hold public hearings on its draft land use plans, and s. 11.4.17 states that at the NPC's hearings, (a) "the tradition of Inuit oral communication and decision making" must be accorded great weight and (b) a DIO must have standing.

The NPC is then obliged to "evaluate the draft plans in light of representations made at the public hearings" (s. 11.5.4(b)) and revise the draft plans "as appropriate" (s. 11.5.4(c)). In other words, the NPC must take the comments it receives under real consideration, which is consistent with the common law principle that the Crown must engage in consultation with an open mind and a willingness to be responsive to the concerns and interests of Aboriginal groups.

As discussed above, Article 11 also helps ensure a meaningful consultation process because pursuant to ss. 11.2.1, 11.3.1, and 11.8.1, the NPC must consider a wide range of concerns, including any concerns that Inuit raise about impacts of proposed land uses on their Harvesting Rights, outpost camps, Inuit Owned Lands, archeological sites, and any other cultural concerns or special local or regional considerations. Essentially, the NPC must consider any reasonable concerns and interests raised by Inuit, whether or not these relate to Inuit rights under the NLCA.

The express consultation requirements set out in Article 11 do fall short of the common law principles in the situation where the Minister sends a draft land use plan back to the NPC for reconsideration. The NPC may be asked to change the land use plan at that stage, yet Article 11 does not expressly require consultation with Inuit should this occur, for s. 11.5.7 simply states: "The NPC shall reconsider the plan in light of written reasons and shall resubmit the plan to the Ministers for final consideration."

Under common law consultation principles, if the Ministers recommend any changes that stand to have a negative impact on Inuit Harvesting rights, their rights in relation to outpost camps or Inuit Owned Lands, or any other s. 35 rights, Inuit are entitled to consultation about those proposed changes, either from the Minister or the NPC. In *Chicot v. Canada*,[47] the Federal Court expressly held that any "consult to modify" dialogue between a board and ministers that implicates s. 35 rights and that does not involve further consultation with affected Aboriginal groups is a breach of the common law duty to consult.

In addition, while Article 11 does not expressly address consultation at this final decision-making stage, such consultation is effectively required by the other provisions in Article 11, for the following reasons:

[47] *Chicot v. Canada (Attorney General),* 2007 FC 763 at paras. 123-124.

a) the NPC has broad discretion over its procedure and is free to consult with Inuit at any stage in the development of land use plans;
b) ss. 11.2.1 and 11.3.1 confirm that meaningful Inuit participation in the development of land use plans and the reflection of their interests, values and priorities in the land use plans are central objectives of Article 11; and
c) the fundamental objectives of Article 11 would be undermined if the NPC did not solicit Inuit input at the final stage of land use planning.

The provisions of Article 11 confirm that the NPC must consult with Inuit in deciding whether to make substantive modifications to a draft land use plan based on written comments from the Ministers.

2. Does the Crown have a duty to consult with Inuit about wildlife research projects that have the potential to negatively affect Inuit harvesting rights under Article 5 ("Harvesting Rights")?

Because wildlife research typically serves to improve the conservation of species, it is normally beneficial for Aboriginal harvesting. However, certain wildlife research projects may reduce wildlife populations or impair the use of harvested products, and so have the potential to negatively affect Harvesting Rights. This situation will likely be rare, but a prime example is studies involving the mark/recapture of polar bears in Nunavut. This requires a significant proportion of the polar bears to be captured and drugged repeatedly. In the process, some bears drown, and the meat of drugged bears is inedible for a period afterwards. The annual allowable Inuit harvest of polar bears is reduced by one bear for every bear killed through research. Moreover, although the effects of the drugs on bears who survive are uncertain from the perspective of western science, Inuit knowledge indicates that bears that have been drugged are disoriented and less able to hunt and provide for themselves. All of these impacts are negative from the perspective of Harvesting Rights.

A research project that reduces a wildlife population harvested by Inuit impairs, and potentially infringes, Harvesting Rights. Therefore, at a minimum, in the case of an impairment, the Crown must consult with Inuit before approving such projects.[48]

As discussed above in Part B, General Principles, by virtue of s. 2.7.3(a), the reasoning in *Mikisew* applies to all Crown decisions that have the potential to negatively impact Inuit rights under the NLCA, including decisions to approve or conduct wildlife research.

In any event, the application of the common law duty to consult in this context is also entirely consistent with the provisions of Article 5.

[48] If the project constitutes an *infringement*, NTI would expect the courts to be more interested in performance of a modern treaty than any *Sparrow*-type justification. As noted in Part B, section 4, the Supreme Court of Canada has stated with respect to treaties that "[i]f the respective obligations are clear, the parties should get on with performance.".

Article 5 is silent as to Canada and Nunavut's powers to authorize and conduct research projects, other than to specify that the powers conferred upon the NWMB with respect to research in no way prejudice "the ability and right of the Government of Canada and Territorial Government to continue their own research functions" (s. 5.2.37). Thus, Article 5 does not set out any decision-making process for Canada and Nunavut's approval of research projects. This issue was probably not even contemplated by the drafters of Article 5. In any event, it follows from the complete silence of Article 5 on Canada and Nunavut's decision-making process that Article 5 reveals no intention to preclude Crown-Inuit consultation as part of that process.

Where the NLCA reveals no express or implicit intention to preclude Crown-Aboriginal consultation, this duty applies and reinforces Inuit rights under the NLCA, for the reasons discussed above in the General Principles section of this paper. Therefore, the Crown must engage Inuit in consultation prior to approving research projects that have the potential to negatively affect Inuit Harvesting Rights

To this point, the focus has been on the authority of the governments of Canada and Nunavut to approve wildlife research projects. In some situations, the NWMB has the authority to sponsor or conduct research or recommend approval of research proposals. For example, the NWMB administers the Nunavut Wildlife Research Trust funding and sponsors projects by federal and territorial government departments. Must the NWMB also consult with Inuit prior to conducting research or recommending approval of projects that have the potential to adversely affect Inuit Harvesting Rights?

Section 5.2.37 expressly requires consultation by the NWMB with Inuit before the NWMB carries out its own research or recommends approval of funding for *any* research project:

> Further to its responsibilities in Section 5.2.37, the NWMB shall:
> ...
> (d) prior to the carrying out of research, communicate, consult and cooperate with residents of the Nunavut Settlement Area and DIOs likely to be affected.

