Federal Court of Appeal  Cour d'appel fédérale

**Date: 20161207**

**Docket: A-29-15**

**Citation: 2016 FCA 311**

**CORAM:** **PELLETIER J.A.**
**WEBB J.A.**
**DE MONTIGNY J.A.**

**BETWEEN:**

**THE GOVERNOR GENERAL IN COUNCIL, MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT, MINISTER OF FINANCE, MINISTER OF THE ENVIRONMENT, MINISTER OF FISHERIES AND OCEANS, MINISTER OF TRANSPORT, AND MINISTER OF NATURAL RESOURCES**

**Appellants**

**and**

**CHIEF STEVE COURTOREILLE ON BEHALF OF HIMSELF AND THE MEMBERS OF THE MIKISEW CREE FIRST NATION**

**Respondent**

Heard at Edmonton, Alberta, on May 12, 2016.

Judgment delivered at Ottawa, Ontario, on December 7, 2016.

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|---|---|
| REASONS FOR JUDGMENT BY: | DE MONTIGNY J.A. |
| CONCURRED IN BY: | WEBB J.A. |
| CONCURRING REASONS BY: | PELLETIER J.A. |

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## REASONS FOR JUDGMENT

**DE MONTIGNY J.A.**

[1] This is an appeal and cross-appeal of a judgment rendered on December 19, 2014 (the Reasons for Judgment) by Justice Hughes of the Federal Court (the Judge) granting in part the application for judicial review of Chief Steve Courtoreille of the Mikisew Cree First Nation

(Mikisew Cree), claiming that the Governor General in Council, the Minister of Aboriginal Affairs and Northern Development, the Minister of Finance, the Minister of the Environment, the Minister of Fisheries and Oceans, the Minister of Transport and the Minister of Natural Resources (collectively the appellants) breached their duty to consult the Mikisew Cree on the development and introduction in Parliament of two omnibus bills that reduced federal regulatory oversight on works and projects that might affect their treaty rights to hunt, fish and trap.

[2] This case raises an issue that has not yet been dealt with by any appeal court: does the Crown have an obligation to consult when contemplating changes to legislation that may adversely impact treaty rights, and if so, to what extent? Indeed, the Supreme Court explicitly went out of its way in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (2010 SCC 43 at para. 44, [2010] 2 S.C.R. 650 [*Rio Tinto*]) to decline addressing that issue, "leav[ing] for another day the question of whether government conduct includes legislative action" for the purpose of triggering the duty to consult and, where appropriate, to accommodate Aboriginal groups. The Judge below recognized, for the first time, that the Crown had such a duty to consult with the Mikisew Cree when the two omnibus bills were introduced in Parliament. The content of the duty included the giving of notice to the Mikisew Cree of the portions of each of those bills that could potentially have an impact on their treaty rights, as well as the provision of a reasonable opportunity to make submissions.

[3] Having carefully considered the submissions made by the parties, both orally and in writing, I am of the view that this appeal should be granted. In particular, I find that legislative action is not a proper subject for an application for judicial review under the *Federal Courts Act*,

R.S.C. 1985, c. F-7, and that importing the duty to consult to the legislative process offends the separation of powers doctrine and the principle of parliamentary privilege.

## I. Facts

[4] The facts leading to this case are not complex and can be briefly summarized. The Mikisew Cree is a band within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, whose traditional territory is located in northeastern Alberta, and whose ancestors adhered to Treaty No. 8, which guarantees their right to hunt, trap and fish throughout the territory covered by that treaty.

[5] In 2012, the Minister of Finance introduced Bill C-38, enacted as the *Jobs, Growth and Long-Term Prosperity Act*, 1st. Sess., 41st Parl., 2012 (assented to 29 June 2012), S.C. 2012, c. 19 and Bill C-45, enacted as the *Jobs and Growth Act 2012*, 1st. Sess., 41st Parl., 2012 (assented to 14 December 2012), S.C. 2012, c. 31. These two omnibus bills resulted in the repeal of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37; the enactment of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 (*CEAA, 2012*); as well as in amendments to the *Fisheries Act*, R.S.C. 1985, c. F-14, the *Species at Risk Act*, S.C. 2002, c. 29, the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 and the *Navigable Waters Protection Act*, renamed the *Navigation Protection Act*, R.S.C. 1985, c. N-22 (*NPA*).

