THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2015 SKCA 31 Date: 2015-04-02

Between: Docket: CACV2533

Buffalo River Dene Nation

Appellant (Applicant)

- and -

The Minister of Energy and Resources and Scott Land & Lease Ltd.

Respondents (Respondents)

Coram:
Jackson, Ottenbreit and Caldwell JJ.A.

Counsel:
Allisun Rana and Emily Grier for the Appellant
R. James Fyfe for the Respondent Ministry
No one appearing for the Respondent Scott Land & Lease Ltd.

Appeal:

From:	2014 SKQB 69
Heard:	September 25, 2014
Disposition:	Appeal dismissed
Written Reasons:	April 2, 2015
By:	The Honourable Mr. Justice Caldwell
In Concurrence:	The Honourable Madam Justice Jackson
	The Honourable Mr. Justice Ottenbreit

Caldwell J.A.

I. INTRODUCTION

[1] Buffalo River Dene Nation [Buffalo River DN], a Denesuline First Nation, is the successor to the Clear Lake Band, a signatory to *Treaty No. 10*, made August 28, 1906.[1] *Treaty 10* entitles the members of Buffalo River DN to practise traditional uses of *Treaty 10* land, including hunting, trapping, and fishing. The Crown has a duty to consult with Buffalo River DN whenever its activities or activities it authorises have the potential of interfering with the rights of members of Buffalo River DN under *Treaty 10*.[2] This is not contested by the Crown. What is at issue in this appeal is whether this duty to consult is triggered in circumstances where the Crown has granted exploration dispositions [Exploration Permits] in respect of subsurface oil sands minerals located under *Treaty 10* lands. A Queen's Bench Chambers judge found the duty had not been triggered in such circumstances because the granting of Exploration Permits had no potential to impair *Treaty 10* rights (decision indexed as: 2014 SKQB 69). Buffalo River DN has appealed from that finding.

[2] In short, I would dismiss this appeal. Buffalo River DN's assertion that the Crown's duty to consult has been triggered here, chiefly because of the possibility of impact on the rights of its members under *Treaty 10*, amounts to no more than speculation at this juncture. While the threshold for proof of interference and a consequent triggering of the duty to consult is low, the law

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[1] Online: www.aadnc-aandc.gc.ca/eng/1100100028874/1100100028906 [*Treaty 10*].
[2] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34, [2005] 3 SCR 388 [*Mikisew Cree* (SCC)].

requires more than a merely speculative impact before the duty is triggered. As Buffalo River DN has not met that burden, I would find the Crown's duty to consult has not been triggered in this case at this time.

II. THE CONTEXT

[3] The facts are straightforward and uncontested. The applicable legislation is known and uncomplicated.

A. Basic Factual Framework

[4] As noted, the Crown admits in its factum that Buffalo River DN is a successor to a signatory to *Treaty 10*. *Treaty 10* provides hunting, trapping, and fishing rights to the members of Buffalo River DN (*Treaty 10* at p. 11):

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the territory surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country acting under the authority of His Majesty and saving and excepting such tracts as may be required or as may be taken up from time to time for settlement, mining, lumbering, trading or other purposes.

[5] The Crown admits members of Buffalo River DN exercise rights under *Treaty 10* on lands that include the lands [the Permit Lands] that are subject to the Exploration Permits [the Scott Permits] issued to Scott Land & Lease Ltd. [Scott Ltd.]. In its factum, and through its affidavit evidence, the Crown states no treaty or Aboriginal rights, or credible claim thereto, exist in relation to provincial Crown minerals in Saskatchewan.

B. Buffalo River DN Evidence

[6] To be clear about the practical implications of the treaty rights afforded to members of Buffalo River DN under *Treaty 10*, Lance Ben Byhette, Chief of Buffalo River DN [Chief Byhette], who is steeped in traditional Denesuline values, culture, and language, attested in his affidavit that:

(a) Chief Raphael Bedshidekkge of the Clear Lake Band signed *Treaty 10* on August 28, 1906 at Ile-a-la-Crosse, Saskatchewan, and Buffalo River DN is the successor to the Clear Lake Band;

(b) Buffalo River DN has 1,328 registered members, of whom approximately 672 live on Indian Reservation No. 193 [IR193], which is Buffalo River DN's only reserve;

(c) oral history tells him that Denesuline people have used and occupied their traditional territory for many generations and members of Buffalo River DN continue to exercise rights guaranteed by *Treaty 10* within that traditional territory, including rights to hunt, trap, and fish; in his words, "[w]e continue to live our 'mode of life' as promised by the Treaty Commissioner";

(d) the exercise of treaty rights is key to the maintenance of Denesuline identity and culture, remains central to the Denesuline way of life, and enables the Denesuline people to pass down Denesuline culture, language, and traditions to future generations;

(e) Denesuline people consider themselves the caretakers of the land;

(f) members of Buffalo River DN are concerned about resource development in their traditional territory and the potential for this development to adversely affect the exercise of their rights under *Treaty 10* and, in particular, are concerned that the Crown is permitting industry to exploit oil, gas, minerals, water, and other resources without adequate, or any, consultation;

(g) a significant portion of the traditional territory of Buffalo River DN has been included in the Primrose Lake Air Weapons Range [the Weapons Range], rendering it inaccessible and unavailable to its members for the purposes of exercising their rights under *Treaty 10*;

(h) members of Buffalo River DN are concerned changes to their traditional territory resulting from resource development and the Weapons Range are impeding their use of land and resources and contributing to the cultural assimilation of the Denesuline people;

(i) although not exhaustive, patterns of land use, exercise of treaty rights, and sites of cultural, historic or spiritual significance in relation to traditional territory of Buffalo River DN have been documented by the 2009 and 2010 Traditional Land Use Studies [the TLUS].

(j) in the geographic area identified in the TLUS as "High Concentration Area" [the HCA], Denesuline people historically carried out traditional ways of life and currently exercise their treaty rights;

(k) medicinal plants, berry-picking sites, traditional hunting areas and trap-lines, cabins, and trails actively used by Buffalo River DN members are located within the HCA;

(l) places sacred to members of Buffalo River DN and important to Denesuline culture and history are found within the HCA, including ancestral burial sites, traditional campgrounds, and settlements;

(m) within the HCA is a registered Northern Fur Conservation Area [FCAN-21], which is used by the membership of Buffalo River DN and two neighbouring Métis communities for trapping;

(n) Buffalo River DN lost access to approximately 15% of FCAN-21 in 1954 when the southern portion of it was subsumed within the Weapons Range;

(o) lands within the HCA to the north of the Weapons Range have seen relatively little resource development to date and, to Chief Byhette's knowledge, there is no resource development currently taking place within that area; and, previous resource development in that area had been limited to relatively small-scale logging and some seismic activity that took place approximately 20 years ago; but, there are some abandoned oil and gas wells in that area; and, members of Buffalo River DN continue intensive use of lands in that area in the exercise of their rights under *Treaty 10*;

(p) the Scott Permits authorise oil sands exploration activity on approximately 200,000 hectares of land in the HCA, southwest of IR193 and north of the Weapons Range; but, to Chief Byhette's knowledge, no oil sands exploration has yet commenced on the Permit Lands;

(q) lands within the Permit Lands are actively used by Chief Byhette and other Buffalo River DN members to exercise their rights under *Treaty 10*, including rights to hunt, trap, and fish;

(r) the Permit Lands encompass sacred sites of vital importance to the Denesuline community;

(s) members of the Buffalo River DN gather plants and camp within the Permit Lands;

(t) there are many land-use trails connecting IR193, the land surrounding Watapi Lake and Dillon Lake, and numerous hunting and trapping cabins along the trails and in close proximity to Watapi Lake and Dillon Lake located within or that cross through the Permit Lands;

(u) a particularly high concentration of burial sites, traditional campgrounds, and communities are located on the lands off the south-eastern shores of Dillon Lake within the Permit Lands;

(v) the entirety of the Permit Lands is contained within FCAN-21;

(w) a boundary of the Permit Lands is approximately 20 kilometres southwest of IR193;

(x) the Crown did not consult with Buffalo River DN prior to posting for sale or issuing the Scott Permits;

(y) the “SAG-O” oil sands operation of Canadian Natural Resources Limited [CNRL] on the Alberta side of the Weapons Range began leaking in 2012 and it leaked underground for several months before it was discovered; and, more than 8,650 barrels of bitumen have since been removed from the sites; and, as of September 2013, it was still leaking;

(z) the Crown’s decision to allow oil sands exploration in the HCA without any consultation with Buffalo River DN is of great concern to Buffalo River DN because, unlike localized

small-scale resource development, oil sands operations have the potential to negatively impact a very broad area;

(aa) Buffalo River DN does not have the skilled personnel required to engage in meaningful consultation with the Crown regarding resource exploration and development within its traditional territory;

(bb) although the Crown has a First Nations and Métis consultation participation fund, the Crown only provides funding under that program once it has determined the duty to consult has been triggered and, as a consequence, only matters that the Crown has deemed to be subject to the *Consultation Policies* [defined below] will receive funding;

(cc) no one provides Buffalo River DN with any funding, and it does not have adequate resources of its own, to retain staff who can monitor proposed resource exploration and development in its traditional territory and advise on when to assert its consultation rights with the Crown; and

(dd) Buffalo River DN is wholly reliant on the Crown to contact it, to provide it with relevant information about proposed activity, and to provide it with adequate capacity funding to allow it to meaningfully engage in a consultation process.

[7] In his supplemental affidavit, Chief Byhette attests to the following additional information:

(a) Buffalo River DN shares kinship ties with Cold Lake First Nation [Cold Lake FN];

(b) prior to the creation of the Weapons Range, people from Buffalo River DN travelled across their traditional territories now within the Weapons Range to meet with their relatives at Cold Lake; and, the relationship between the two First Nations remains a close one;

(c) to the present day, Buffalo River DN leadership maintains a working relationship with Cold Lake FN on a variety of issues, including land use, resource development, and maintenance of traditions and cultures;

(d) Chief Byhette has been in contact with members of Cold Lake FN and with the other chiefs from the Meadow Lake Tribal Council [the Tribal Council], of which Buffalo River DN is a member, regarding an oil spill involving CNRL's oil sands operation on the Alberta side of the Weapons Range;

(e) CNRL's oil sands operations in the Weapons Range are in close proximity to Buffalo River DN's traditional territory and the oil spills are approximately 50 kilometres from the Permit Lands;

(f) Chief Byhette is aware of the general nature of the bitumen leaks from the CNRL oil sands operations, their locations, timing and discovery, and the amount of land and water impacted thereby;

(g) Chief Byhette is aware that the bitumen leaks are ongoing and that CNRL is having difficulty pinpointing the cause of the leaks and stopping them;

(h) in conjunction with Cold Lake FN and other members of the Tribal Council, Chief Byhette has been monitoring the oil spills and has taken steps to have them addressed by the appropriate authorities so that they are stopped and clean up measures are undertaken;

(i) Chief Byhette understands the bitumen seepage has resulted in the death of wildlife and the contamination of a lake, forest, and muskeg near the CNRL oil sands operation;

(j) Chief Byhette observes that oil spills and bitumen leaks are ways in which oil sands exploration and development have the potential to adversely impact the exercise of treaty rights by Buffalo River DN members on the Permit Lands;

(k) Chief Byhette advises that oral history states that members of Buffalo River DN have "since time immemorial used, harvested, managed and conserved the land, waters and animals and developed a culture based upon [their] relationship to the land and to the spirits of [their] traditional territories which culture has included trading, managing and conserving with [their] customs, law and traditions"; and

(l) Buffalo River DN's traditional territory includes, but is not limited to, the HCA, which he describes as the land surrounding Peter Pond Lake and IR193, the land west of Peter Pond Lake to

the Alberta border, and the land southwest of Peter Pond Lake to the Weapons Range.

[8] In her affidavit, Debbie Billette, who was the chief of Buffalo River DN [Chief Billette] at the time the Scott Permits were posted and issued, averred that:

(a) any matters involving land use and resource development and Buffalo River DN were administered directly by her, as chief;

(b) the Crown did not consult with Buffalo River DN prior to posting or issuing the Scott Permits;

(c) in mid-December 2012, she heard a radio news report of an oil sands disposition in the area north of the Weapons Range and that report caused her to investigate the matter further, which she did in early 2013; and

(d) Chief Billette, in January 2013, discovered the Crown had issued the Scott Permits.