In practice, it appears that the NWMB requires applicants for research funding to demonstrate that they have discussed their proposed project with Inuit and secured Inuit consent for the project:

> **Consultation Requirements:**
>
> The NWMB anticipates that most research will be done with the cooperation and active participation of local people. Hence, consultation before, during and after the research project is a requirement for research sponsored by the NWMB. The proponent must provide a record of any consultations carried out before the proposal was submitted to NWMB, and plans for future consultations and reporting of research results to communities. Letters of support from the relevant

> Regional Wildlife Organization(s) and/or Hunters and Trappers Organization(s) will be required by the NWMB as a condition of funding.[49]

This is an excellent practice that fully respects the spirit of *Haida* and the common law duty to consult.

In summary, in the rare cases where a proposed research project carries the potential to negatively impact Inuit Harvesting Rights, Crown consultation with Inuit, in keeping with the common law requirements, is required before the project is approved.

3. Does Canada have a duty to consult with Inuit before imposing an export ban on polar bear products under the Convention on International Trade in Endangered Species of Wild Fauna and Flora?

Canada is considering imposing an export ban on polar bear products from some Nunavut polar bear subpopulations. In particular, Canada plans to issue a report, pursuant to the 1973 *Convention on International Trade in Endangered Species of Wild Flora and Fauna ("Convention")*, which may conclude that trade in those products is detrimental to those subpopulations ("Detrimental Finding Report"). Under the *Convention*, a Detrimental Finding in relation to polar bears would in turn require Canada to withhold export permits for the relevant products.[50]

In NTI's view, Canada must at least consult with Inuit prior to finalizing a Detrimental Finding Report.

Under s. 5.7.30, of the NLCA, Inuit harvesters have the right "to dispose freely to any person any wildlife lawfully harvested." Section 5.7.30 expressly states that the disposition right includes the right to "sell" and to do so "inside or outside the Nunavut Settlement Area." This right is subject to ss. 5.6.26 to 5.6.30 and 5.7.31 to 5.7.33; however, the only provision in this set relevant to trade restrictions on polar bear products is s. 5.7.31, which entitles an Inuk to an export permit outside Nunavut on demand unless there is good cause for refusing.

The *Convention* came into effect in Canada in 1975. Under s. 5.9.4 of the NLCA, "Inuit harvesting" is subject to the terms of international agreements that were in place when the NLCA was ratified in 1993. The disposition of harvest products is not "harvesting." If export bans infringe the Inuit disposition right under s. 5.7.30, such bans in NTI's view would be impermissible. Alternatively, it may be that the disposition of harvests is included within the meaning of "harvesting" under Part 9 of Article 5 and that therefore, by virtue of s. 5.9.4, the

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[49] Nunavut Wildlife Management Board Policy: Nunavut Wildlife Research Trust (NWRT) Funding (June 2002), p. 4, which was accessed at http://www.nwmb.com/english/funding/nwrtfpolicy.pdf on April 7, 2009.

[50] Article IV(2)(a) of the *Convention* states that export permits for species included in Appendix II – which includes polar bears – will only be granted when "a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species." Canada implemented the *Convention* and controls export permits for the species that are subject to the *Convention* pursuant to the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act,* S.C. 1992, c. 52 ("WAPPRITA").

export restrictions in the *Convention* serve to internally limit the right. In the latter case, consultation would be required pursuant to the principles of *Haida* and *Mikisew*.

There is no doubt that any position taken by Canada to reduce the international trade of Nunavut polar bear products or any unilateral restriction by Canada of the right of Inuit harvesters to export such products would have a detrimental effect on the Inuit's s. 5.7.30 right of sale. According to the reasoning in *Mikisew*, this negative impact on a treaty right triggers the Crown's common law duty to consult and, where reasonable, accommodate the treaty right at stake. As discussed above, s. 2.7.3(a) confirms the application of the Crown's common law duty to consult on any decision or action carrying the potential to negatively affect any Inuit right under the NLCA.

As in the case of the NWMB's role in wildlife research, the NLCA itself also imposes express consultation requirements that are consistent with the Crown's constitutional consultation duties. Section s. 5.9.2 obliges Canada to hold discussions with Inuit before formulating its position on matters relating to Inuit wildlife harvesting rights for the purpose of international agreements:

> 5.9.2 The Government of Canada shall include Inuit representation in discussions leading to the formulation of government positions in relation to an international agreement relating to Inuit wildlife harvesting rights in the Nunavut Settlement Area, which discussions shall extend beyond those discussions generally available to non-governmental organizations.

From the negotiators' perspective, the s. 5.9.2 requirement ensures that Canada will not again place itself in the position it occupied under the 1916 *Migratory Birds Convention*, which banned duck hunting in the spring soon after the right to hunt ducks in the spring had been guaranteed to the Aboriginal signatories of Treaty 8. Aboriginal involvement in the development of Canada's positions, such as occurred when the *Migratory Birds Convention* was revised in the mid-1990s, should help ensure that the Crown will not enter into new international agreements that contravene its obligations towards Inuit under the NLCA.

Section 5.9.2 mandates consultation before Canada issues a Detrimental Finding Report. "[G]overnment positions in relation to an international agreement relating to Inuit wildlife harvesting rights in the Nunavut Settlement Area" includes positions taken by Canada in the *negotiation* of international agreements *or in the implementation* of international agreements. This is because "in relation to" is a broad term which is reasonably understood as applying to both types of positions.[51]

Further, "Inuit wildlife harvesting rights," the term employed in s. 5.9.2, includes not just the right to harvest animals, but also the right to dispose of those harvests. This is because disposition rights are inextricably related to the right to harvest the animal in the first place. Indeed, the right to harvest does not make any sense on its own without the further right to make use of the harvest in one or more ways. This reality is reflected in the fact that the definition of Aboriginal harvesting rights under s. 35 of the *Constitution Act, 1982* always specifies the

[51] Indeed, it should also cover situations where Canada takes a position in relation to the *interpretation* of a wildlife agreement.

purposes for which the harvest may occur.[52] Similarly, the NLCA characterizes the basic Inuit Harvesting Right in terms of Inuit "needs."[53] The intention behind s. 5.9.2 is presumably to ensure that Canada consults with Inuit about any proposed position on international agreements where the proposed position will affect Inuit's ability to harvest *or to dispose of the products of their harvests*.

The preparation of a Detrimental Finding Report can be characterized as "the formulation of [a] government position…" in relation to an "international agreement," namely the *Convention*. Detrimental Finding Reports relate to the *Convention* because the *Convention* requires Canada to produce Detriment Findings for species listed under Appendix II (which is where polar bears are listed). They are also "positions" because these Reports present updates on Canada's views as to whether the Canadian export of wildlife products is compromising the survival of the wildlife species in question and, ultimately, they constitute a position that a reduction in trade of Canadian polar bear products is required for the implementation of the *Convention.*

In short, before Canada issues a Detrimental Finding Report, it must "include Inuit representation in discussions leading to the formulation" of those positions. The parties to the NLCA must have intended for such discussions to take place in good faith, with Canada being genuinely open to hearing Inuit's concerns and to the possibility of modifying its proposed position (within the limits, of course, of Canada's obligations under the relevant international agreement).