[6] Mikisew Cree alleges that the omnibus bills reduced the types of projects that were subject to federal environmental assessment, reduced the navigable waters that required federal approval to build obstructing works on them, diminished the protection of fish habitat, and

reduced the requirements to approve effects on species at risk. Since environmental assessments and other federal approval mechanisms typically allow First Nations to voice their concerns about effects on its treaty rights to hunt, fish and trap, and have those rights accommodated, the Mikisew Cree argue that this reduction in oversight may affect their treaty rights and accordingly, the Crown should have consulted with it during the development of that legislation and upon its introduction in Parliament. The Mikisew Cree sought declaratory and injunctive relief against the Crown before the Federal Court.

## II. The impugned decision

[7] On the standard of review, the Judge noted that the application required a *de novo* consideration of the circumstances, and as such there was no standard of review.

[8] First, the Judge found that the application was not precluded by subsection 2(2) of the *Federal Courts Act*, which states that a "federal board, commission or other tribunal" does not include, amongst others, "the Senate, the House of Commons, [or] any committee or member of either House". While he took issue with the applicant's characterization of the matter as "executive" rather than "legislative" in nature, the Judge noted that the applicant was not seeking judicial review of the content of the bills, of decisions of committees or members upon their introduction in Parliament, or of any particular decision of a minister in implementing legislation. Rather, it was his view that judicial review of the actual process undertaken by ministers "before legislation has been drafted and presented to Parliament" was being sought (Reasons for Judgment at para. 22).

[9] Second, the Judge found that the matter was justiciable, entailing the determination of whether a legal and enforceable duty to consult existed, and that the matter was not premature (Reasons for Judgment at para. 29).

[10] Third, the Judge found that if there was a duty to consult, it could not trigger any judicial intervention before a bill was introduced into Parliament by virtue of the separation of powers doctrine. The Judge acknowledged the tension between the traditional reluctance of courts to impose any procedural requirements upon the legislative process, and the constitutional duty to consult arising from section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11. He found that neither *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 [*Tsilhqot'in*] nor *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447 [*Grassy Narrows*] stood for the proposition that legislation constitutes Crown conduct for the purposes of the duty to consult, and that certain passages of *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 [*Haida Nation*] and *Rio Tinto* suggest the contrary, since in both such cases, the court refused to dictate a particular regulatory scheme that Parliament should adopt to comply with the duty to consult. On that reasoning, the Judge found that the duty to consult was not triggered by legislative provisions that made "procedural changes", such as the provisions of the *CEAA, 2012* and of the *Fisheries Act* that allow the Crown to transfer its duty to consult to provincial authorities; public notification requirements in the *NPA*; time-limits and restrictions on public participation in environmental assessments as found under the *CEAA, 2012*; and the transfer of responsibilities for pipeline and powerline regulations and species at risk certifications to the National Energy Board.

[11] In response to the applicant's argument that the duty to consult and judicial review could nonetheless attach to the policy development occurring prior to the decision to draft legislation, the Judge found that restraints on the executive's policy choices to develop legislation is a restraint on the legislative branch itself, relying mainly on *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3 [*Criminal Lawyers' Association*] and *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 83 D.L.R. (4th) 297 [*re Canada Assistance Plan*]. He found that the ministers acted in their legislative capacity in reaching the decision at issue in the application, and that the above-noted cases applied in the Aboriginal context since the result of applying the duty to consult to the law-making process would equally place procedural constraints on Parliament (Reasons for Judgment at paras. 65-67). He further noted that the law-making process requires flexibility, and that having the duty to consult apply to this process would constrain it.