C. Crown Evidence

[9] I now turn to set forth what is involved, from the Crown's perspective, in the process of granting an Exploration Permit. This evidence is found in the affidavit of Paul Mahnic, Director of the Petroleum Tenure Branch at the Ministry of Energy and Resources [the Energy Ministry], from which I have summarised the process of offering for public sale and granting Exploration Permits as well as what has occurred in this case:

(a) the Energy Ministry posts (*i.e.*, solicits bids on) Exploration Permits covering specific lands [Disposition Lands] upon receipt

of a request to do so from an interested party, which is usually an oil and gas company; but, the Energy Ministry does not do so automatically as legal concerns, ownership issues, and environmental or geological considerations may lead it to decide not to post lands; furthermore, the Crown has, on occasion, withdrawn Disposition Lands from a public sale, including for the purposes of treaty land entitlement [TLE] selection; in this case, Scott Ltd. requested the posting of the Permit Lands by two facsimile transmissions, each dated July 11, 2012;[3]

(b) the Energy Ministry has no background information about a requesting party or its exploration plans when the Energy Ministry posts Disposition Lands and the Energy Ministry does not require bidders to submit, or the successful bidder to provide it with, any exploration or development plans;

(c) the Energy Ministry notifies the public when it posts Disposition Lands for public bidding; in this case, the Energy Ministry gave notice by means of Public Sale Notice 350[4] directly to subscribers to its email services, to the public generally via its website, and through publication of Public Sale Notice 350 in *The Saskatchewan Gazette*;

(d) the Energy Ministry also notifies all First Nations in Saskatchewan of the potential sale of Exploration Permits; in this case, the Energy Ministry mailed a copy of Public Sale Notice 350 to Buffalo River DN on September 27, 2012;

[3] Appeal Book pp. 41a-44a.
[4] Appeal Book pp. 45a-63a.

(e) the Energy Ministry grants an Exploration Permit having a term of five years to the successful bidder; but it does not automatically issue Exploration Permits when it has received bids because the Energy Ministry has an unqualified right to reject any or all of the bids, under s. 37(1) of the *Regulations* [defined below]; and, bids are commonly rejected on the basis of fair market value, the present and long-term outlook for commodity prices, the geological potential of the area, and comparative prices received for rights in similar areas; in particular reference to the Permit Lands, the Energy Ministry has posted Exploration Permits for sale four times since August 2007, but never issued an Exploration Permit during that time either because it did not receive any bids or the bids were rejected as unacceptable; in this case, Scott Ltd. successfully bid on two Exploration Permits, having submitted bonus bids of $501,025.50 and $501,680.53 each (or $5.00 per hectare), which were awarded to it on December 3, 2012 (*i.e.*, the Scott Permits);

(f) in this case, the Energy Ministry forwarded the results of the public sale to Buffalo River DN by mail on December 6, 2012;

(g) the Energy Ministry does not regulate surface exploration activities with respect to Disposition Lands; in this case, the provincial Crown regulates surface exploration activity on the Permit Lands through the Ministry of Environment [the Environment Ministry];

(h) the Energy Ministry is not notified of requests the Environment Ministry receives from Exploration Permit holders

[Permit-Holders] for permission to conduct surface exploration activities on Disposition Lands; nor is the Energy Ministry consulted by the Environment Ministry with respect to the latter Ministry's decision to grant or withhold such permission; and

(i) Permit-Holders commonly fail to conduct surface exploration activities during the term of an Exploration Permit.

[10] The Crown supplemented this information with the affidavit of Gregory Hayes, Manager of Lands Management North in the Lands Stewardship Branch of the Environment Ministry [the Manager], who averred, *inter alia*, that:

(a) the Environment Ministry decides whether to grant surface access rights or dispositions [Surface Dispositions] to Permit-Holders, which allow a Permit-Holder to enter upon the surface of provincial Crown lands in northern Saskatchewan;

(b) the Environment Ministry conducts, and the Manager oversees, consultation programs with First Nations and Métis groups where provincial Crown land-use decisions have the potential to negatively impact treaty or Aboriginal rights in northern Saskatchewan;

(c) when deciding whether to grant a Surface Disposition, the Environment Ministry is guided by Ministry-wide consultation policies and processes, namely: Saskatchewan, Ministry of Environment, *Policy Guidance and Operational Procedures for Consultation with First Nations and Métis Communities* (Regina:

Queen's Printer, February 2011)[5] and Saskatchewan, Ministry of Environment, *Consultation Process for Lands Branch* (Regina: Queen's Printer, 2012)[6] [together, the *Consultation Policies*];

(d) the Environment Ministry's Lands Management North office conducts annually in excess of 100 consultations with First Nations and Métis groups in northern Saskatchewan;

(e) anyone who applies to the Environment Ministry for a Surface Disposition so as to conduct mineral (including oil sands) exploration activities on provincial Crown land must submit a project proposal setting out the details of the project, *i.e.*, the "what", "where" and "how";

(f) the Environment Ministry does not consult with the Energy Ministry when deciding whether to grant Surface Dispositions to Permit-Holders; nor is the Environment Ministry concerned whether a Permit-Holder has provided the Energy Ministry with a bonus bid;

(g) the Environment Ministry is not required to grant Surface Dispositions to Permit-Holders and it has declined to issue Surface Dispositions in the past, citing environmental reasons;

(h) the grant of an Exploration Permit has no bearing on the location, intensity, timing, or any other detail of any surface exploration activity that might be allowed through a Surface Disposition affecting Disposition Lands;

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[5] Appeal Book pp. 241a-261a.
[6] Appeal Book pp. 263a-284a.

(i) the Environment Ministry has not received any project proposal or any application to conduct surface exploration activities on the Permit Lands; and

(j) if the Environment Ministry receives a project proposal or an application to conduct surface exploration activities in respect of the Permit Lands, it will follow its *Consultation Policies*.

[11] The Crown also tendered the affidavit of Douglas Gordon MacKnight, the Executive Director of the Lands and Mineral Tenure Branch at the Ministry of the Economy, in which Mr. MacKnight confirms the information adduced through Mr. Mahnic and Mr. Hayes and provides some background on the *Consultation Policies*. Mr. MacKnight also averred as follows:

(a) the Crown does not guarantee or undertake to issue any Surface Dispositions to Permit-Holders;

(b) an Exploration Permit has value because it provides the security of tenure to the Permit-Holder that is integral to the process of raising investment capital for the purposes of planning for and undertaking exploration and development;

(c) notwithstanding its potential value, there is no guarantee that a Permit-Holder will actually carry out an exploration or development program in relation to an Exploration Permit on Disposition Lands;

(d) factors such as commodity prices, global economic conditions, availability of working capital, geologic prospects, exploration

costs and regulatory approvals influence the timing and extent of an exploration program, if it occurs at all; and

(e) it is "very common" for Crown mineral dispositions, *i.e.* Exploration Permits, to revert to the Crown with little or no work being conducted on the Disposition Lands; this is a normal part of the mining cycle and reflects the speculative nature of most Exploration Permits.

D. Statute and Regulations

[12] The legislation and policy elements of this matter are as follows. To start, *The Crown Minerals Act*, SS 1984-85-86, c C-50.2, limits the scope of an Exploration Permit, which is a "Crown disposition" within the meaning of that *Act*, in clear terms:

> **Entry and use of surface**
> **19** No Crown disposition shall authorize any person to enter on or use the surface of the Crown mineral lands to which the Crown disposition applies.

[13] Notwithstanding this, *The Petroleum and Natural Gas Regulations, 1969*, Sask Reg 8/69 [the *Regulations*], just as clearly entitle Permit-Holders (or "permitees") to explore for oil sands or oil shale and impose a number of financial and work obligations on them:

> **Rights granted**
>
> **23.21**(1) Subject to *The Seismic Exploration Regulations, 1999*, a permittee has the right, licence, privilege and authority to explore for oil and gas or oil sands or oil shale, as the case may be, within the permit lands.
>
> (2) The permittee may not remove, produce, recover or extract any oil and gas, oil shale or oil shale products or oil sands or oil sands products discovered by exploration under a permit until a lease is granted to the permittee pursuant to this Part.
>
> (3) On the application of the permittee, the minister may waive the requirement to obtain a lease for a specified period on those terms that the minister considers appropriate to enable the permittee:

(a) to place a well on production for production test purposes; or

(b) to remove, produce, recover or extract for test purposes:

(i) oil shale and oil shale products; or

(ii) oil sands and oil sands products.

(4) The permittee shall comply with section 84 of *The Oil and Gas Conservation Regulations, 1985*.

Rent

23.3(1) During the term of the permit, the permittee shall pay rent of $0.25 per hectare to the ministry annually.

(2) During the term of any lease, the permittee shall pay rent to the ministry in accordance with subsection 44(1).

(3) Rents are due and payable to the ministry in advance of the anniversary date of the permit or the lease.

(4) Rent is not refundable where lands are surrendered or the permit or lease is terminated.

(5) Where a permittee or lessee fails to pay rent in accordance with this section, the minister shall terminate the permit or lease, and all interest in any land affected reverts to the Crown.

Work commitment

23.31(1) The permittee shall make a minimum of one well per permit to a depth that is satisfactory to the minister.

(2) Where the petroleum, natural gas or petroleum and natural gas permit land exceeds 100,000 hectares, the permittee shall make at least two wells to depths that are satisfactory to the minister.

(3) Wells made in satisfaction of the requirements of this section are to be separated by at least eight kilometres.

Expenditure requirements

…

23.4(2) In the case of a permit issued to explore for oil sands, the permittee shall expend at least the following amounts exploring for oil sands in the permit land during the term of the permit:

(a) $1 per hectare for each of the first two years;

(b) $2 per hectare for each of the last three years;

(c) $3 per hectare for each year the permit has been extended.

(3) In the case of a permit issued to explore for oil shale in the permit land, the permittee shall expend at least the following amounts exploring for oil shale in the permit land during the term of the permit:

(a) the greater of the amount of the proposed annual work and $1 per hectare for each of the first two years;

(b) $2 per hectare for each of the last three years;

(c) $3 per hectare for each year the permit has been extended.

…

(5) Subject to section 23.51, if a permittee fails to meet the permittee's minimum annual expenditure requirements, the minister shall cancel the permit and all interest in the permit lands reverts to the Crown.

…

Deficiency payments

23.51(1) Where the permittee does not meet the permittee's minimum annual expenditure requirements pursuant to subsection 23.4(1), (2) or (3), as the case may be, the minister may allow the permittee to make a non-refundable cash payment in the amount of the deficiency in order to maintain the permit in good standing.

(2) Subsection (1) does not apply where the permittee fails to meet the minimum annual expenditure requirements in consecutive years.

(3) Subsection (1) does not apply with respect to a permit that has been extended.

…

Termination

23.7 Where a permit is terminated, cancelled or surrendered pursuant to subsections 23.3(5), 23.4(5) or 23.41(5) or section 23.61, any remaining expenditure deposit held by the ministry is forfeited by the permittee.

…

Conversion to lease based on commercial discovery

23.71(1) In this section, "**lease block**" means:

…

(b) a block of permit land with minimum surface dimensions of 1.6 kilometres by 1.6 kilometres and maximum surface dimensions of 9.7 kilometres by 9.7 kilometres for oil sands or oil shale permits, but only if all lands in the lease are adjoining.

(2) If a well made on permit land pursuant to section 23.31 results in the discovery of commercial quantities of oil or gas or results in the discovery of oil sands or oil shale capable of producing oil sands products or oil shale products in commercial quantities, as the case may be, and the permittee wishes to obtain a lease for that land, the permittee shall, if the permit is in good standing, within 180 days after the discovery:

(a) select one or more lease blocks; and

(b) apply for a lease or leases of the selected lease blocks in accordance with these regulations.

(3) The lease blocks selected pursuant to subsection (2) must include the well whose making resulted in the discovery of oil or gas, or of oil sands or oil shale

capable of producing oil sands products or oil shale products, in commercial quantities.

(4) In addition to any lease or leases obtained pursuant to subsection (2), the permittee has the exclusive right at the expiry of the term of the permit or within 60 days after the expiry to select one or more lease blocks and apply for a lease or leases of the areas included in the lease blocks if the permittee:

(a) complies with sections 23.31, 23.4 and 23.51; and

(b) applies for the lease or leases in accordance with these regulations.