Section 5.9.2 also states that these discussions "shall extend beyond those discussions generally available to non-government organizations." This means that Inuit are entitled to a deeper level of dialogue with Canada than regular stakeholders.

Essentially, s. 5.9.2 mandates consultation similar in principle to that which would be required by the logic of *Haida* and *Mikisew.* It is reasonable to import other consultation principles from those decisions to reinforce s. 5.9.2, such as the need for Canada to initiate discussions with Inuit early on in its position formulation process, before it has made up its mind as to what position to take, and the duty to share with Inuit all necessary information.

4. Does the Department of Fisheries and Oceans ("DFO") have a duty to consult with Inuit about proposed new Nunavut Fisheries Regulations that would serve to bring the Regulations into compliance with the NLCA?

The regional regulations under the *Fisheries Act*, R.S.C. 1985, c. F-14 that currently apply to Nunavut are the *Northwest Territories Fisheries Regulations*, C.R.C. c. 847 ("NWT Regulations"). Many of these Regulations are inconsistent with Article 5 of the NLCA, which recognizes Inuit rights to harvest fish and limits the Crown's authority to regulate those rights.

[52] See for example *R. v. Côté,* [1996] 3 S.C.R. 139 at para. 56; *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at paras. 40-45.
[53] Section 5.6.1 of the NLCA states: "Where a total allowable harvest… has not been established… an Inuk shall have the right to harvest… up to the full level of his or her economic, social, and cultural needs, subject to the terms of this Article."

For example, s. 5.3.3 of Article 5 imposes significant restrictions on the authority of Canada, Nunavut and the NWMB to impose quota and non-quota harvesting restrictions on Inuit harvesters, and ss. 5.6.16-5.6.36 set out a comprehensive scheme for allocating the harvest of a particular species between Inuit harvesters and others where a total maximum harvest needs to be set (the "Total Allowable Harvest" or "TAH"). Many NWT Regulations impose restrictions on fishing locations,[54] methods,[55] and timing,[56] as well as on the species that may be fished, and are inconsistent with these Article 5 rules. Although ss. 5.6.4 and 5.6.51 of the NLCA "grandfather" quota and non-quota harvesting restrictions on Inuit harvesters that were in force prior to the ratification of the NLCA, ss. 5.6.4 and 5.6.51 contemplate that the NWMB will modify the grandfathered restrictions to bring them into conformity with Article 5.

There is no question that Canada needs to adopt regional fisheries regulations that are custom-tailored to Nunavut and the requirements of the NLCA. Like the old regulations, these new regulations will no doubt have an impact on various aspects of Inuit fish Harvesting Rights. The question is whether Canada must consult with Inuit in developing these new regulations.

In NTI's view, the common law duty to consult should apply pursuant to s. 2.7.3(a) of the NLCA in this case. In any event, s. 2.6.1 of the NLCA expressly requires consultation on legislation that serves to implement the NLCA:

> Government shall consult closely with a DIO in the preparation of any legislation proposed to implement the Agreement, including any amendments to implementing legislation.

Article 1 of the NLCA defines "legislation" to include regulations, and there is no doubt that new, Nunavut fisheries regulations would serve to "implement" Article 5 by bringing the federal fisheries regulations for Nunavut into step with the NLCA. Thus, the NLCA itself requires Canada to engage in "close consultation" with a DIO – which in this case is NTI – in the development of these new regulations.

There is no reason not to apply the principles of the common law duty to consult to this particular consultation process. Those principles are general and flexible, and can easily apply to this situation, and they will serve to ensure a meaningful dialogue between the parties, which is presumably the intention underlying s. 2.6.1.

5. Must the Crown consult with Inuit before it authorizes land uses that will be incompatible with the exercise of Harvesting Rights?

Inuit Harvesting Rights are vulnerable to land use decisions that the Crown is entitled to make.

Under s. 5.7.16 of the NCLA, Inuit enjoy a broad, general right of access to lands for harvesting purposes in the Nunavut Settlement Area. Sections 5.7.17 and 5.7.18 set out a number of

[54] See for example, the *Northwest Territories Fisheries Regulation,* C.R.C. c. 847, s. 13.
[55] See for example, the *Northwest Territories Fisheries Regulation,* C.R.C. c. 847, ss. 5(6), 7 and 9.
[56] See for example, the *Northwest Territories Fisheries Regulation,* C.R.C. c. 847, ss. 5(7) and 5(8).

exceptions to this access right, some of which relate to use and occupation of land. The following are the provisions that contemplate diminished access rights due to occupation of land:

> 5.7.17 The rights of access granted by Section 5.7.16 shall not extend to:
>
> (a) lands that are
>
> (i) dedicated to military or national security purposes or being temporarily used for such purposes under the *National Defence Act*,
> …
> (iii) granted in fee simple after the date of ratification of the Agreement, where such parcel of land is less than one square mile
>
> …
>
> 5.7.18 The right of access granted by Section 5.7.16 is subject to:
> …
> (d) any land use activity which has been authorized in accordance with any applicable requirements, including Articles 11 and 12, to the extent that the right of access is incompatible with that land use activity and for only as long as is necessary to permit that land use to be exercised.

In theory, the exceptions in ss. 5.7.17 and 5.7.18 could mean that significant tracts of land become unavailable for the exercise of Harvesting Rights. The NLCA sets no limit on the amount of lands which may become unavailable, and so there is potential for the land base for Inuit harvesting to shrink significantly. In this sense, the NLCA may be viewed as similar to Canada's numbered treaties and their "taking up clauses."

Section 2.7.3(a) confirms the Inuit right to consultation before the Crown makes any decision that has the potential to adversely affect their rights under the NLCA. It follows from this premise that the Crown must consult with Inuit prior to dedicating lands to military or national security uses, granting fee simple parcels of less than one square mile, or authorizing any land use activity where any of these decisions has the potential to interfere with Inuit Harvesting Rights, since such situations raise the same type of problem as in *Mikisew*, i.e. the possibility that the authorized land use, or "taking up," will interfere with the ability of Aboriginal people to exercise their harvesting rights. The depth of the duty to consult will depend on the severity of the potential interference with Inuit Harvesting Rights.