[12] The Judge then considered whether the honour of the Crown in its dealings with Aboriginal peoples mandated a departure from the traditional separation of powers doctrine with respect to the legislative process. On this point, he noted that Treaty No. 8 contained no special provisions that would "allow the Mikisew, in preference to other Canadians, to intervene in the legislative process before a bill that may, in some arguable way, interfere with the Mikisew's treaty rights of fishing and trapping" (Reasons for Judgment at para. 71). Although the Judge qualified this proposition by indicating that "[t]his does not mean that all legislative conduct will automatically fail to constitute Crown conduct for the purpose of triggering a duty to consult", he found that intervention in the law-making process in this case would compromise parliamentary

sovereignty. He therefore concluded that if there was a duty to consult, it could not trigger any judicial intervention prior to the introduction of a bill in Parliament.

[13] Fourth, the Judge applied the test from *Haida Nation* to establish whether a duty to consult exists, which asks whether (1) the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal or treaty right, and (2) contemplates conduct that (3) might adversely affect it (*Haida Nation* at para. 35). Regarding knowledge of the Aboriginal or treaty right, the Judge acknowledged the Crown's concession that it has knowledge of Mikisew Cree's treaty rights. With respect to the requirement of Crown conduct, the Judge proceeded on the assumption that the steps ministers take prior to the introduction of a bill in Parliament constitute Crown conduct that can give rise to the duty to consult (Reasons for Judgment at para. 84). As for the potential adverse effects, the Judge found that the reduction of navigable waters that are protected under the *NPA* and the reduction of protection to fish habitat under the *Fisheries Act* constitute a sufficient potential risk to fishing and trapping rights to trigger the duty to consult. He emphasized that potential harm is sufficient under the *Haida Nation* test. However, with respect to the *CEAA, 2012*, the Judge found that the narrower scope of consideration of environmental effects should not affect Aboriginal peoples given subsection 5(1) of the *CEAA, 2012*, and that the amendments to the *Species at Risk Act* would not allow individuals to engage in activities that affect listed wildlife species. The Judge concluded that for the provisions which triggered a duty to consult (i.e., those found in the *NPA* and in the *Fisheries Act*), it could have been triggered when the omnibus bills were introduced to Parliament (Reasons for Judgment at para. 99).

[14] The Judge went on to discuss the extent of that duty, concluding that the amendments to the *NPA* and the *Fisheries Act* triggered a duty to give notice and a reasonable opportunity to make submissions, but did not result in a duty to accommodate, because the provisions had not yet been applied to any specific situations that would trigger the higher end of the spectrum of consultation described in *Haida Nation*.

[15] Fifth, the Judge found that the appropriate remedy was a declaration to the effect that the Crown had a duty to consult with the Mikisew Cree at the time each omnibus bill was introduced in Parliament by giving notice and an opportunity to provide submissions. On injunctive relief, he found that there would be no value in such an order, which would be impossible to define and would unduly fetter the workings of government (Reasons for Judgment at para. 106). The Judge found that the constitutional nature of the duty to consult allowed the court to review the conduct at issue, but that in deciding on a remedy, it should grant no relief beyond a declaration in recognition of the constitutional responsibilities of the legislative branch (Reasons for Judgment at para. 107). Since the omnibus bills had already been enacted, a declaration that the Crown should consult would be pointless; however, the Judge found that a declaration on the existence of the duty to consult would have practical value for the parties' future obligations in implementing Treaty No. 8.

## III. Issues

[16] I agree with the respondent that the issues on the appeal and cross-appeal overlap, and that there is no use in parsing them out. Overall, the case raises the following questions:

A. Did the Judge err in conducting a judicial review of legislative action contrary to the *Federal Courts Act*?

B. Did the Judge err by failing to respect the doctrine of separation of powers or the principle of parliamentary privilege?

C. Did the Judge err in concluding that the duty to consult had been triggered?

D. Did the Judge err in determining the appropriate remedy?

[17] As I dispose of this appeal on the basis of issues A and B, issues C and D will not be addressed in my analysis below.

## IV. Analysis

[18] There is no dispute between the parties that the issues raised on this appeal are subject to the standard of correctness as questions of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235), except for any factual findings underlying the existence of the duty to consult, which are reviewable on palpable and overriding error (*Haida Nation* at para. 61), and the Judge's discretionary decision regarding the remedy to grant, which is also subject to deference (*Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43, [2010] 1 S.C.R. 6). I shall therefore proceed with my analysis, keeping in mind these various standards of review.