(5) The total area of the lease blocks selected by a permittee pursuant to this section is not to comprise more than:

…

(b) 25% of the permit land covered by the oil shale permit on the day on which the permit is issued; or

(c) 50% of the permit land covered by the oil sands permit on the day on which the permit is issued.

…

(7) If a permittee selects more than one lease block from an oil sands or oil shale permit and that permittee has not discovered oil sands or oil shale capable of producing oil sands products or oil shale products in commercial quantities within the area covered by the permit, each lease block is to be situated so that any side of one block is at least 4.8 kilometres perpendicularly distant from any side of another block except that the blocks may be diagonally situated so as to have a common corner.

(8) If a permittee selects more than one lease block from an oil sands or oil shale permit and the permittee has discovered oil sands or oil shale capable of producing oil sands products or oil shale products in commercial quantities in the area covered by the permit, the permittee may select each lease block at random.

…

Powers of minister

23.9(1) The minister may determine the form of any permit or lease issued pursuant to this Part.

(2) The minister may place environmental or drilling restrictions on a permit or lease.

(3) Where a permittee violates any of the terms, conditions, stipulations or restrictions placed on a permit or lease by the minister, the minister may cancel that permit or lease and all interests in any lands affected revert to the Crown.

…

Advertisement for bids and offers

37(1) On the application of an interested person or on the minister's own motion, the minister may advertise for sale any Crown disposition that may be granted pursuant to these regulations.

(1.1) The maximum area that may be the subject of any application for a lease pursuant to subsection (1) is four sections of Crown land.

(1.2) The minister may reject any application for a lease where, in the opinion of the minister, the applicant has not complied with subsection (1.1).

…

(1.4) No land is to be advertised for oil shale or oil sands rights under a permit to be issued pursuant to Part II.1, if the land is within 10 kilometres of any active oil shale or oil sands EOR project at the time of advertisement.

(2) An advertisement for the purposes of subsection (1) is to:

(a) be published in the Gazette; and

(b) contain:

(i) the date of the sale;

(ii) the date and time after which the minister will not receive bids or offers; and

(iii) the address to which interested persons may write or to which they may go to obtain:

(A) the pertinent terms and conditions under which the bids or offers may be made;

(B) a list of the petroleum, natural gas, petroleum and natural gas, oil sands or oil shale rights available for disposition at the sale; and

(C) any other information that the minister considers relevant.

(3) Sealed bids or offers submitted to the minister are to be in accordance with the terms and conditions mentioned in paragraph (2)(b)(iii)(A).

(4) The unqualified right to refuse any or all bids or offers and the unqualified right to refuse to issue a disposition to any or all persons submitting bids or offers shall be reserved to the minister and the money submitted with the bids or offers by the unsuccessful applicants shall be refunded.

(4.1) The rights set out in subsection (4) are terms or conditions under which all bids or offers may be made.

…

(6) The minister may determine the form of any Crown disposition issued pursuant to these regulations.

> (7) If there are ongoing thermal enhanced oil recovery activities on Crown lands that, in the opinion of the minister, may be adversely affected by the development of the deeper rights, as determined by the minister, in those Crown lands, the minister shall withdraw those deeper rights from disposition.

[14] The granting of an Exploration Permit [first-stage] thus affords the Permit-Holder with exclusive subsurface rights in a specified area and exclusive mineral exploration rights with respect thereto, but does not grant the Permit-Holder any right to access the surface of the Disposition Lands or to extract oil sands or other minerals therefrom. To do this, the Permit-Holder must separately obtain surface access rights from the Environment Ministry [second-stage] and, if same are granted and the Permit-Holder's exploration proves a commercially-viable mineral, the Permit-Holder must subsequently obtain a lease from the Energy Ministry [third-stage] before the Permit-Holder may begin to actually extract the mineral discovered.

[15] On the facts of this case, the Crown's position appears to be that its duty to consult with Buffalo River DN will be triggered — at the second-stage — if Scott Ltd. applies to the Environment Ministry for surface access to the Permit Lands—and, presumably, it will also be triggered if Scott Ltd. subsequently applies to the Energy Ministry—at the third-stage—for a lease approval (Respondent Factum, at paras. 5, 62 and 67). This would also be in accordance with Crown policy.

E. Crown Policy

[16] In consequence of the statutory and regulatory provisions and the nature of the duty to consult with Aboriginal and Métis groups, the Crown has taken the policy position that the duty is not triggered by the issuance of an Exploration Permit. This is evidenced in the Crown's framework document,

First Nation and Métis Consultation Policy Framework (Regina: Queen's Printer, June 2010)[7] at 6, which states:

> ***Mineral Dispositions***
> The issuance of mineral dispositions under *The Crown Minerals Act* is not subject to this policy. These dispositions do not provide the disposition holder with a right of access to lands for purposes of mineral exploration and development. This policy will, however, apply where the Government is contemplating surface land use decisions related to mineral exploration and development that may have an impact on Treaty and Aboriginal rights and traditional uses.

[17] As the Crown's corresponding duty to *accommodate* the rights of members of Buffalo River DN, even if engaged on the facts of this matter, is not at issue in this appeal, I will say nothing about it other than to note the Crown has an established process under the *Consultation Policies* for fulfilling its duty to accommodate.

F. The Scott Permits

[18] In recognition of the financial and work requirements of the *Regulations*, the Scott Permits themselves contain the following notice to the Permit-Holder:

> Pursuant to Part II.1 of *The Petroleum and Natural Gas Regulations, 1969*, the Grantor hereby grants to the Permittee the exclusive right, licence, privilege and authority to explore for oil sands insofar as the Crown in right of Saskatchewan has the right to grant the same in, upon or under the lands described, for a term of five years commencing the 3rd day of December, 2012, subject to the fulfilment, observance and performance on the part of the Permittee of the provisions of *The Petroleum and Natural Gas Regulations, 1969*, as the same are now in force or as they may from time to time hereafter be amended, revised or substituted.

[19] But, in furtherance of *The Crown Minerals Act* and the Crown's policy position on the duty to consult, the Scott Permits also stipulate:

> No Crown disposition shall authorize any person to enter on or use the surface of the Crown mineral lands to which the Crown disposition applies. In other words:

[7] Appeal Book pp. 213a-229a.

a) the holder will be responsible to the owner of the surface rights for any loss or damage that may be caused to the surface of the land by entering upon, locating, using or occupying such surface; and

b) the holder is responsible for ensuring that no work will be conducted with respect to oil sands on restricted or prohibited areas of the province including but not limited to the generality of the following: on and without consent of the person named in the Certificate of Title of Patented Lands; without consent of the Government of Canada on land owned or occupied by them; land within the meaning of and as provided by the acts and regulations governing parks and/or forests; and including land defined by the Grantor as restricted.

[20] With that background, I turn now to summarise the Chambers judge's decision.

III. THE CHAMBERS JUDGE'S DECISION

[21] The Chambers judge concluded that the facts of this case had not triggered the Crown's duty to consult with Buffalo River DN and, therefore, he dismissed Buffalo River DN's application for judicial review of the Crown's decision to post and issue the Scott Permits. The thrust of his reasons was that Buffalo River DN had not proven the activities permitted under the Scott Permits had the possibility to adversely affect any of its members' treaty rights under *Treaty 10*.

[22] More particularly, the Chambers judge held that while the Scott Permits gave Scott Ltd. the right to engage in exploration for minerals on *Treaty 10* lands, that right was subject to Scott Ltd. "obtaining authorization to go onto the land in order to engage in any physical exploration work" (at para. 20). The Chambers judge found this limited right under the Scott Permits was not altered by the *Regulations*, which Buffalo River DN had argued required Scott Ltd. to, *inter alia*, "drill the wells and to physically explore on the land" (at

para. 22). To the contrary, despite the mandatory language of the *Regulations*, the Chambers judge found their effect was limited to (at para. 24):

> …mak[ing] the continued validity of each permit conditional on the activities being carried out. That is, if Scott Land does not carry out the activities…the consequence will be that Scott Land will forfeit the permits.

[23] Moreover, the Chambers judge found Scott Ltd. would become *entitled* to carry out the mandated exploration activity *only if* Scott Ltd. acquired additional Crown permission—this time from the Environment Ministry—to physically enter the Permit Lands (at paras. 25-27). He noted the Crown would make this second-stage decision independently of its initial decision to grant the Scott Permits, which had been made through the Energy Ministry. Additionally, the Chambers judge concluded the Crown would make the second-stage decision "without regard for the existence of an exploratory permit or for any expenditure of resources, including money, that the applicant may have made to obtain an exploratory permit" (at para. 39). However, the Chambers judge allowed that the Crown's duty to consult might be engaged in circumstances where Scott Ltd. had sought the second-stage permission of the Crown to physically enter upon the Permit Lands (at para. 41).

[24] The Chambers judge next considered Buffalo River DN's argument that the Crown decisions to post and grant the Scott Permits fell within the purview of "strategic, higher level decisions"[8] that attract a duty to consult under the reasoning in *Rio Tinto*. In rejecting the argument, the Chambers judge found "the decisions were made at an administrative level, with hardly any information at hand, and the decisions involved no planning" (at para. 31). In his analysis, the Chambers judge found Mr. Mahnic's affidavit evidence

[8] See: *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 44, [2010] 2 SCR 650 [*Rio Tinto*].

compelling, noting Mr. Mahnic did not have any "information about any possible exploration or development from the person or from anyone else" before he posted the Exploration Permits for the Permit Lands and he lacked a reason not to post them (at paras. 32-36). In consequence, the Chambers judge found the posting and sale of Exploration Permits were "straightforward processes" devoid of strategic thinking or planning. In his words, the processes existed simply to (at para. 37):

> …accommodate persons who are considering the possibility of oil sands exploration. Neither process in any way is part of the Crown beginning a strategic or planning process. Both processes simply facilitate persons who wish to gather information in considering what those persons might wish to pursue and request in the future.

[25] Taken together, the Chambers judge's reasons stand for the conclusion that the requirement for second-stage permission from the Environment Ministry and the *administrative* nature of the Energy Ministry's first-stage decision to post and grant the Scott Permits did not engage the duty to consult. He summarised his conclusions in these terms (at para. 44):

> The Minister of Energy and Resources … did not make a decision that could affect the use of the land. The decision that could impact the use of the land would be made by the Minister of Environment, and that Minister considers making such a decision only if an applicant asks for authorization to go onto the land. When such a request is made, the duty of consultation may be engaged.

[26] Thus, the Chambers judge concluded posting Exploration Permits for the Permit Lands and subsequently issuing the Scott Permits did not have the potential to adversely affect the rights of members of Buffalo River DN under *Treaty 10* "because posting and issuance can have no effect on the use of the land unless a later, necessary and independent step is taken" (at para. 46). To the Chambers judge, the duty to consult claimed by Buffalo River DN lacked any causal connection to interference with *Treaty 10* lands or rights. Or, more pointedly, the Chambers judge found Buffalo River DN had failed to

demonstrate a causal relationship between the posting and issuance of the Scott Permits and a potential adverse impact on an asserted Aboriginal right or claim.

IV. JURISDICTION AND STANDARDS OF REVIEW

[27] The Court's jurisdiction to hear this appeal is found in ss. 7 and 10 of *The Court of Appeal Act, 2000,* SS 2000, c. C-42.1.

[28] Chief Justice McLachlin described the standards of review in appeals of this nature in *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*], in these broad terms:

> 60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.
>
> 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. *On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.
>
> …

> 63 *Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness.* Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.
>
> [Emphasis added]

[29] In his work *Native Law*, looseleaf (Rel 6, 2011) vol 1 (Toronto: Carswell, 1994) at 5-56, Jack Woodward comments on the breadth of the foregoing passages from *Haida Nation*:

> Perhaps the best way to reconcile these statements is to say that the courts will generally show some deference towards the Crown's understanding of the *facts* that are relevant to whether and what level of consultation is required, but that the courts *will readily impose their own judgment about what those facts mean for the existence and scope of the duty to consult*.
>
> [Italics in original; underlining added]

See also Thomas Isaac, *Aboriginal Law: Commentary and Analysis* (Saskatoon: Purich Publishing, 2012) at 352, where the author cites *Haida Nation*, noting the standard of review applicable to a determination of whether the duty to consult exists is correctness.