As described in more detail below, an application of common law consultation principles is also appropriate based on a review of the relevant NLCA provisions.

The NLCA is silent on the Crown decision-making process to be followed for decisions to designate lands for military purposes and to grant fee simple parcels of less than one square mile (i.e. the access restrictions in s. 5.7.17 cited above). The NLCA contemplates no particular Crown decision-making processes for these decisions, let alone the role of Inuit in those

processes. Therefore, the NLCA reveals no intention to preclude Crown-Inuit consultation. As discussed above, it is in keeping with the honour of the Crown to reinforce the NLCA with the common law duty to consult where the NLCA reveals no intention to preclude such consultation.

As for land use activities that may be incompatible with the exercise of Harvesting Rights (i.e. the access restriction in s. 5.7.18(d) cited above), Articles 11 and 12 of the NLCA are relevant. As already discussed, Article 11 establishes a process for the development of land use plans which requires meaningful Inuit input and the taking into account of all Inuit rights and concerns. Therefore, the NLCA requires that Inuit have the opportunity to be directly involved in setting the parameters for permissible land uses and designating the areas where particular land use activities can occur, and Harvesting Rights are to be a key consideration during the land use planning process.

Article 12, for its part, sets out a process for the impact review and approval of specific "project proposals." "Project proposals" are defined in Article 1 as meaning

> a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out, or a physical activity that a proponent proposes to undertake or otherwise carry out, such work or activity being within the Nunavut Settlement Area, except as provided in Section 12.11.1 [emphasis added].[57]

The definition of "project proposal" and hence the application of Article 12, is very broad. Article 12 applies to land use activities that would fall under s. 5.7.18(d). Therefore, the question is whether the project review process in Article 12 reveals any intention to preclude the application of a common law duty to consult with Inuit.

For the reasons provided below, in NTI's view, Article 12 effectively requires consultation by the body that has primary responsibility for reviewing the impacts of proposed projects - the Nunavut Impact Review Board ("NIRB"). Moreover, since Article 12 is silent on the final stage of the review process, other than to establish that final approval lies with the "Minister", the common law duty to consult applies to the final stage of project reviews.

Under Article 12, the NIRB is charged with "screening" all proposed projects and deciding whether they have a "significant impact potential" (s. 12.4.1). Where this is the case, the Minister must either order a comprehensive "review" of the project by a federal panel (s. 12.4.7(a) as amended[58]) or order the NIRB to conduct that review (s. 12.4.7(b)) (unless the Minister rejects the project outright or requires the proposal to be modified and resubmitted).

Although the NIRB is not expressly required to engage in consultation for the purposes of screenings, it is clear from the stated objectives of the NIRB and the principles guiding screenings that consultation with Inuit (and indeed, all residents) is required:

[57] Section 12.11.1 actually broadens the definition of project proposals by specifying that the Government may agree to the review of a project located outside the Nunavut Settlement Area where the project "may have significant adverse ecosystemic or socio-economic effects on the Nunavut Settlement Area."
[58] See P.C. 2008-977, May 29, 2008.

Primary Objectives

12.2.5 In carrying out its functions, the primary objectives of NIRB shall be at all times to protect and promote the existing and future well-being of the residents and communities of the Nunavut Settlement Area…

…

12.4.2 In screening a project proposal, NIRB shall be guided by the following principles:

(a) NIRB generally shall determine that such a review is required when, in its judgement,

(i) the project may have significant adverse effects on the ecosystem, wildlife habitat or Inuit harvesting activities,

(ii) the project may have significant adverse socio-economic effects on northerners,

(iii) the project will cause significant public concern…

The existing and future well-being of the Nunavut Settlement Area residents and communities is manifestly the overarching priority of the NIRB in all of its work, and it can only be respected if the NIRB engages in a dialogue with those residents – around 85 percent of whom are Inuit - to understand their needs and aspirations.

Further, in conducting screenings and deciding whether a review is required, the NIRB must form a judgement as to whether the project has the potential to negatively affect Inuit harvesting activities, to have significant adverse socio-economic effects on residents, or, even more generally, whether the project is raising significant public concerns. Section 12.4.2(a)(i) should be particularly effective in identifying proposed land use activities that would be incompatible with Inuit harvesting and which stand to have a serious impact on Harvesting Rights, but 12.4.2(a)(iii) also serves to capture any project that raises major concerns for Inuit from the perspective of their Harvesting Rights or any other rights or interests.

Although Article 12 does not expressly require consultation with Inuit or other residents to determine whether any of the factors in 12.4.2(a) are present, the requirement is implicit in that NIRB could not make the assessment required for a screening without engaging in such a dialogue. Indeed, in NTI's view, the NIRB has taken this responsibility seriously: it generally seeks to provide early and direct notification to Inuit organizations and communities about screenings and to provide Inuit with an opportunity for meaningful input.

The NIRB also needs to provide Inuit with an opportunity for meaningful engagement at the review stage. This is because it must take into account a number of matters in deciding whether the project should be approved and if so, on what terms:

> 12.5.5 NIRB shall, when reviewing any project proposal, take into account all matters that are relevant to its mandate, including the following:
>
> (a) whether the project would enhance and protect the existing and future well-being of the residents and communities of the Nunavut Settlement Area, taking into account the interests of other Canadians;
>
> …
>
> (c) whether the proposal reflects the priorities and values of the residents of the Nunavut Settlement Area;
>
> (d) steps which the proponent proposes to take to avoid and mitigate adverse impacts;
>
> (e) steps the proponent proposes to take, or that should be taken, to compensate interests adversely affected by the project;
>
> …
>
> (g) the monitoring program that the proponent proposes to establish, or that should be established, for ecosystemic and socio-economic impacts; and
>
> (h) steps which the proponent proposes to take, or that should be taken, to restore ecosystemic integrity following project abandonment.

Sections 12.5.5(a) and (c) require hearing from Nunavut Settlement Area residents, including Inuit, as to their concerns about a project. Sections 12.5.5(d), (e), (g) and (h) all require exploring measures that a project proponent can take to mitigate, compensate for or accurately account for the impacts of the proposed project. All of these issues may be relevant to the accommodation of Inuit Harvesting Rights or other concerns held by Inuit, and so to conduct a thorough assessment of these issues, the NIRB will need to seek Inuit input on these matters, as indeed, it does.

Where the NIRB conducts its review through a public hearing, it must "allow full standing to a DIO" in any public hearings (s. 12.2.24 (b)), and it must "give due regard and weight to the tradition of Inuit oral communication and decision-making" (s. 12.2.24(a)(ii)). Both of these requirements help ensure meaningful Inuit participation in public hearings.