A. *Did the Judge err in conducting a judicial review of legislative action contrary to the Federal Courts Act?*

[19] The first hurdle that an applicant must surmount when filing a proceeding in the Federal Court is jurisdictional. As a statutory court, the Federal Court must have been granted jurisdiction by Parliament to deal with the subject matter of the proposed application or action (*ITO – Int'l Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 at p. 766, 28 D.L.R. (4th) 641; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 43, [2010] 3 S.C.R. 585 [*TeleZone*]).

[20] When the *Federal Courts Act* was adopted in 1971, an important consideration was the need for a national and coherent perspective on judicial review of federal public bodies; as a result, the jurisdiction of the former Exchequer Court was expanded to confer on the Federal Court and the Federal Court of Appeal the exclusive supervisory function to review the decisions of federal decision-makers (see *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para. 52, 379 D.L.R. (4th) 737; *Canada v. Tremblay*, 2004 FCA 172, [2004] 4 F.C.R. 165).

[21] By its very nature, judicial review is concerned with the rule of law and the objective of ensuring that government officials, from the highest ranking representatives to those operating at the lower echelons, act within the boundaries of the law. As the Supreme Court stated in *TeleZone*, "[j]udicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers" (at para. 24). It is concerned with government action, and not with legislation.

[22] This rationale is reflected in the wording of sections 18 and 18.1 of the *Federal Courts Act*, along with the definition provided for "federal board, commission or other tribunal" at paragraph 2(1) and the exclusion from that definition of the Senate and House of Commons at paragraph 2(2) of that same *Act*. These provisions read as follows:

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| **Definitions** | **Définitions** |
| 2 (1) In this Act, | 2 (1) Les définitions qui suivent s'appliquent à la présente loi. |
| federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; | office fédéral Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*. |
| **Senate and House of Commons** | **Sénat et Chambre des communes** |
| (2) For greater certainty, the expression "federal board, commission or other tribunal", as defined in subsection (1), does not include the Senate, the House of Commons, any committee or member of either House, the Senate Ethics Officer, the Conflict of Interest and Ethics Commissioner with respect to the exercise of the jurisdiction or powers referred to in sections 41.1 to 41.5 and 86 of the *Parliament of Canada Act* or the Parliamentary Protective Service. | (2) Il est entendu que sont également exclus de la définition de « office fédéral » le Sénat, la Chambre des communes, tout comité ou membre de l'une ou l'autre chambre, le conseiller sénatorial en éthique, le commissaire aux conflits d'intérêts et à l'éthique à l'égard de l'exercice de sa compétence et de ses attributions visées aux articles 41.1 à 41.5 et 86 de la *Loi sur le Parlement du Canada* et le Service de protection parlementaire. |

**Extraordinary remedies, federal tribunals**

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

**Recours extraordinaires : offices fédéraux**

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

**Extraordinary remedies, members of Canadian Forces**

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

**Recours extraordinaires : Forces canadiennes**

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

**Remedies to be obtained on application**

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

**Exercice des recours**

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

**Application for judicial review**

18.1 (1) An application for judicial review may be made by the Attorney

**Demande de contrôle judiciaire**

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le

General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

**Time limitation**

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

**Powers of Federal Court**

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

**Grounds of review**

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted

procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

**Délai de présentation**

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

**Pouvoirs de la Cour fédérale**

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

**Motifs**

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé

beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

**Defect in form or technical irregularity**

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

**Vice de forme**

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

[23] On a plain reading of these provisions, there would appear to be two requirements for this Court or the Federal Court to be validly seized of an application for judicial review. First, that there be an identifiable decision or order in respect of which a remedy is sought. Second, that the impugned decision or order be made by a "federal board, commission or other tribunal". In the case at bar, the second of these conditions is clearly not met.