[30] O'Brien J.A., for the court in *Tsuu T'ina Nation v Alberta (Minister of Environment)*, 2010 ABCA 137 at para 28, [2010] 10 WWR 627 [*Tsuu T'ina Nation*], resolved some of the inconsistency with this synopsis:

> [27] *Whether there is a duty to consult and, if appropriate, to accommodate, is essentially a question of legal duty, and consequently governed by a standard of correctness.* However, deference is owed to the fact findings upon which such a duty might be premised. To the extent that the duty is inextricably intertwined with findings of fact, then the standard is reasonableness: *Haida* at para. 61.
>
> [28] *Correctness will also govern the assessment of the seriousness of the claims advanced for aboriginal and treaty rights, as well as the degree of adversity the government action will have on those rights*: *Haida* at para. 63. Once again, deference will be owed to any underlying findings of fact.
>
> [29] The process of consultation and accommodation is examined on a standard of reasonableness. Perfect satisfaction is not required. Rather, the reasonableness of the steps taken by the government as a whole, and in all of the circumstances, must be examined: *Haida* at para. 62. Put another way, if a duty arose, it is a question of

> mixed law and fact whether Alberta's actions satisfied such duty, with the result that the appropriate standard of review is reasonableness. [Emphasis added]

[31] On this basis, I conclude that, given that the parties have proceeded to have this case determined on the basis of largely uncontested facts, the standard applicable to our appellate review of the Chambers judge's conclusion that the Crown's duty to consult had not been triggered in this case is correctness.

V. ISSUE

[32] The appeal raises a single issue, which, in keeping with the standard of review, is:

> Did the Chambers judge correctly find the Crown's duty to consult with Buffalo River DN had not been triggered by the Energy Ministry's decision to post and issue Exploration Permits in respect of *Treaty 10* land?

As I will explain, this issue may be more narrowly framed as an inquiry into whether the Energy Ministry's decision—even though not having an immediate impact—had the *potential* to adversely impact the rights of members of Buffalo River DN under *Treaty 10*.

VI. ANALYSIS

[33] Section 35(1) of the *Constitution Act, 1982*[9] protects both Aboriginal and treaty rights: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 35 engages the *honour of the Crown*, which may obligate the Crown "to consult and,

[9] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11.

where indicated, accommodate Aboriginal interests" (*Haida Nation*, at para. 25).

[34] In general terms, the honour of the Crown does not practically affect whether the duty to consult has been triggered, but it can be useful in contextualising the duty in the larger picture of the relationship between the Crown and Aboriginal peoples. For that reason, it may be useful to make four brief points about the honour of the Crown:

> 1) The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation of the land: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24, [2004] 3 SCR 550 [*Taku River Tlingit FN*]; *Mitchell v Canada (Minister of National Revenue – M.N.R.)*, 2001 SCC 33 at para 9, [2001] 1 SCR 911; *Mikisew Cree* (SCC) at para. 1; *Haida Nation* at paras.16-17.
>
> 2) It obliges the Crown to act honourably, in accordance with its historical and future relationship with Aboriginal peoples: *Taku River Tlingit FN* at para. 24; *Haida Nation* at paras. 19-20.
>
> 3) A breach of the honour of the Crown does not give rise to an independent cause of action: *Brown v Canada (Attorney General)*, 2010 ONSC 3095 at para 85; *Polchies v Canada*, 2007 FC 493; but, it should nevertheless receive a generous and purposive interpretation to promote the reconciliation mandated by s. 35(1): *Taku River Tlingit FN* at para 24; *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2013 FC 900, 438 FTR 210 [*Hupacasath FN* (FC)].
>
> 4) Its purpose is to promote the reconciliation of Crown sovereignty over land with the prior existence of Aboriginal peoples on the land: *Labrador Métis Nation v Canada (Attorney General)*, 2006 FCA 393 at para 22, 277 DLR (4th) 60 [*Labrador Métis Nation* (FCA)]; *Rio Tinto* at para. 50; *Ross River Dena Council v Yukon*, 2012 YKCA 14 at para 37, 358 DLR (4th) 100 [*Ross River*].[10]

[10] See generally, Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014); Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Houghton Boston, 2012); J. Timothy S. McCabe, *The Honour of the Crown and its Fiduciary Duties to Aboriginal Peoples*, (Markham: LexisNexis, 2008); Thomas Isaac, *Aboriginal Law: Commentary and Analysis*, *supra*.

In this respect, the duty to consult arises whenever the assertion of Crown sovereignty comes into conflict with the existence of Aboriginal peoples on the land. The practical dimensions of this conflict arise where Crown conduct on or in respect of the land comes into conflict with the existence or exercise of Aboriginal rights or treaty rights to the land. Where the potential for such conflict exists, the duty to consult is triggered.

[35] The basic test for triggering the duty to consult is well-established. The Supreme Court stated in *Haida Nation* (at para. 35) that the duty is triggered "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it." The Court later broke this down into a three-element test in *Rio Tinto*:

(a) the Crown's "knowledge, actual or constructive, of a potential Aboriginal claim or right" (at para. 31), namely, the Crown's "real or constructive knowledge of a claim to the resource or land to which it attaches" (at para. 40);

(b) "contemplated Crown conduct" (at para. 31), namely, "Crown conduct or a Crown decision that engages a potential Aboriginal right" and that "may adversely impact on the claim or right in question" (at para. 42), which conduct includes "'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights", where a "potential for adverse impact suffices" (at para. 44); and

(c) "the potential that the contemplated conduct may adversely affect an Aboriginal claim or right" (at para. 31), namely, a "*possibility*

> that the Crown conduct may affect the Aboriginal claim or right" where the claimant has established "a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights" (at para. 45).

[36] In Saskatchewan, assessment under the first element is simple: "[i]n the case of a treaty, the Crown, as a party, will always have notice of its contents" (*Mikisew Cree* (SCC); see also: *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, 372 DLR (4th) 385). And, in this case, the Crown has properly acknowledged its obligations under *Treaty 10* (Respondent Factum, at para. 22).

[37] The Crown has also conceded that the second element of the *Rio Tinto* test has been met (Respondent Factum, at para. 22). It acknowledges its first-stage decision to post and issue the Scott Permits is Crown conduct within the meaning of the second element.

[38] The only issue at play in this appeal is whether the Chambers judge erred when he concluded the third element of the *Rio Tinto* triggering test had not been met—that is: did the Chambers judge err when he concluded the first-stage decision to post and issue the Scott Permits did not have the potential to adversely affect an Aboriginal claim or right?

A. Jurisprudence

[39] *Haida Nation*, *Rio Tinto* and the triggering test have been the subject of extensive judicial interpretation. This follows from the Supreme Court's direction to lower courts in *Haida Nation* (at para. 11) to follow the age old tradition of the common law and "fill in the details of the duty to consult and

accommodate". Accordingly, I turn first to examine the case law on the triggering test by jurisdiction to determine how courts have interpreted and applied the third (adverse impact) element of the test, so as to identify some relevant principles.[11]

[40] I would preface this by noting I did not find any case having a factual situation similar to this one where the reviewing court concluded the duty to consult had not been triggered. In two factually-similar cases the reviewing courts *assumed* the duty had been triggered: *Athabasca Chipewyan* and *Dene Tha'* (BC). Nevertheless, I found no case where a court had actually *applied* the *Rio Tinto* test in circumstances similar to those at hand.

1. Supreme Court of Canada

[41] In *Mikisew Cree* (SCC), the Supreme Court described the adverse impact element of the test as having a low threshold:

> [34] In the case of a treaty the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult. *Haida Nation and Taku River set a low threshold. The flexibility lies not in the trigger ("might adversely affect it") but in the variable content of the duty once triggered.* At the low end, "the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice." (*Haida Nation*, at para. 43).
>
> [Emphasis added]

[42] Later in *Mikisew Cree* (SCC), the Court noted the duty to consult is a *procedural* obligation—separate and distinct from any substantive obligations the Crown may owe under treaty (at para. 57). And, while the duty may have developed out of the earlier infringement test for Aboriginal rights, it is distinct from the concept of infringement. In the context at play in *Mikisew Cree* (SCC), Justice Binnie said:

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[11] Professor Newman has said "to come to an understanding of the duty to consult, there is no alternative than to grapple with the case law" (at p. 37).

> [59] … The Court must first consider whether that process [of "taking up" Aboriginal lands] is planned to go ahead, and whether that process is compatible with the honour of the Crown. If not, the First Nation may be entitled to succeed in setting aside the Minister's order on the process ground whether or not the facts of the case would otherwise support a finding of infringement of the hunting, fishing, and trapping rights.

[43] As such, the triggering of the duty to consult does not rest on an infringement of an Aboriginal right. While there will be a duty to consult whenever an Aboriginal right has been or may be infringed, infringement (whether actual or anticipated) is not a requirement because infringement itself is concerned with the substantive obligations owed by the Crown, while the duty to consult is concerned with the procedural obligations owed by the Crown. In this sense, the duty is more about the manner of the Crown's *dealings* with an Aboriginal group than the substantive outcome of those dealings.

[44] In *Rio Tinto*, the Court considered whether the British Columbia Utilities Commission was required to consult with a First Nation when determining whether a contract for sale of excess power from a dam on the First Nation's traditional lands was in the public interest. The Commission found the decision could not have an adverse impact on the First Nation and therefore concluded the duty to consult had not been triggered. The Supreme Court upheld this conclusion saying, with respect to the adverse impact element:

> [47] *Adverse impacts extend to any effect that may prejudice a pending Aboriginal claim or right. Often the adverse effects are physical in nature. However, as discussed in connection with what constitutes Crown conduct, high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on land and resources"*: Woodward at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have *a direct adverse impact* on land and resources. For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that

> the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions.
>
> [Emphasis added]

[45] Importantly, the Court noted that the adverse impact element is limited to adverse impacts flowing from the impugned Crown conduct at issue:

> [52] …[*Haida Nation*] confines the duty to consult to adverse impacts *flowing from the specific Crown proposal at issue*—not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.
>
> [Emphasis added]

2. Federal Court of Canada and Federal Court of Appeal

[46] In *Fond du Lac Denesuline First Nation v Canada (Attorney General)*, 2010 FC 948, 377 FTR 50 [*Fond du Lac Denesuline* FN], the Federal Court considered whether a provincial decision to renew an operating license for a uranium mine triggered the duty to consult. With respect to the adverse impact element of the *Rio Tinto* test, the Court wrote:

> [211] For the duty to consult to arise there must be some evidence presented to establish an adverse impact on Aboriginal rights. Further, *evidence to support the finding of an interference with a specific or tangible interest must be linked to the project or decision under consideration and must constitute more than mere submissions or generalities*. [Emphasis added]

[47] In the context at play in *Fond du Lac Denesuline FN*, the Court found the First Nation had presented no evidence to indicate the mere renewal of a license could have a negative impact on an Aboriginal right or treaty right. While the initial granting of the license might have attracted the duty to consult, its renewal did not trigger the duty unless the renewal would constitute some sort of different negative impact on an Aboriginal or treaty right.

[48] In *Brokenhead Ojibway Nation v Canada (Attorney General)*, 2009 FC 484, 345 FTR 119 [*Brokenhead Ojibway Nation*], the Federal Court assessed whether the Crown had met its duty to consult a First Nation with respect to a pipeline development project. The Court rejected the existence of a general duty to consult arising out of all pipeline projects, stating:

> [34] …*There is no at-large duty to consult that is triggered solely by the development of land for public purposes*. There must be *some unresolved non-negligible impact* arising from such a development to engage the Crown's duty to consult. [Emphasis added]

[49] The Court found that, as it crossed only private lands and existing rights-of-way, the proposed pipeline did not affect any land covered by treaty or subject to a claim for Aboriginal rights. When concluding that only a minimal duty to consult could be triggered (if any at all), the Court said:

> [43] It cannot be seriously disputed that the Pipeline Projects have been built on rights-of-way that are not legally or practically available for the settlement of any outstanding land claims in southern Manitoba. Even the Treaty One First Nations acknowledge that the additional lands they claim were intended to be taken from those lands not already taken up by settlement and immigration. In the result, if the Crown had any duty to consult with the Treaty One First Nations with respect to the impact of the Pipeline Projects on their unresolved land claims, it was at the extreme low end of the spectrum involving a peripheral claim attracting no more than an obligation to give notice: see *Haida Nation*, above, at para. 37. Here the relationship between the land claims and the Pipeline Projects is simply too remote to support anything more: also see *Ahousaht v. Canada*, 2007 FC 567, [2007] F.C.J. No. 827 at para. 32, aff'd 2008 FCA 212, [2008] F.C.J. No 946 at para. 37.