In sum, under the terms of Article 12 itself, the discharge of the NIRB's functions in the approval process for project proposals requires meaningful engagement with Inuit, and thus the

application of the common law consultation principles is entirely consistent with those provisions.

Once the NIRB has conducted its project review, it prepares a project report for the Minister, which includes a recommendation as to whether the project should proceed and if so, on what terms and conditions (and these terms must "reflect… the primary objectives set out in Section 12.2.5"). The Minister makes the final decision as to whether the project may proceed and if so, on what terms and conditions (ss. 12.5.7-12.5.12).

Article 12 does not address the process that the Minister must follow in deciding whether to accept the NIRB's determinations; by its silence on the issue of Crown-Aboriginal consultation at that stage, it cannot be said to reveal an intention to preclude such consultation.

At common law, consultation may well be required in the final decision-making stage of a project review. This was confirmed in the case of *Chicot v. Canada*.[59] In that case, the Aboriginal group was engaged in the regulatory review of a proposed extension to a large oil and gas project. As a result of the review process, certain mitigation measures were recommended to the Minister, some of which would have helped reduce the impacts of the project on the Aboriginal group's s. 35 rights. However, the Minister proceeded to review those recommendations with the review board that had proposed them and in further, closed-door discussions, approved the project with less onerous mitigation measures (a "consult to modify" process, which was provided for by the relevant legislation[60]). The Federal Court ruled that this was a breach of the Crown's duty to consult.[61]

Under Article 12, where the Minister contemplates varying the conditions upon which a project may proceed, or where it considers approving a project which the NIRB recommended be rejected, common law consultation principles would require the Minister to consult with Inuit if either decision stands to have a negative impact on their rights under the NLCA. Since Article 12 reveals no intention to preclude such a dialogue, and since the honour of the Crown requires that such a dialogue take place, the provisions of Article 12 must be supplemented with the common law consultation principles.

6. Does the Crown (including the NWMB) have a duty to consult with Inuit before adopting an interpretation of a provision in the NLCA that differs from the interpretation of Inuit?

In many cases, the interpretation of NLCA provisions will affect, or have the potential to affect, the nature or scope of an Inuit right under the NLCA. This will be particularly true of provisions which expressly recognize an Inuit right, or provisions which limit the Crown's authority to restrict Inuit rights under the NLCA. A prime example of the latter is s. 5.3.3 of the Wildlife Article:

> Decisions of the NWMB or a Minister made in relation to Part 6 shall restrict or limit Inuit harvesting only to the extent necessary:

[59] *Chicot v. Canada (Attorney General)*, 2007 FC 763.
[60] *Chicot v. Canada (Attorney General)*, 2007 FC 763 at para. 120.
[61] *Chicot v. Canada (Attorney General*), 2007 FC 763 at paras. 123-124.

(a) to effect a valid conservation purpose;

(b) to give effect to the allocation system outlined in this Article, to other provisions of this Article and to Article 40; or

(c) to provide for public health or public safety.

Section 5.3.3 serves to specify and limit the bases upon which the Nunavut Wildlife Management Board (NWMB) or the Minister may impose direct or non-quota harvesting limitations on Inuit harvesters. The interpretation of s. 5.3.3(b) has already generated disagreements between NTI and the NWMB, with the NWMB interpreting its authority under that paragraph more broadly than NTI.

For example, the NWMB maintains that s. 5.3.3(b) allows it and the Minister to impose harvesting restrictions for the sole purpose of reflecting the traditional and current levels, patterns or character of Inuit harvesting, a general objective of the Article 5 system of harvesting rights that is enunciated in s. 5.1.3(a)(i). Further to this view, it relies on s. 5.1.3(a)(i) to assert the right to impose harvesting restrictions aimed at ensuring "humane" harvesting methods. In NTI's view, the NWMB's interpretation of s. 5.3.3(b) is not supported by the text of that provision or the function of general principles such as s. 5.1.3(a)(i). Moreover, the discretion which the NWMB interprets itself as having is so broad that it would defeat the NLCA's objective of providing Inuit with certainty and clarity as to their Harvesting Rights. In short, NTI disagrees that s. 5.3.3(b) allows the NWMB or Minister to impose harvesting restrictions on Inuit harvesters based on the general objectives of Article 5.

Since restrictions based on the NWMB's or Minister's view of "humane harvesting" would directly limit Inuit harvesting methods, this interpretive disagreement has real implications for the ability of Inuit to exercise their Harvesting Rights under Article 5. Must the Crown (i.e. Canada, Nunavut, or the NWMB) consult with Inuit prior to adopting and applying this understanding of s. 5.3.3(b)?

This situation differs from the situation in *Haida*, where the scope of the rights at stake was necessarily uncertain because the rights were not yet proven. The purpose of consultation in a case such as *Haida* is not to settle the scope of the s. 35 rights, but rather to reach some reasonable accommodation of those asserted rights given that they are reasonably asserted but still unproven. Although *Mikisew* concerned established Treaty 8 rights, the Aboriginal group in that case was not seeking consultation to discuss the scope of its harvesting rights *per se*, but rather to discuss the impacts that a proposed road would have on those rights. No other consultation case to date specifically contemplates the application of *Haida* to help resolve a disagreement between treaty signatories about the meaning of a particular treaty provision.

Where the parties disagree about the interpretation of a treaty provision, a final resolution can be achieved: they can engage in dispute resolution via mechanisms provided for in the treaty, other processes to which they agree, or as a last resort, in court. One way or another, the parties can obtain a definitive ruling on how to interpret the disputed treaty provision, and that ruling will

govern henceforth. In other words, where the parties cannot agree on how to interpret a treaty, they can obtain a "correct" answer from an adjudicator. This ruling will be much more final in nature than the one which an Aboriginal group would seek in a *"Haida"* situation: if the Aboriginal group is dissatisfied with the Crown's consultation efforts or refusal to consult and brings the matter to court, the court will simply decide whether the Crown must consult or whether the Crown has discharged its consultation and accommodation obligations, without providing any definitive ruling on the existence or nature of the s. 35 rights at issue.