[24] It is difficult to conceive of any discrete decision made by the Governor in Council or the various ministers that would be the subject of this application for judicial review. Indeed, the relief requested by the respondent is of a declaratory and injunctive nature with respect to the development of the omnibus bills. The Judge found as much at paragraph 16 of his reasons, where he stated explicitly that "[t]his is not a review of any decision or order of a federal board". He did say, later on in his reasons, that "there is a sufficient legal basis for the Court to review the matter judicially: namely, whether the legal and enforceable duty to consult applies to the decisions at issue" (Reasons for Judgment at para. 29), and that "the [m]inisters acted in their legislative capacity to make decisions that were legislative in nature" (Reasons for Judgment at para. 66) [emphasis added]. It is not clear, however, what particular decisions he was referring to in the above-referenced passages. If it is the decision to move forward with a policy initiative with a view to bringing proposed legislation to Cabinet for approval and eventually, to Parliament for adoption, it would presumably not meet the requirement for a formal decision as it would be inchoate in nature and not formally recorded.

[25] Be that as it may, this is not the argument put forward by the respondent. Instead, it argues that the *Federal Courts Act* does not require that there be a "decision", but only a

"matter" triggering rights to judicial review. They rely for that proposition on the reasons of this Court in *Air Canada v. Toronto Port Authority et al.*, 2011 FCA 347, [2013] 3 F.C.R. 605 (per Stratas J.) [*Air Canada*], which the Judge quoted at length and purportedly applied. The crux of the Court's reasoning can be grasped from the following excerpt:

> Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by "the matter in respect of which relief is sought". A "matter" that can be subject of judicial review includes not only a "decision or order", but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada*, [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing", a "decision", an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action", not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> *Air Canada* at para. 24

[26] Assuming that the focus of the inquiry is whether the decision-maker has done anything which may have triggered rights on the part of the aggrieved party to bring a judicial review, the respondent still has to establish that the Federal Court is empowered to act and to provide a remedy. Typically, the kind of remedies available on an application for judicial review are couched with a view to ensuring that the legal framework within which the executive branch of the government must act is complied with. The language of subsections 18.1(3) and (4) is permeated with notions that partake to administrative law (consider, for instance, the following terms used in these subsections: "unlawfully", "unreasonably delayed", "invalid or unlawful", "quash, set aside or set aside and refer back for redetermination", "prohibit or restrain", "acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction", "failed to observe a principle of natural justice", "erred in law", "erroneous finding of fact", "acted in any other way that was contrary to law"). This is clearly not the kind of language used in relation

to legislative action. To the extent, therefore, that the ministers and the Governor in Council were acting in their legislative capacity in developing the two omnibus bills, as argued by the appellants, judicial review would clearly not be available. This brings me to the second requirement for the Federal Court (and this Court) to have jurisdiction pursuant to sections 18 and 18.1 of the *Federal Courts Act*.

[27] Sections 18 and 18.1 of the *Federal Courts Act* make it clear that it is only those decisions made and actions taken by a "federal board, commission or other tribunal" that can be the subject of the supervisory jurisdiction of the Federal Court (and of the Federal Court of Appeal pursuant to section 28 of the *Federal Courts Act*). It is well established that the test for determining whether a person or body falls within the definition of those words as found in subsection 2(1) involves two questions. First, what is the particular jurisdiction or power that is being exercised, and second (and more importantly), what is the source of that jurisdiction or power (see *Anisman v. Canada (Border Services Agency)*, 2010 FCA 52 at paras. 29-31, 400 N.R. 137; *Air Canada* at para. 47). As D.J.M. Brown and J.M. Evans put it in *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Thomson Reuters Canada, 2016) at para. 2:4310:

> In the result, the *source* of a tribunal's authority, and not the *nature* of either the power exercised or the body exercising it, is the primary determinant of whether it falls within the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown. [references omitted] [emphasis in the original]