The Court determined the requirements of the duty to consult had been satisfied by the Crown as the content of the duty consisted of, at most, an obligation to give notice.

[50] In *Gitxaala Nation v Canada (Minister of Transport, Infrastructure and Communities)*, 2012 FC 1336, 421 FTR 169, the Federal Court examined the triggering of the duty to consult in the context of the preparation of a federal interdepartmental report on marine safety issues arising out of the potential

construction of a pipeline. A First Nation asked to reopen the process of preparing the report so that it could be consulted and provide input on the subject-matter. The Crown said the application was premature as a joint review panel had been established to provide a mechanism for consultation with all affected Aboriginal groups. In these circumstances, the Court found:

> [40] Gitxaala's argument is based on the recognized principle that meaningful consultation must be timely consultation. The duty to consult may, therefore, arise in advance of preliminary decisions *if a clear momentum to move forward would arise*[.] [Emphasis added]

But, it held that no clear momentum existed on the facts of the case. The Court said the joint review panel process provided ample opportunity for the First Nation to raise its concerns and make arguments with respect to the pipeline project and its potential impact on Aboriginal rights and interests. In short, the Court ruled the application premature and found no duty to consult.

[51] In *Labrador Métis Nation* (FCA), the Federal Court of Appeal turned to consider whether the duty to consult arose when the federal Attorney General decided to stay a private prosecution initiated by a First Nation against a province. The Court found the duty to consult had not been triggered in that circumstance because any causal connection between the impugned Crown conduct (*i.e.*, the decision to stay the prosecution) and a potential impact on an Aboriginal right was remote. In this respect, the Court wrote:

> [22] The function of the duty to consult is to protect aboriginal rights and interests that potentially could be proved and to ensure that the aboriginal community has a say in the matter during the process of reconciliation of interests, however long that may take.

However, the Court found the duty had no application in the context of a decision of the federal Attorney General to order a stay of prosecution as the duty was inconsistent with the mandate of an Attorney General, which required independent exercise of all prosecutorial functions.

[52] *Hupacasath FN* (FC) is an example of a case where the potential adverse impact of impugned Crown conduct was found to be too remote to trigger the duty to consult. There, a First Nation had applied for judicial review of the federal Crown's decision to enter into a bilateral investment treaty with China. The First Nation argued the Crown owed it a duty of consultation and that the Crown had breached that duty. The Federal Court rejected this contention, holding that no duty to consult had been triggered and noting with respect to the third element of the triggering test:

> [56] While a generous and purposive approach to this element is required, *"[m]ere speculative impacts" will not suffice. There must be an appreciable adverse effect on the First Nations' ability to exercise their aboriginal right* (*Rio Tinto*, above, at para. 46). [Emphasis added]

Importantly, the First Nation there argued that the Crown conduct was a higher-level management decision capable of triggering the duty to consult. In rejecting this argument, the Court determined that for such decisions to trigger the duty to consult the decisions must *directly relate* to land or resources in respect of which Aboriginal rights have been asserted (at para. 73). However, the potential impacts of the Crown's decision to enter into a treaty with China were determined to be non-appreciable and entirely speculative. The Court therefore found the duty to consult had not been triggered.

[53] In *Kiwcksutaineuk Ah-Kwa-mish First Nation v Canada (Attorney General)*, 2012 FC 517, 409 FTR 82, a First Nation had applied for judicial review of a federal Crown decision to issue licenses for two aquaculture farms. The licenses had originally been issued under provincial legislation, but a court had ruled the legislation *ultra vires* the province. The federal Crown then "reissued" the licenses under the corresponding federal legislation. While the First Nation had participated in the development of the federal fisheries regime, the federal Crown had not consulted with it on the decision

to reissue the licenses. The question for the Federal Court was whether the duty to consult had been triggered and, in that analysis, the most contentious matter was whether the third element of the *Rio Tinto* test had been met.[12] Based on *Gitxsan v British Columbia (Minister of Forests)*, 2002 BCSC 1701, 10 BCLR (4th) 126 [*Gitxsan*], the Federal Court held that the duty to consult had been triggered on those facts, saying:

> [107] …If the change in control from one company to another may lead to adverse consequences with respect to claimed Aboriginal rights because of differing philosophies, it is more likely to be the case when the transfer of decision-making involves two levels of government, however that may happen. While this may yet be indiscernible, only time will tell whether the regulation of aquaculture will dramatically be impacted as a result of the *Morton* decision. *In recognition of this fundamental shift in the management of the aquaculture industry, I believe the federal government has an obligation to consult the Applicant and all of the other First Nations present in the region.* [Emphasis added]

[54] One of the more recent decisions on the duty to consult out of the Federal Court is *Mikisew Cree First Nation v Governor General in Council*, 2014 FC 1244 [*Mikisew Cree* (FC)], released on December 19, 2014—after the appeal hearing in this matter. The case concerned an application by a First Nation for a declaration that the federal Crown had a duty to consult affected Aboriginal groups prior to passing an omnibus bill amending several environmental statutes and that it had breached that duty. While most of the Federal Court's decision relates to the point in the legislative process at which a court is entitled to intervene, it did find the duty to consult had been triggered. In context, the only issue under the *Rio Tinto* test was the third element, *i.e.*, adverse impact. The Crown had argued any environmental concerns raised by the First Nation in relation to the legislative amendments were speculative in nature and the amendments were, in many respects,

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[12] The Court's reasoning in this respect has been criticised as being inconcistent with the main conclusion in *Rio Tinto* and its application in *Fond du Lac Denesuline FN*, see: Newman at pp. 50-51. In *Rio Tinto* the Court said (at para. 45): "Past wrongs, including previous breaches of the duty to consult, do not suffice."

beneficial to the environment (at para. 92). The Federal Court rejected this argument, stating:

> [93] I agree that no actual harm has been shown but that is not the point. As the Supreme Court of Canada in *Haida Nation* at paragraph 35 has said, the "*potential existence*" of a harm (in that case, the potential right as title to land, here to fishing and trapping) is sufficient to trigger the duty. I find that, on the evidence, a sufficient potential risk to the fishing and trapping rights has been shown so as to trigger the duty to consult.

[55] One risk identified in *Mikisew Cree* (FC) had been an amendment to the *Navigation Protection Act*, RSC 1985, c N-22, that had removed a number of navigable waters from a protection scheme that required the Crown's approval prior to the building or placing of any work on, over, or under the protected waters. The net effect of the amendment was said to reduce the Crown's ability to monitor some waterways over which the First Nation exercised its treaty rights. A second identified risk was an amendment to the *Canadian Environmental Assessment Act, 2012*, SC 2012, c. 19, said to have the effect of reducing the number of projects for which an environmental assessment would be required, which could have affected the First Nation's fishing, hunting, and trapping rights. Given this context, the Court found the duty had been triggered.

[56] However, the Court noted in *Mikisew Cree* (FC) that the content of the duty to consult was minimal—it only required the Crown to give the First Nation notice of the provisions in the omnibus bills and the opportunity to make submissions (at para. 103). Curiously, the Court did not find that the public notice necessarily resulting from the introduction of a bill in Parliament combined with the opportunity for interested parties to make submissions before Parliament in respect of the bill at the committee stage had satisfied the notice requirement of the duty to consult. Rather, the Court found the Crown had not satisfied its duty. Nevertheless, since Parliament had

already passed the amending bills into law, the Court found the only remedy it could grant was a declaration that the Crown had breached its duty to consult. It gave no other relief.

[57] Lastly, in *Hupacasath First Nation v Canada (Attorney General)*, 2015 FCA 4 [*Hupacasath FN* (FCA)] (released January 9, 2015—after the appeal hearing in this matter[13]), the Federal Court of Appeal reviewed the Federal Court decision in *Hupacasath FN* (FC) on appeal. While much of the appeal focused on questions of jurisdiction and whether the matter was justiciable, on the merits of the appeal, the Federal Court of Appeal agreed with the result and much of the reasoning of the Federal Court in *Hupacasath FN* (FC) (at para. 8)—finding that the First Nation had not established a causal relationship between the effects of the impugned Crown conduct upon the First Nation and its asserted rights and interests and that any such effects were "non-appreciable" and "speculative". These findings, it said, were predominantly factual in nature and deserved deference on appeal. Importantly, the Federal Court of Appeal concluded the Supreme Court's decision in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, had not changed the law concerning when the Crown's duty to consult is triggered, rather that case confirms that *Rio Tinto*, *Haida Nation* and *Mikisew Cree* (SCC) still set out the correct law (at para. 80).

[58] Nevertheless, the Federal Court of Appeal observed that in *Rio Tinto* the Supreme Court had set out two aims that the duty to consult is meant to fulfil, which must be kept "front of mind" when assessing whether the triggering test had been met, namely:

> [82] …First is "the need to protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests": *Rio Tinto*, *supra* at paragraph 50. Second is the need to

[13] As these new authorities are not binding on this Court, we saw no need to obtain further submissions from the parties on their significance to the appeal at hand.

> "recognize that actions affecting unproven Aboriginal title or rights or Agreement rights can have irreversible [adverse] effects that are not in keeping with the honour of the Crown": *Rio Tinto, supra* at paragraph 46.
>
> [83] This last-mentioned idea–that the duty is aimed at preventing a present, real possibility of harm caused by dishonourable conduct that cannot be addressed later–is key:
>
> > The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of [Agreement] 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. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. (*Haida, supra* at para. 27.)

[59] In the circumstances, the Court's analysis was concerned chiefly with the third element of the *Rio Tinto* test, which it described in these terms:

> [85] Both before the Federal Court and in this Court, the central issue was whether the third of these requirements–a causal relationship between the Crown conduct and potential adverse impacts on pending Aboriginal claims or rights–was met. The degree of causal relationship and whether it has been met in this case lies at the core of the debate between the parties.
>
> [86] On this, the parties agree that the Federal Court accurately identified the law concerning the degree or quality of causal relationship that must be present in order to trigger a duty to consult. That law is found, once again, in *Rio Tinto, supra* and contains two elements:
>
> - The focus of the analysis must be the effect caused by the Crown conduct on Aboriginal rights or the exercise of rights (at paragraph 46). A general "adverse impact" or an effect caused on matters divorced from rights, such as "a First Nation's future negotiating position," is irrelevant (at paragraphs 46 and 50);
> - While a "generous, purposive approach [must] be taken," the effect on rights must be one of "appreciable adverse effect." While "possible" impacts can qualify, those that are "[m]ere[ly] speculative…will not suffice" (at paragraph 46).

[60] The Court then applied the third element in context, noting:

> [101] Before us, the appellant emphasized that there is a difference between "possibilities" and "speculations" and that while the Supreme Court said the duty to consult does not arise in the case of the latter, it does in the case of the former. The mere possibility of harm is enough.
>
> [102] The appellant is right to draw this distinction to our attention. And in some cases the line between the two might be a fine one. However, the aims behind the recognition of the duty can assist us in drawing the line. To reiterate, they are to protect Aboriginal rights from injury, to protect against irreversible effects and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests: see paragraphs 82-83 above. *An impact that is, at best, indirect, that may or may not happen at all (such that we cannot estimate any sort of probability), and that can be fully addressed later is one that falls on the speculative side of the line, the side that does not trigger the duty to consult.* As the Federal Court found on the facts, this case falls on that side of the line.
>
> …
>
> [105] Bearing in mind the aims the duty to consult is meant to fulfil, I cannot say that imposing a duty to consult in this case would further those aims at all. *There is no apprehended, evidence-based potential or possible impact on Aboriginal rights. The imposition of a duty here is not necessary to preserve the future use of the resources claimed by Aboriginal peoples. Any adverse impact on rights stemming from the Agreement, if any, can be addressed later when they rise beyond the speculative and trigger the duty to consult*. The appellants have failed to show that anything will be evasive of review before any harm is caused, if ever it is caused.
>
> [Emphasis added]

3. British Columbia

[61] In *Dene Tha' First Nation v Canada (Minister of Environment)*, 2013 BCSC 977, [2013] 11 WWR 764 (BCSC) [*Dene Tha' FN* (BCSC)], the Court faced the issue of determining the *content* of the duty to consult in the context of a disposition of mineral tenures for exploration and extraction activities. The Court noted "[t]he existence of a duty to consult is neither contested nor contestable in view of [the First Nation's] status as a signatory to *Treaty 8*" (at para. 4). As a *content* case, *Dene Tha' FN* (BCSC) is distinguishable from the circumstances at hand. I reference it here because the process for issuing mineral tenures in British Columbia shares some similarities with Saskatchewan's Exploration Permit process: proponents there request the posting of parcels for tendering under a competitive bid process whereby the

successful bidder obtains a tenure that only affords rights to subsurface resources and does not authorize surface exploration activities, which require a second-stage approval. As here, the first-stage disposition was called into question in *Dene Tha' FN* (BCSC)—as the second stage of applying for permission to carry out exploration activities had not then occurred. The Court nevertheless proceeded *on the assumption* the duty to consult with respect to the tenure disposition had been triggered—the Crown there having conceded the triggering of the duty to consult, the only issue was the scope and content of that duty. The Court held that, in that context, the consultation process had been adequate.