It is important not to treat disagreements about the interpretation of the NLCA as matters that simply require consultation and accommodation by the Crown. The Crown, including the NWMB, must interpret the NLCA properly, not simply find some middle ground between its interpretation and that of the Inuit.[62]

Although the duty to consult and accommodate as described in *Haida* may not, strictly speaking, apply to treaty interpretation disagreements, *Haida* and *Mikisew* do support the proposition that the Crown must engage in open discussions with the Aboriginal party to a treaty before adopting an interpretation of the treaty where it has notice that this interpretation conflicts with the Aboriginal party's understanding of the agreement.[63]

The Supreme Court of Canada stated in *Haida* and *Mikisew* that reconciliation is an ongoing process which does not end with the conclusion of a modern treaty:

> …the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.[64]
>
> Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 [i.e. the conclusion of Treaty 8] was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.[65]

As the above passages indicate, the reconciliation process must continue under any Crown-Aboriginal treaty, and the Crown must act honourably in implementing treaties and living up to its commitments in those constitutional documents: "the honour of the Crown infuses every treaty and the performance of every treaty obligation."[66]

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[62] Unless of course the parties both agree to adopt a "middle ground" interpretation, in which case, as a practical matter, that interpretation will prevail.

[63] In *Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources),* 2008 YKCA 13 the Court of Appeal stated: "The inescapable conclusion to be drawn from the reasons of Binnie J. [in *Mikisew*] is that the honour of the Crown and a duty to consult and accommodate applies in the interpretation of treaties and exists independent of treaties (para. 67).

[64] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 32.

[65] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 54.

[66] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 57.

The Supreme Court of Canada stated in *Mikisew* that where "the respective obligations are clear the parties should get on with performance."[67] In that case, the honour of the Crown requires compliance with the treaty. Where, in contrast, the parties disagree about their respective rights and obligations under a treaty, reconciliation will best be furthered if both parties discuss their differing views openly and in good faith, in an attempt to understand the other's perspective, potentially through some kind of non-binding, mediated process. Ideally, the parties will manage to reach agreement on what the treaty provision says. The alternative to such dialogue is adjudication, which the Supreme Court of Canada has been consistently discouraging in the context of Aboriginal claims.[68]

The Supreme Court of Canada has specifically stated that the honour of the Crown must govern the interpretation of Crown-Aboriginal treaties:

> The honour of the Crown also infuses the processes of treaty making and treaty interpretation.[69]
>
> The honour of the Crown is itself a fundamental concept governing treaty interpretation and application…[70]

These passages support the proposition that the Crown must carry out the task of treaty interpretation honourably. An honourable approach to treaty interpretation would include ensuring that the Aboriginal group understands the Crown's approach to interpretation, taking the time to understand a differing position held by the Aboriginal group and, ideally, trying to reach agreement on the meaning of the provision in question.

The Crown's obligation to explore with Inuit any disagreements about the interpretation of NLCA provisions extends to the NWMB as "an institution of public government" (s. 5.2.1) and "the main instrument of wildlife management in the Nunavut Settlement Area and the main regulator of access to wildlife" (s. 5.2.33). The NWMB is heavily involved in the implementation of certain components of the NLCA on behalf of the Crown and, as a practical matter, it must interpret the NLCA in order to fulfill these functions. As an instrument of the Crown, the NWMB must also be bound by the principle of the honour of the Crown and be guided by the principle of reconciliation, including on the matter of treaty interpretation.[71]

In summary, *Haida* and *Mikisew* support the proposition that the Crown and any of its agencies interpreting the NLCA must engage in a dialogue with Inuit before adopting interpretations of the NLCA which differ from Inuit interpretations and which might restrict Inuit rights under the

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[67] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 63.
[68] See for example *Delgamuukw v. British Columbi,a* [1997] 3 S.C.R. 1010 at para. 186. Moreover, the entire *Haida* framework serves to foster dialogue and compromise as a more productive alternative to injunction applications by Aboriginal groups.
[69] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 19, aff'd in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69 at para. 33.
[70] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 51.
[71] The role of the NWMB is the next issue discussed in this paper.

NLCA. This dialogue may be referred to as a consultation process. At the same time, this obligation differs from the duty to consult and accommodate as described in *Haida*, because the Crown has an obligation to interpret the NLCA correctly, not merely accommodate the Inuit perspective. If consultations fail to produce agreement between the parties on the correct interpretation of the NLCA, either party will have the right to obtain a definitive ruling in court, a very different (and more final) recourse than challenging any consultation process that the Crown undertook in interpreting the NLCA provision.

7. What are the respective roles of the NWMB and other Crown officials in consultation on decisions that involve both the NWMB and the Minister?

This question about the respective roles of the NWMB and other Crown officials in consultation on wildlife decisions is less about whether consultation is required and more about how the duty must be discharged.

First, Article 5 establishes a detailed scheme for many types of wildlife decisions, i.e. who makes the decisions (e.g. s. 5.6.48), constraints on the Crown's discretion in making those decisions (e.g. s. 5.3.3), and the criteria that must be considered in the making of particular decisions (e.g. s. 5.6.27). This scheme allows for Crown-Inuit consultation, and in NTI's view must provide for a certain amount of Crown-Inuit consultation. NTI is also of the view that the requirements of the common law duty to consult do not override, or lead to outcomes that would contravene, any of the requirements set out in Article 5.

Second, the NWMB was established under the NLCA as a body that would be representative of both governments and Inuit. Nunavut decision-making bodies which include Inuit appointees help ensure that the Inuit perspective will be taken into account in Crown decision-making, and should help improve that decision-making from the Inuit perspective. However, the fact that the NWMB includes Inuit representation does not alter the fact that the NWMB is a Crown entity. As stated in Article 5, the NWMB is "an institution of public government" (s. 5.2.1) and the "main instrument of wildlife management in the Nunavut Settlement Area and the main regular of access to wildlife" (s. 5.2.33).

The DIOs that appoint members to the NWMB do not have control over the positions taken by their appointees to the NWMB once these individuals take their oath to "impartially...execute and perform the duties required of [him or her] as a member of the Nunavut Wildlife Management Board." These duties are clearly laid out in Article 5 and do not include the duty to advocate or represent the positions held by the entity that appointed the member to the NWMB. Moreover, NWMB members are appointed for a term of four years (s. 5.2.4), and may only be recalled "for cause" (s. 5.2.5). In short, board members are meant to be independent of the entities that appointed them.

While the NWMB should, in theory, be sensitive to Inuit perspectives on wildlife issues by virtue of its DIO-appointed members, this does not mean that the NWMB actually represents Inuit in Crown decision-making or that it serves as a substitute for Crown-Inuit consultation. [72]

[72] In the decision of *Nunavut Wildlife Management Board v. Canada (Minister of Fisheries & Oceans),* 2009 FC 16, the Federal Court may have assumed in passing, at para. 118, that the Crown has a duty to consult with Inuit via

Where the Crown, including the NWMB, contemplates making a decision that has the potential to negatively affect Inuit Harvesting Rights, consultation with Inuit will still be required.