[62] In *Da'naxda'xw/Awaetlala First Nation v British Columbia (Attorney General)*, 2011 BCSC 620, [2011] 3 CNLR 188, a First Nation argued the duty to consult arose when the provincial Crown contemplated a request to amend the conservation boundary of a particular area. The issue was whether the Crown's contemplated conduct might adversely affect the First Nation's claim to Aboriginal title. The Crown had argued there was no adverse impact—as any impact would be speculative and hypothetical because there were so many uncertainties as to whether the project would ever proceed. The Court rejected this argument, stating as follows with respect to the third element of the triggering test:

> [142] I find that the Minister's decision not to recommend the boundary amendment may adversely affect the Da'naxda'xw's claim of aboriginal title. *It limits the future uses of the land in the Upper Klinaklini Conservancy and because it was made under the government's policy, it may impact the Da'naxda'xw's right to participate in strategic decisions in respect of future uses.*
>
> [Emphasis added]

As such, the Court found the duty to consult had been triggered and breached.

[63] In *Louis v British Columbia (Minister of Energy, Mines and Petroleum Resources)*, 2013 BCCA 412, 368 DLR (4th) 44 [*Louis*], the British Columbia Court of Appeal considered the scope of the duty to consult with respect to the expansion of an existing mine. A First Nation had challenged the Crown's decision to issue a permit where the Crown had notified the First Nation one day *after* it had issued the permit. The Crown had consulted with the First Nation regarding other impacts of the expansion project. The First Nation there advanced an argument similar to that advanced by Buffalo River DN in this case: that the Crown's granting of permits earlier in the process would effectively fetter the Crown's discretion when it came to granting permits later in the process—such that any later consultation would ultimately be ineffective. In rejecting this argument in *Louis*, the Court said:

> [98] I note, as well, that Thompson Creek Metals, while expending efforts and money on the initial applications, appreciated that it was taking risks. When molybdenum prices fell shortly after it obtained approval for mill construction, Thompson Creek Metals suspended the project. *It must have known that other contingencies—such as failing to obtain regulatory authority—could similarly have derailed its plans.*
>
> [99] The Stellat'en suggest that the scale of the expansion project should lead a court to conclude that there was some sort of assurance up front that regulatory authority would be granted. *I do not agree. Thompson Creek Metals may well have believed that regulatory approval was highly probable. Such a belief might well have been reasonable, given that the project, while of a large scale, did not result in substantial new adverse impacts on the land. Thompson Creek may have operated on the assumption that it would be able to satisfy regulatory authorities as to the appropriateness of the project, or alternatively, make changes to the project to accommodate regulatory requirements and First Nation interests.*
>
> [100] I agree, therefore, with the chambers judge's assessment that the regulatory considerations of different aspects of the project were genuine, and that "approval of one aspect of the project at one stage [did] not inexorably lead to approval of other aspects at the later stages." [Emphasis added]

[64] Moreover, with respect to when consultation should occur in the context of a long-term project, the Court in *Louis* opined:

> [106] As I read these cases, they require the Crown to engage in consultations from the earliest phases of a project. *The Crown cannot defer consultation such that*

> *a project becomes a fait accompli without ever having been subject to comprehensive consultation and consideration. On the other hand these cases do not suggest that where the government plays no role in strategic planning or decision-making, it is nonetheless required to restructure its own statutory duties in such a way as to transform it into high-level decision-making*.
>
> [Emphasis added]

[65] Nonetheless, the Court found there had been no strategic or higher-level planning in that case—as any planning for the project had been done by the private operator, not the Crown. Given this context, the Court commented:

> [107] The difficulty for the appellant's argument in this case is that there were no high-level or strategic decisions made by the Crown without consultation. *Thompson Creek Metals certainly made high-level strategic decisions. The mine expansion project, however, was not a Crown initiative, nor did it guide the process.*
>
> [108] Thompson Creek Metals provided the Crown with an overview of the project, and both the Crown and Thompson Creek provided that overview to the Stellat'en. Thompson Creek then proceeded to apply for various permits required for the project, as it was required to do by legislation. Crown agents considered each application as it was presented. [Emphasis added]

To the Court, the fact the Crown had engaged in consultation from the issuance of the first permit on the project only strengthened its conclusion that the duty to consult had been adequately fulfilled.

[66] In *Squamish Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, 34 BCLR (4th) 280 [*Squamish IB*], the issue before the British Columbia Supreme Court was whether the Crown had breached its duty to consult a First Nation with respect to the proposed development of a resort on land over which the First Nation had claimed Aboriginal title. The legislation governing the development required the Crown and the developer to enter into a number of interim agreements, all of which were legally binding and all of which increased the likelihood of the project being approved as a whole. The Crown and the first developer reached an interim agreement that made no provision for consultation with the First

Nation. The environmental assessment office notified the First Nation that the parties had reached an interim agreement and asked the First Nation for comment, inviting it to participate in the environmental review process. The first developer then lost financing and the agreement was assigned to a second developer, who presented a significantly expanded plan for the resort. Neither the Crown nor the developer gave the First Nation notice of the new plan. With respect to the duty to consult in this context, the Court in *Squamish IB* said:

> [74] *The duty of consultation, if it is to be meaningful, cannot be postponed to the last and final point in a series of decisions. Once important preliminary decisions have been made and relied upon by the proponent and others, there is clear momentum to allow a project*. This case illustrates the importance of early consultations being an essential part of meaningful consultation.
>
> [Emphasis added]

The Court then set out a series of relevant questions to consider in determining whether a duty to consult has arisen in a particular context and concluded the Crown had a duty to consult the First Nation and that it had breached that duty:

> [83] Thus, in my view, the duty to consult in this case arises at the earliest decision making by the government in an approval process leading to the possible infringement of claimed aboriginal rights. Further, the accommodation which may be required in order to justify any infringement may include requiring the consent of the Squamish Nation to some part of the proposed infringement. Therefore, the consultation process must be full, timely and well documented.

As such, the Court remitted the decision to the Crown for reconsideration following good faith consultation with the First Nation.

[67] In *Hupacasath First Nation v British Columbia (Minister of Forests)*, [2006] 1 CNLR 22 [*Hupacasath FN* (BCSC)], the issue before the Court was whether decisions relating to privately-owned land affected by a First Nation's claim to Aboriginal title could trigger a duty to consult. The First Nation there had sought judicial review of a Crown decision to consent to the removal of privately-owned land from a particular tree farm license [TFL],

which gave rise to a change to the allowable annual cut. The Court held that Crown ownership of land was not a precondition to the triggering of the duty to consult:

> [191] The Crown is sovereign over all lands, including those held in fee simple. Certain decisions by the Crown, such as this decision to remove the lands from the TFL, may significantly affect land to which Aboriginal peoples lay claim, even though the Crown is not the title-holder to the land. …*Crown ownership of the land is not a necessary condition for the existence of that power to make decisions*.
>
> [Emphasis added]

The Court observed the Crown decision had affected the First Nation's ability to exercise Aboriginal rights that it might have on the privately-owned land by reason that it reduced Crown regulation and oversight over that land and made the First Nation's access to the land less secure. This was enough to trigger the duty to consult.

[68] *Gitxsan* is a pre-*Haida Nation* decision dealing with the duty to consult where a First Nation had asked the British Columbia Supreme Court to recognize the duty to consult with respect to a Crown decision to approve a change in control of a corporation that held several TFLs in areas that were the subject of claimed Aboriginal rights or title. Under the terms of the British Columbia *Forest Act*, RSBC 1996, c 157, the Crown's consent was required for the disposition of a TFL, the amalgamation of a license-holder, and for a change in control of a license-holder. The Court found the duty to consult had been triggered in these circumstances, saying:

> [82] I do not accept the submission that the decision of the Minister to give his consent to Skeena's change in control had no impact on the Petitioners. While it is true that the change in control was neutral in the sense that it did not affect the theoretical tenure of the tree farm and forest licences or any of the conditions attached to them, the change in control was not neutral from a practical point of view. *First, it changed the identity of the controlling mind of Skeena, and the philosophy of the persons making the decisions associated with the licences may have changed correspondingly.* Second, Skeena was on the brink of bankruptcy and it may have gone into bankruptcy if the Minister had not given his consent by April 30. If Skeena had gone into bankruptcy, it would no longer have been able to

> utilize the licences. It is possible that the trustee in bankruptcy or Skeena's secured creditors would have been able to sell the licences but any sale would have required the Minister's consent and there can be no doubt that he would have been required to consult the Petitioners before giving his consent to any sale of the licences. There was also a possibility that the tree farm licence would not be sold, in which case the Petitioners would have had the opportunity of pursuing their own ventures for logging some or all of the lands covered by the licence.
>
> [Emphasis added]

[69] In *R v Douglas*, 2007 BCCA 265 at para 44, 278 DLR (4th) 653, the Court held that the duty to consult had not been triggered where a change in government policy had had "*no appreciable adverse effect* on the First Nations' ability to exercise their aboriginal right". The question before the Court was whether the development of rules in respect of a sport fishery called for further consultation after an initial round of consultation with interested Aboriginal groups on the overall fisheries strategy. In concluding no duty had arisen, the Court found the initial consultation had been adequate.

[70] *Adams Lake Indian Band v British Columbia (Lieutenant Governor in Council)*, 2012 BCCA 333, 326 BCAC 154, is a case where a First Nation claimed a duty to consult had arisen where the Crown had contemplated the incorporation of a municipality to facilitate resort development within the First Nation's traditional territory. The Court found no inherent connection between the proposed incorporation and any effect on Aboriginal rights.

4. Yukon

[71] In *Ross River*, the Yukon Court of Appeal considered whether a duty to consult had been triggered under a regime for mineral rights dispositions similar to that at issue in this appeal. Under the Yukon legislation, a person might acquire mineral rights by staking a claim and recording it with a Crown agency. Once recorded, the claimant would be entitled to the minerals within the claim and to conduct certain exploration activities on the surface of the

land without further notice or approval. Recorded claims were valid for an initial one-year period, but could be renewed upon proof of $100 worth of work on the claim. Under the applicable regulations, exploration activities could take place *without notice or consultation*, which activities included: clearing land; constructing lines, corridors and temporary trails; using explosives; removing subsurface rock; and other activities. The Court in *Ross River* found the duty to consult had been triggered and that the regulatory scheme did not adequately satisfy the content of the duty, saying:

> [6] For reasons that follow, I agree with the chambers judge's finding that the statutory and regulatory regime currently in place for the recording of mineral claims within the traditional territory of the Ross River Dena does not measure up to the consultation requirements in *Haida*. The Ross River Dena have strong claims to Aboriginal rights and title in at least some parts of their traditional territory. The current regime may allow mineral claims to be granted without regard to asserted Aboriginal title. They also allow exploratory work that may adversely affect claimed Aboriginal rights to be carried out without consultation.

[72] When finding that the duty to consult had arisen, the Court said, in respect of the third element of the triggering test:

> [36] I do not, in any event, accept the Crown's argument that the absence of statutory discretion in relation to the recording of claims under the *Quartz Mining Act* absolves the Crown of its duty to consult.
>
> [37] *The duty to consult exists to ensure that the Crown does not manage its resources in a manner that ignores Aboriginal claims. It is a mechanism by which the claims of First Nations can be reconciled with the Crown's right to manage resources. Statutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims are defective and cannot be allowed to subsist.*
>
> [38] The honour of the Crown demands that it take into account Aboriginal claims before divesting itself of control over land. Far from being an answer to the plaintiff's claim in this case, the failure of the Crown to provide any discretion in the recording of mineral claims under the *Quartz Mining Act* regime can be said to be the source of the problem. [Emphasis added]

In *Ross River*, the Court had no doubt the adverse impact element of the *Rio Tinto* test had been met because the First Nation's claim to Aboriginal title over the affected land included a claim to mineral rights.

5. Alberta

[73] In *R v Lefthand*, 2007 ABCA 206, [2007] 10 WWR 1, the accused had been convicted of several regulatory offences for fishing in restricted areas and using prohibited fishing methods. He argued the Crown had a duty to consult with Aboriginal people prior to enacting fishing regulations and that it had breached its duty to do so. The Court, in rejecting this argument, said:

> [36] …There was no evidence presented in these appeals (as there was in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69 at para. 44) of the impact the fishing ban would have on the defendants' rights. *Some meaningful impact is required, and the degree of impact will certainly dictate the degree of consultation that is required*: *Mikisew Cree* at paras. 34, 55, 62-3. Based on the admission that the fishing ban "limited" the aboriginal right, even if it was not a *prima facie* infringement (see *infra*, paras. 121-122), one can assume there was some duty to consult here. But the companion admission that aboriginal fishing was rare means that the duty to consult was at the low end of the scale. The question is then whether that duty was fulfilled, and if not whether the resulting decisions can be collaterally attacked.
>
> [Emphasis added]

The Court concluded the duty to consult argument was an impermissible collateral attack on the validity of the regulations and thus rejected it.

[74] In *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2011 ABCA 29, 505 AR 72 [*Athabasca Chipewyan FN*], a First Nation sought judicial review of a Crown decision to grant five oil and gas leases without consultation. The regulatory system in Alberta was almost identical to the Saskatchewan system: the Crown would post parcels for competitive bid where the successful bidder would receive a term lease of subsurface rights but actual mineral development required next-stage Crown approvals, including surface access approvals, and (potentially) hearings regarding conservation and environmental issues. The evidence was that the Crown would consult with potentially-affected First Nations at the approvals stages. The evidence also indicated very few oil and gas leases had actually

proceeded to development. The main issue in *Athabasca Chipewyan FN* was a limitation period, not whether a duty to consult had been triggered. The Court ultimately held that the First Nation's claim was barred; but, with respect to the duty to consult, the Court of Appeal recognized the lower court judge had *assumed* that a duty to consult with an extremely minimal content (notice only) had been triggered. The Appeal Court engaged in no independent analysis of its own; it merely adopted the assumption of the lower court.

[75] In *Tsuu T'ina Nation*, the Alberta Court of Appeal considered the triggering and scope of the duty to consult with respect to the development of a water management plan by Alberta. The lower court judge had found no adverse impact on Aboriginal rights or treaty rights because the proposed plan did not adversely affect any claimed water rights; nevertheless, he found the duty to consult had been triggered—although he placed the content of that duty at the very low-end of the spectrum. Before the Appeal Court, the Crown had argued that no duty to consult had arisen because the First Nation had not established the potential for an adverse impact. The Appeal Court rejected this suggestion, stating "[t]he threshold for this prerequisite to consultation is very low" (at para. 67), and:

> [69] The operative word is "might". It seems obvious that a Plan intended to manage water resources, including the protection of the aquatic environment, has the potential for adversely affecting the express treaty rights of the appellant First Nations, as well as water rights claimed by them within the subject area. …*The fact that the Plan ultimately might not have had adverse impacts, as found by the Chambers judge, does not eliminate the need to consult in the development of the plan*. [Emphasis added]

The Appeal Court confirmed that the duty to consult had arisen, but that its content was at the very low end of the spectrum. It agreed the Crown had satisfied the duty because some consultation had occurred between it and the First Nation.

6. Newfoundland

[76] In *Labrador Métis Nation v Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75, 288 DLR (4th) 641 [*Labrador Métis Nation* (NLCA)], the Court considered whether the Crown had a duty to consult with a First Nation regarding the impact of wetland and watercourse crossings of a highway project. While primarily a case on the issue of standing, the Court did comment on the triggering test, noting: "[i]n assessing whether a duty to consult exists and the extent of any such duty, the Crown is not permitted to narrowly interpret the facts" (at para. 27). Rather, it held, the honour of the Crown requires a liberal and flexible interpretation of the facts and any duty to consult that may arise. The Court also noted that the duty to consult "is triggered at a low threshold" (at para. 29).

[77] I turn now to review the Chambers judge's decision.

B. Review of the Chambers Judge's Application of the Triggering Test

[78] While the Crown has conceded that the first two elements of the triggering test are met, it is important to delineate precisely what those elements entail in this appeal. This is because it is difficult to assess the potential for an adverse impact without knowing what is potentially being impacted upon and what the Crown conduct is that gives rise to that potential impact. And so, I will briefly explain how the first two elements of the *Rio Tinto* triggering test are met to set the context for the review, which follows, of the Chambers judge's application of the third element on the facts of this case.

1. An Aboriginal Right or Claim

[79] The rights arising in this case are treaty rights. Buffalo River DN is a party to *Treaty 10*, which covers the Permit Lands over which the Scott

Permits were issued. Briefly, under the terms of *Treaty 10*, members of Buffalo River DN are entitled to continue their traditional use of the land that is covered by the treaty, which includes hunting, trapping, and fishing on that land. The lands also include some sacred sites and traditional campgrounds. I have set out the particulars and practical details of these treaty rights and their exercise over *Treaty 10* lands, as deposed to by Chief Byhette, earlier in these reasons.

2. Impugned Crown Conduct

[80] The impugned Crown conduct here is twofold: first, the Crown's decision to solicit bids on Exploration Permits for the Permit Lands, and, second, the Crown decision to issue the Scott Permits. Buffalo River DN's arguments only addressed the second decision (*i.e.*, to issue the Exploration Permits), but both are relevant to the question of whether the duty to consult has arisen. As such, for the purposes of these reasons, I have treated the two as being one decision, which I often refer to as the first-stage decision because it is the first decision to be made by the Crown in a known regulatory process.

[81] I have set out the facts of this matter more completely earlier in these reasons, but, as to the first element of the first-stage decision, Mr. Mahnic has averred that "[o]il and gas dispositions that are posted in each sale are dispositions that have been requested for posting by interested parties, who are usually oil and gas companies".[14] He has stated that, even though the Energy Ministry might receive such a request, the Ministry does not automatically post the identified land for disposition; rather, legal concerns, ownership issues and environmental or geological considerations may lead

[14] Para 11, Affidavit of Mr. Mahnic.

the Energy Ministry to determine that, although requested, Exploration Permits will not be posted for sale.[15]

[82] Once the first element of the first-stage decision has occurred (*i.e.*, the Crown has decided to post lands for disposition), the Energy Ministry receives sealed bids from interested bidders. Obviously, the Energy Ministry will not issue an Exploration Permit if it does not receive any bids; but, just the same, the fact a bid is received does not mean the Energy Ministry will automatically issue an Exploration Permit to the bidder.[16] The Energy Ministry has an unqualified right to reject any and all bids.[17] If a bid is received and it is of a value the Energy Ministry deems satisfactory and it has no other concerns, the Energy Ministry will issue an Exploration Permit to the successful bidder.[18] Buffalo River DN challenges this second element of the first-stage decision in this appeal.

3. The Adverse Impact

[83] I find the Chambers judge correctly concluded there was "no obvious and immediate physical impact" arising from the impugned Crown conduct in this case. While a factual conclusion, it is largely underpinned by an interpretation of the regulatory scheme and Crown policy. And, in my assessment, the legislation, the *Regulations*, the *Consultation Policies*, and the affidavit evidence of both parties make it clear that, on its own, the Crown's first-stage decision to issue the Scott Permits *does not directly or indirectly impact the Permit Land or treaty rights under Treaty 10* and,

[15] Para 17, Affidavit of Mr. Mahnic.
[16] Paras 28-32, Affidavit of Mr. Mahnic.
[17] Para 28, Affidavit of Mr. Mahnic.
[18] Para 35, Affidavit of Mr. Mahnic.

therefore, the duty to consult did not arise on the evidence before the Court. I say this for several reasons.

[84] The first reason relates to Buffalo River DN's understandable concern about the adverse impacts of oil sands exploration and development on *Treaty 10* land.[19] I accept that Buffalo River DN is concerned such development will hamper its members' exercise of their treaty rights to hunt, trap, and fish on *Treaty 10* land and will adversely impact the numerous sacred sites located in that area or its members use of such sites.[20] But, there is no suggestion in the evidence that Buffalo River DN is concerned with any potential impact resulting from the mere *sale* of mineral rights; rather, it is clearly and solely occupied with the potential adverse impacts that might result from a Permit-Holder attempting *to access or exploit* the minerals underlying *Treaty 10* lands via the surface of that land. In this regard, Buffalo River DN is concerned the very *issuance* of the Scott Permits *could* lead to resource exploration and development and so it desires to consult with the Crown on the question of whether the Scott Permits ought to be issued.

[85] In this respect, Professor Dwight Newman cautions that a permit-by-permit approach to the duty to consult in the context of Saskatchewan's mineral rights scheme might "result in 'death by a thousand cuts'" in that Aboriginal groups might not realise the significance of each permit thereby precluding a fair opportunity to respond to the effect of the overall project.[21] As a general caution, it is well-taken. Any piecemeal approach to consultation could result in a process that omits to consider the broader effects of Crown conduct.

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[19] Para 8, Affidavit of Chief Byhette.
[20] Affidavits of Chief Byhette, generally.
[21] Professor Newman at p. 54.

[86] However, as Professor Newman also observes, a permit-by-permit approach to consultation may be impractical and unworkable for all concerned. The Professor concludes his observations in these terms (at p. 55):

> In some circumstances, it may be appropriate for the government to consult on a general strategy such that the duty to consult would not then be engaged by every decision along the way. However, these matters must be decided in the manner most appropriate to the issues at stake. As part of its approach to consultation in particular circumstances, the government ought to consider in good faith whether a particular decision is inherently connected to a larger strategy or project in a manner other than exploring the possibility of that strategy or project. If so, it may be appropriate to consider consultation about the larger undertaking from the outset, or at least from whenever it crystallizes.

[87] Indeed, on the evidence before the Court, neither the Crown nor Buffalo River DN can be certain of the consequences of the Crown having issued the Scott Permits or where that might ultimately lead. But, what is certain on the evidence is that there is a well-defined and linear regulatory process in place that expressly contemplates consultation at the second- and later-stages, which should eliminate the risk identified by Professor Newman.

[88] In my assessment, it would be incorrect to find the Crown's duty to consult had been triggered any time it issued an Exploration Permit because that action has no meaningful impact on treaty rights. This is straightforward. Under s. 19 of *The Crown Minerals Act*, the issuance of an Exploration Permit (*i.e.*, a Crown disposition) does not authorize anyone to enter upon the surface of Disposition Lands. An Exploration Permit merely and only grants subsurface rights, not surface rights. Buffalo River DN has treaty rights exercisable on the surface of the Permit Lands, but does not advance here a treaty right or Aboriginal claim to subsurface rights or rights exercisable in relation to the subsurface of *Treaty 10* lands. In simple terms, there is no intersection of the two sets of rights or, on a Venn diagram basis, there is no overlap between Scott Ltd.'s rights under the Scott Permits and Buffalo River

DN's rights under *Treaty 10*. In this narrowest of senses, the Crown's grant of rights under the Scott Permits cannot give rise to an adverse impact on treaty rights under *Treaty 10* because the two do not bear upon the same subject-matter. Put in terms of the honour of the Crown, this means there is no conflict between the Crown's assertion of sovereignty over the land by issuing the Scott Permits and the existence of Aboriginal peoples on the land.