The respective roles of the NWMB and other Crown officials (e.g. the "Minister" and his or her staff) in Crown-Inuit consultations concerning wildlife decisions need not and probably cannot be set in stone. They will depend in part on the nature of the decision, and the NWMB's role in making that particular decision. The Crown also has some flexibility in deciding precisely who or which entity will take the lead on consultation.

To the extent that the NWMB is involved in wildlife decisions under Article 5, it would make practical sense for this Crown entity to also play a role in discharging any Crown consultation obligations that may arise with that decision. Indeed, although Article 5 does not expressly require consultation, the NWMB must consult with Inuit in order to properly fulfill many of its decision-making functions.[73]

For example, under s. 5.6.26, the NWMB must periodically review Inuit "basic needs levels" for species that are subject to a Total Allowable Harvest ("TAH"), in order to determine whether Inuit require a higher allocation of the TAH. Section 5.6.27 requires the NWMB to take a variety of factors into account, some of which will obviously require consultation with Inuit:

> ...
> (b) changing patterns of consumption, assignment and other uses including adjustments for intersettlement trade and marketing in the Nunavut Settlement Area;
> (c) the nutritional and cultural importance of wildlife to Inuit;
> (d) variations in availability of and accessibility to species other than the species under consideration...

As another example, the NWMB has authority to establish non-quota limitations ("NQLs") on Inuit harvesting under s. 5.6.48. In addition to the constraints set out in s. 5.3.3, s. 5.6.50 states that NQLs "shall not unduly or unreasonably constrain [Inuit] harvesting activities." One of the

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the NWMB before allocating commercial fishing licenses in Zones I and II of (which are specific marine areas described in the NLCA). However, that case involved an unusual provision of the NLCA, s. 15.3.4, which expressly requires the government to seek advice from the NWMB on certain wildlife management decisions in Zones I and II that stand to affect Inuit harvesting rights. In any event, the issue of whether the Crown must consult with NWMB was not squarely addressed by the Court, and Inuit were not a party to that case. For all of these reasons, this decision cannot be interpreted as establishing that the NWMB is a beneficiary of, rather than an entity responsible for, Crown consultation with Inuit.

[73] Two recent decisions from the British Columbia Court of Appeal suggest that where a body exercises quasi-judicial functions, it will not have a role in consulting, but it may be responsible for reviewing the Crown's consultation efforts and determining whether they are adequate: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission),* 2009 BCCA 67 and *Kwikwetlem First Nation v. British Columbia (Utilities Commission),* 2009 BCCA 68. However, the caselaw on this issue is only nascent and, furthermore, it is not clear that the NWMB exercises quasi-judicial functions and that it would qualify for this supervisory role based on the criteria developed in those cases.

considerations in setting NQLs will be the impact of the proposed NQL on Inuit harvesters, which the NWMB can only ascertain by consulting with the harvesters.

As a practical matter, the NWMB must consult with Inuit for many of its decisions. Moreover, by virtue of s. 5.2.23, the NWMB has broad discretion over its decision-making process, which means that Article 5 imposes no procedural constraints on consultation with Inuit. In fact, the most notable procedural constraint is NWMB's obligation to accord to any Inuk, HTO or RWO "the status of full party at a public hearing" (s. 5.2.28), a rule which helps ensure meaningful participation of Inuit in NWMB's decision-making.

NWMB involvement in consultation is also particularly appropriate where it initiates a proposal or is the lead Crown actor in the decision-making process, since consultation principles dictate that consultation begin early on in the Crown's decision-making process.

NTI is not suggesting, however, that consultation should fall solely on the shoulders of the NWMB. Crown officials from the relevant ministry may also engage in consultation with Inuit, perhaps even before the NWMB becomes involved in the decision-making process. For example, Crown officials might consult with Inuit about a "proposal for decision" before submitting it to the NWMB for its consideration. Such an approach has already been adopted by the federal Departments of Fisheries and Environment in their current memorandum of understanding with the NWMB to integrate the process of listing a species under the *Species at Risk Act* with the NLCA's related decision-making process. The NWMB could then take this initial consultation into consideration, and if the record establishes clear Inuit support for the proposed measure, it may not even be necessary for the NWMB to engage in further consultation over and above its decision-making responsibilities.

At the same time, if no consultation has taken place by the time a proposed decision which could potentially have a negative impact on Inuit Harvesting Rights reaches the Minister for approval (e.g. under ss. 5.3.9 or 5.3.18), the Crown will need to ensure that the duty to consult is discharged. Similarly, if the NWMB has engaged in some consultation, but it appears that not all Inuit concerns have been fully explored or addressed, further consultation by Crown officials would normally be in order. Finally, if the NWMB conducted adequate consultation with Inuit but the Crown proposes to reject or vary the NWMB's decision, further consultation will be in order; this is confirmed in the Federal Court decision of *Chicot v. Canada*, which holds that Aboriginal groups may not be shut out of the final stage of the decision-making process where that last stage stands to have an effect on their asserted or established s. 35 rights. [74]

Ultimately, what matters is that the Crown's duty to consult be discharged, be it by the NWMB, other Crown officials, or a combination of the two. Like the Crown, NTI prefers that consultation processes be efficient, with as little duplication as possible, as long as Inuit have an opportunity for meaningful, complete consultation. NTI is flexible about who engages in consultation, as long as the Crown makes it clear to Inuit who is responsible for consulting, and as long as Inuit are afforded the opportunity to engage in early consultation and to be consulted at all stages in the decision-making process which stand to affect their Harvesting Rights.

[74] *Chicot v. Canada (Attorney General)*, 2007 FC 763.

This analysis has centred on the respective roles of the NWMB and other Crown officials in decision-making under the NLCA. However, much of the reasoning here is general enough to apply equally well to other decision-making bodies established under the NLCA, such as the NPC and the NIRB. In these cases as well, NTI's view is that the bodies in question are Crown entities that are well situated to play a role in the Crown-Inuit consultation process.

Part II: Recommended Changes to Interim Consultation Guidelines

A. Recommendations Based on Part I Analysis

First, NTI recommends that the final version of the Consultation Guidelines acknowledge that the common law duty to consult applies to modern treaty rights unless the treaty in question clearly and plainly precludes its application. In other words, unless it would be manifestly inconsistent with the treaty, the Crown must consult with Aboriginal groups about decisions that have the potential to negatively affect their modern treaty rights.