[89] In practical terms, the Scott Permits do not grant Scott Ltd. any greater entitlement than an inchoate interest in the minerals lying beneath the surface of the Permit Lands. The Scott Permits do not grant Scott Ltd. a right of access to the lands for purposes of exploration and development.[22] To Scott Ltd., the value of the Scott Permits presumably lies in the provision of a security of tenure, which is "integral to the raising of investment capital and the spending of money as part of planning for and, subject to obtaining appropriate government approvals, undertaking an exploration or development program"[23]—suggesting an appreciable plan for exploration and development could arise in the future. The only link between the first-stage decision to issue an Exploration Permit and a possible future, second-stage decision to grant someone surface access to Disposition Lands is that the first-stage decision (likely) identifies the party that might later apply for such surface access rights. But, even at that, the first-stage decision does not *in any way* impact the lands themselves. Such an impact is *only* lawfully possible if and once the Crown has granted a Permit-Holder access to the surface under the second-stage decision-making process. And, there is no suggestion that that is even contemplated—let alone occurring—at this juncture.

[22] See also: paras. 4-5, Affidavit of Mr. MacKnight, Appeal Book at 286a.
[23] Para. 9, Affidavit of Mr. MacKnight, Appeal Book at 289a.

[90] A potential adverse impact—one that is more than speculative—will be proven when the claimant has established that the impugned Crown conduct will have some *appreciable* and *current* potential to adversely impact the substance of a claimed right. In this case, the Crown conduct of posting and issuing Exploration Permits will not have an *appreciable* or *current* impact on treaty rights under *Treaty 10*.

[91] That leads to the second reason. The duty to consult is triggered at a low threshold, but it must remain a meaningful threshold—the applicant has to establish some sort of appreciable or discernible impact flowing from the impugned Crown conduct before a duty to consult in relation to that impact will arise. This is both logical and practical because there has to be *something* for the Crown and the Aboriginal group to consult about—the duty to consult is, at core, a practical doctrine. Put another way, it makes little sense for the duty to consult to arise where, as the Chambers judge concluded here, there is nothing to consult about, *i.e.*, nothing to reconcile.

[92] What I mean by this is that, here, Buffalo River DN has not established that a foreseeable impact on *Treaty 10* lands (and, consequently, on its members' hunting, trapping, and fishing rights) could possibly arise *without* the occurrence of a subsequent or second-stage approval from the Crown. However, once any form of surface access is *contemplated*, then *actual* impact on *Treaty 10* land becomes *possible*. It is at this point in the process that the Permit-Holder is required to provide a plan for its proposed exploration or development of minerals lying under the surface of *Treaty 10* lands. It is at this point that the Crown and Buffalo River DN would have something meaningful, in the sense of quantifiable, to consult about, to reconcile. And, indeed, the Crown seems to acknowledge that it would have a duty to consult

with Buffalo River DN *if* this matter were to reach this point in the regulatory process.

[93] The Crown does not suggest oil sands exploration (let alone oil sands development) will proceed without good faith consultation with every affected Aboriginal group—it simply says Buffalo River DN's application to force it do so is premature. I agree; it is premature because, at this first stage in the regulatory process, there is simply no evidence that could have been tendered to show a causal relationship between the decision to issue the Scott Permits and the speculative future adverse impact of oil sands exploration and development on Buffalo River DN's rights under *Treaty 10*.

[94] I do not accept that the Court can simply assume the Crown will unfairly prioritize mineral resource exploration and development over protection of treaty rights. Nevertheless, if the Crown did so in breach its obligations under *Treaty 10*, then Buffalo River DN would have full opportunity to hold the Crown to account before the courts by seeking a remedy for the Crown's failure.

[95] In fact, the Court is in no better place to infer that—when the time comes—the Crown will prioritize the protection of treaty rights over the exploration and development of mineral resources. Government priorities shift from time to time and the commercial viability of resource development fluctuates over time. On the evidence before the Court, only minimal resource exploration—and no oil sands development of any kind—has ever taken place on the *Treaty 10* land used by Buffalo River DN.[24] This serves to further illustrate this third point that, at this first stage, the parties can only *guess* as to what might happen with resource exploration and development into the future

[24] Paras. 16-23, Affidavit of Chief Byette.

and as to what next-stage decisions or approvals might arise, or when they will arise, or whether they will ever arise—because there is no evidentiary basis upon which to do more than guess. In that Buffalo River DN's has argued to the contrary, it has had to resort to "layers of speculations or assumptions, conjectures and guesswork, not evidence" (*Hupacasath FN* (FCA), para. 112).

[96] In this same vein, while the impugned Crown conduct is the first step in the Crown's regulatory process for controlling oil sands exploration and development in northern Saskatchewan, it is not the first decision from which an adverse impact could flow. This is because, while the existence of the Scott Permits suggests that oil sands minerals might eventually be extracted from the Permit Lands, that is no more than speculation at this point. Unlike in *Ross River*, the granting of the Scott Permits does not automatically give Scott Ltd. a right to enter upon the Permit Lands or to do anything that requires entrance upon the Permit Lands. The *Regulations* do not, on any reasonable reading of them, suggest the Crown might be forced to accede to the plans of Scott Ltd. or any Permit-Holder simply because the Permit-Holder has met the requirements for retaining its Exploration Permits.[25] The *Regulations* do no more than set conditions for the retention of Exploration Permits. On this, I agree with the Chambers judge.

[97] Unlike in *Kiwcksutaineuk Ah-Kwa-mish FN*, the impugned Crown conduct does not bring about a fundamental shift in the management of, or in the philosophy of management of, the mineral resources. Under the *Regulations*, Exploration Permits do not, unlike the TFLs in *Haida Nation*, result in the Crown ceding its control over a resource or over *Treaty 10* lands. Unlike in *Gitxsan*, the impugned Crown conduct does not change the identity

[25] See also para 5, Affidavit of Mr. MacKnight.

of the decision-maker—that responsibility still lies with the Crown who retains regulatory control over all aspects of the exploration and development process. Unlike in *Ross River*, the *Regulations* do not compromise the Crown's ability to consult with Aboriginal groups in accordance with the honour of the Crown. Unlike in *Rio Tinto* and *Louis*, the first-stage decision does not set the stage for future decisions favourable to Scott Ltd. or favourable to exploration or development—those decisions, if they arise, will be made by the Crown, albeit by a different decision-maker within the Crown.

[98] Rather, on the facts before the Court, if this matter did so proceed, Scott Ltd. would have to assume any risk that any project it might possibly propose might not ultimately go ahead. Moreover, given the content of the duty to consult and to accommodate, and the accommodation framework outlined under the *Consultation Policies*, should Scott Ltd. (or a subsequent Permit-Holder) actually wish to physically explore for and later develop oil sands minerals lying under the Permit Lands, the law and prudence dictate that the proponent would have to present a plan that adequately accounted for and accommodated the rights and claims of Buffalo River DN and other Aboriginal groups, environmental groups, and other relevant persons or groups so as to maximize the possibility of receiving project approval from the Crown—all of which is, of course, highly speculative at this point. Nonetheless, on the basis of the legislation and evidence before this Court, it cannot be said that a Permit-Holder is *entitled to*, or could even reasonably rely on receiving, a favourable second- or later-stage approval decision from the Crown. While Permit-Holders have the right to be treated fairly in the Crown's decision-making process, nothing before the Court suggests they have the right to receive a favourable decision in result of that process.

[99] To the contrary, it would be a great waste of time, effort and public resources to require the Crown to sit down with Buffalo River DN to consult about something that is, at this time, so terribly contingent and unquantifiable. The most that the Crown could do at this first-stage is simply give an interested Aboriginal group notice of the posting and sale of Exploration Permits and the Disposition Lands they cover. This would give such groups adequate time *to prepare for* meaningful consultation with the Crown down the road and would significantly expedite the consultation process once the duty to consult has actually been triggered. What I mean by this is that first-stage notice would afford an Aboriginal group adequate time to get its interests and broad consultation strategy in order. And, that is precisely what the Crown did in this case. To be clear, though, I do not mean that the Crown was somehow *obliged* to give such notice.

[100] Further, while no second- or later-stage decision or approval is forthcoming on the record before us, I am nonetheless satisfied on the evidence that we do have that, if any actual non-speculative potential impact on Buffalo River DN's treaty rights should arise in the future, Buffalo River DN will have ample opportunity to address that in consultation with the Crown before any non-remedial harm could occur.

[101] Lastly, although I find the Chambers judge in error in his interpretation of the meaning of "strategic, higher level decisions", I find no reason to disturb his conclusion that the impugned Crown conduct in this case is not a strategic or higher level decision such that it attracts the duty to consult. In this respect, I largely agree with Buffalo River DN's submission to the effect that the Chambers judge misinterpreted the meaning of "higher level" decision when he focused on the *identity or administrative level* of the Crown

agent who made the decision. But, his reasons clearly disclose that he also fully considered the *nature of the decision* itself and its potential for having an adverse impact on treaty rights; moreover, his conclusion on this point was correct. I say this chiefly because, on the evidence before the Chambers judge, it is not uncommon for bidders on posted Exploration Permits to not have any kind of plan in place to extract a mineral from Disposition Lands.[26] Whereas, in *Dene Tha' FN* (FC), for instance, the strategic, higher level decision was a consultation *blueprint* for a pipeline. The case law on this point is all distinguishable on the facts at play here, which involve the simple posting and issuing of Exploration Permits, subject to a myriad of statutory and other restrictions, on the basis of a terse, two-page facsimile transmission. There is no doubt that the Permit-Holder must clear a number of regulatory hurdles before *any kind* of mineral resource exploration or extraction can occur. For this reason it is not, on the evidence, possible to characterize the posting and issuing of the Scott Permits as being part of some kind of appreciable, non-speculative *strategy* on the part of the Crown or Scott Ltd. having a potential to adversely impact Buffalo River DN's rights under *Treaty 10*. Nor, as previously noted, is this a case where consultation will be deferred until "the last and final point in a series of decisions", as was the case in *Sambaa K'e Dene Band*. Nor, as contemplated in *Louis*, is this a case where the Crown will defer consultation until a project has become a "*fait accompli* without ever having been subject to comprehensive consultation and consideration."

[102] Put simply, there is just no *project* at stake—at least not one discernible on the evidence—that is anything more than speculative or that might have anything more than a speculative impact on Buffalo River DN's treaty rights at this juncture. Self-evidently, a non-existent project is not and cannot

[26] Paras. 14 and 36, Affidavit of Mr. Mahnic, Appeal Book at 197a.

become a *fait accompli*. And, again, if a such a project were proposed, as the Chambers judge correctly noted (at para. 41), then the duty to consult would be triggered, a legal consequence which is expressly stated on the cover page to Public Sale Notice 350[27] and which is not contested by the Crown.

[103] In the result, under this last reason for upholding the decision below, I would find no error in the Chambers judge's conclusion that the impugned Crown conduct was not of the order of a strategic, higher level decision.

VII. CONCLUSION

[104] The jurisprudence is clear: there is a meaningful threshold for triggering the duty to consult. To trigger it, actual foreseeable adverse impacts on an identified treaty or Aboriginal right or claim must flow from the impugned Crown conduct. While the test admits *possible* adverse impacts, there must be a direct link between the adverse impacts and the impugned Crown conduct. If adverse impacts are not possible until after a later-in-time, independent decision, then it is that later decision that triggers the duty to consult.

[105] Here, the Scott Permits deal with subsurface rights. Buffalo River DN makes no claim to rights to subsurface minerals. Buffalo River DN's sole concern is with respect to the impact of subsurface resource exploration and development on its hunting, trapping, and fishing rights under *Treaty 10*, all of which are exercised only in respect of the surface of the land. None of these treaty rights can possibly be adversely impacted unless and until some surface access of some nature is contemplated under the provincial regulatory process controlling the exploration and development of subsurface minerals. That activity is not currently contemplated. Buffalo River DN has not

[27] Appeal Book at p. 46a.

proven—because the evidence simply does not exist at this stage—that there is a potential adverse impact on treaty rights under *Treaty 10* that is better than speculative. As speculation does not satisfy the third element of the test in *Rio Tinto*, I find the duty to consult has not been triggered in this case.

[106] In the result, there being no grounds to set aside the judgment of the Chambers judge, the appeal is dismissed. As the Crown has not sought its costs in this appeal, none shall be awarded.

DATED at the City of Regina, in the Province of Saskatchewan, this 2nd day of April, A.D. 2015.

"Caldwell J.A."
Caldwell J.A.

I concur "Jackson J.A."
Jackson J.A.

I concur "Ottenbreit J.A."
Ottenbreit J.A.