Where the modern treaty establishes a decision-making process and that scheme expressly or implicitly requires consultation with the Aboriginal group, the common law consultation principles may simply serve to flesh out or confirm the nature of that consultation obligation. Since most of the consultation principles are fairly flexible in their application, they will normally mesh easily with the decision-making regimes that are established in treaties.

Second, the Interim Consultation Guidelines should remind Crown officials that treaty rights must be *respected*, and that the Crown cannot make decisions that *infringe* a treaty right simply by following a process of consultation and accommodation as described in *Haida* and the related case law. An Aboriginal group with an established treaty right that stands to be infringed is not in the same position as a group that asserts an Aboriginal right or a group whose treaty right stands to be adversely affected, without actually being infringed.

The Interim Consultation Guidelines currently do not recognize that where a Crown decision would lead to an infringement of an established treaty right, the Crown's duty is to respect the right at issue, not simply reduce its impact or offer a compromise solution to the Aboriginal group. For example,

- on p. 17, Federal Departments and Agencies are instructed to find ways to *mitigate* impacts of proposed decisions;

- on p. 44, Figure 3 includes a range of consultation and accommodation measures but fails to indicate that in some cases it will be appropriate to reject a project in order to ensure that a treaty right (or a proven Aboriginal right) is not infringed;

- on p. 51 it is stated that "the legal duty to consult does not include a requirement to agree on a resolution to the issues" except in "contexts that involve Aboriginal lands over which title has been established;"

- on p. 53 it is stated that "an "established" right or title may suggest a requirement for consent from the Aboriginal group(s)." [emphasis added]

NTI submits that all of these passages need to be modified to make it clear that Crown officials are expected to make decisions that do not *infringe* treaty rights.

Third, the Crown should adopt a policy of consulting with modern treaty signatories where it becomes aware of a disagreement with the Aboriginal signatory as to the meaning of a particular treaty provision. In NTI's experience, a good faith dialogue about the interpretation of controversial treaty provisions is critical to ensuring that Crown-Aboriginal relationships flourish under modern treaties and to minimizing treaty litigation.

Fourth, the Crown must ensure that Crown entities that are established under modern treaties understand their role in any Crown-Aboriginal consultation that must take place for decisions in which they are involved. The Interim Consultation Guidelines recognize the need for government agencies and departments to work together to fulfill the Crown's consultation obligations (p. 15). The Guidelines could also acknowledge that it will at times be necessary for the Crown to engage with Crown entities and ensure that they understand that they have a role to play in consultation. Ideally, the Crown and the entity in question would work towards an agreement of their respective roles, to ensure an efficient and effective consultation process with Aboriginal groups.

B. Miscellaneous Recommendations

NTI also has a number of other recommendations which do not relate to the interplay between the duty to consult and modern treaties.

First, the final version of the Consultation Guidelines should place more emphasis on the fact that assessing the strength of the Aboriginal claim cannot normally be a purely internal government exercise, and that it typically requires consultation with the Aboriginal group in question. There is an acknowledgment at p. 44 that it "may also be appropriate to approach the Aboriginal groups to clarify the basis of their claim." Otherwise, however, the Guidelines imply that Crown officials can assess the strength of the claim without such dialogue (see pp. 17 and 43).

In practice, a discussion about the strength of the Aboriginal claim is often a key topic in the consultation process itself. Moreover, the British Columbia Supreme Court decision in *Brown v. Sunshine Coast Forest District (District Manager)*[75] establishes that Aboriginal groups should be given the opportunity to know and respond to any government assessment of their Aboriginal title claim and that if they are not, they will have the opportunity to adduce further evidence about the strength of their claim in a judicial review application challenging the consultation process in question. Since the strength of the s. 35 claim is a key determinant of the level of consultation and accommodation owed, it is only fair that Aboriginal groups be given a chance to

[75] *Brown v. Sunshine Coast Forest District (District Manager),* 2008 BCSC 1642 at paras. 126-127.

establish the strength of their claim and know of any evidence from other sources that the Crown is relying upon in reaching its determination.

Second, the final version of the Consultation Guidelines should acknowledge the critical importance of understanding the potential environmental impacts of proposed projects/activities. This issue is identified as a factor which Crown practitioners should take into account (p. 40), but it deserves more emphasis. A proper understanding of the environmental impacts of a project is critical to the assessment of a project's potential impacts on any s. 35 land-based rights or harvesting activities. Although Aboriginal groups can typically contribute traditional knowledge – in the case of Inuit, *Inuit Qaujimajatuqangit* – that will be relevant to understanding the impacts of a proposed project or activity, they generally do not have the resouces to conduct complete, scientific analysis on the potential impacts of a project. Thus, unless the Crown or the project proponent develops and shares this knowledge, Aboriginal groups will lack information that is vital to assessing the impacts of the proposed project/activity on their rights and which they need in order to engage in a meaningful dialogue about how to mitigate those impacts. The final version of the Consultation Guidelines should therefore emphasize the need for Crown practitioners to ensure that there is adequate, reliable information to make sound predictions about the environmental impacts of proposed projects and activities. The onus for providing such information can, of course, be placed on the project proponent, so as to avoid burdening government departments and agencies with excessive expenses.

Third, the Tables at pages 44-45 do not reflect the most extreme, but possible, outcome of the consultation and accommodation process: a rejection of the proposed project. Aside from the situation, already discussed, where a proposed project would infringe a modern treaty right, there may be cases where a project would infringe proven or undisputed Aboriginal rights and where the Crown determines that the infringement could not be justified. There may also be cases where the claim for an unproven s. 35 right is very strong, and the potential harm to the right is severe, such that the balance of interests weighs in favour of protecting the asserted rights. While the cases in which it would be reasonable to reject a project outright may be rare, that outcome is a logical possibility under a consultation and accommodation process, and the Consultation Guidelines should acknowledge it explicitly.

Conclusion

As has been emphasized in this paper, the duty to consult applies differently in the modern treaty context than in the context of historical treaties or Aboriginal rights, and it is critical that the final version of the *Aboriginal Consultation and Accommodation Guidelines for Federal Officials* recognize this fact.

The other central theme of this paper, which is specific to Nunavut Inuit, is that the duty to consult is highly compatible and consistent with the NLCA. The Inuit right to consultation is preserved through s. 2.7.3(a). In any event, the treaty text reveals no clear and plain intention to preclude consultation, and, on the contrary, in many cases, it expressly contemplates consultation that is essentially in keeping with common law consultation principles.

NTI looks forward to responding to any questions that the Government may have about this paper, to discussing the issues raised here and to engaging in further discussions as the Government finalizes the federal consultation guidelines, with a view to building its relationship with NTI and Inuit generally under the NLCA.