[28] The respondent argues that ministers are not acting as members of Parliament empowered to legislate by Part IV of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., reprinted in R.S.C. 1986, App. II, No. 5 during the policy development phase of law making, but rather, they are

exercising their executive powers as Cabinet ministers responsible for their departments pursuant to various departmental acts (see *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6; *Department of Environment Act*, R.S.C. 1985, c. E-10; *Department of Fisheries and Oceans Act*, R.S.C. 1985, c. F-15; *Department of Transport Act*, R.S.C. 1985, c. T-18; *Department of Natural Resources Act*, S.C. 1994, c. 41; *Financial Administration Act*, R.S.C. 1985, c. F-11). These various statutes provide for the appointment of ministers; establish the scope of their mandates; provide a basic framework of powers, duties and functions they may exercise in delivering on their mandates and for which they are accountable; create departments over which they preside; and organize resources to support them in the discharge of their responsibilities. Nowhere, however, do these acts refer even implicitly to their role as policy-makers or to the development of legislation for introduction into Parliament. This is not to say that such a responsibility is not part of their mandate as ministers; but it flows from the Constitution itself and from our system of parliamentary democracy, and not from a delegation of powers from Parliament to the executive. The exercise of such powers is not reviewable by way of judicial review (*Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C.R. 465 at paras. 27-29, 73 D.L.R. (4th) 289 (FCA)).

[29] The respondent proposes that a distinction be drawn between ministers acting as policy-makers and ministers acting as legislators. Indeed, the respondent argued that the law-making process can be neatly split between the consultation part, on the one hand, and the various steps following the approval by the relevant Cabinet policy committee of the memorandum through which policy approval and authority to draft a bill is sought, on the other. But as shown by a document describing the law-making process at the federal level published by the Privy Council

Office and to which the Judge referred at length in paragraphs 31 to 36 of his reasons (see *Guide to Making Federal Acts and Regulations*, 2d ed., 2001, Affidavit of Douglas Nevison, Exhibit H, Appeal Book, vol. 19 at p. 5752 and ff.), the legislative process is a fluid exercise involving many players, both at the political and at the government officials level. It would be artificial to parse out the elements of a minister's functions associated to either its executive or legislative functions for the purpose of drawing a red line between the dual roles of the members of Cabinet.

[30] In that respect, I am of the view that the Judge correctly found that the power that the ministers exercised in the entire course of the law-making process was legislative in nature. He rightly came to that conclusion after quoting from the decision of the majority of the Supreme Court in *Criminal Lawyers' Association* at paragraph 28 (per Karakatsanis J.):

> Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.

[31] I shall return in the next section of these reasons to the concept of the separation of powers and its consequences in the case at bar. Suffice it to say, for the moment, that making policy choices and adopting laws are explicitly recognized as functions of the legislative branch. It is also worth noting that Justice Karakatsanis, in the above-quoted excerpt, refers to the "legislative branch" as opposed to the "legislature"; she thereby implicitly recognized that the

legislative function is not under the exclusive purview of parliamentarians in our system of government, where Cabinet ministers are by convention elected members of Parliament and are "a *hyphen* which joins, a *buckle* which fastens, the legislative part of the state to the executive part of the state" [emphasis in the original], to use the words of Walter Bagehot, *The English Constitution*, 2d ed. (London and Edinburgh: Thomas Nelson & Son, 1872) at p. 14.

[32] In that context, it is difficult to understand why the Judge adopted a restrictive interpretation of subsection 2(2) of the *Federal Courts Act*. While admitting that this provision would preclude the intervention of the Court if the proceedings could be said to engage the parliamentary process, he emphasized that it was the process undertaken by the ministers before any piece of legislation had been drafted and presented to Parliament that was at stake here. Not only does this finding appear to run counter to his view that the ministers acted in their legislative capacity when they made the decisions leading to the formulation and introduction of the omnibus bills to Parliament (see Reasons for Judgment at para. 66), but it also seems at odds with a contextual and purposive construction of subsection 2(2) of the *Federal Courts Act*. When read in its historical perspective, and bearing in mind the true nature of judicial review, the exclusion of the Senate and of the House of Commons in that subsection is not only meant to protect the existing function of parliamentary privilege by ensuring that judicial review is not extended to ministers acting in their capacity as members of Parliament or Senators, as the respondent would have it, but more broadly to preclude judicial review of the legislative process at large. When ministers are engaged in the law-making process, at whatever stage, they are not acting as statutory decision-makers but as legislators, and their actions and decisions are immune from judicial review.

[33] Finally, the respondent relied on two cases in support of its argument that a distinction must be drawn between ministers acting in their parliamentary roles, that is, after a bill has received Cabinet approval and is introduced in Parliament, and ministers acting as members of the executive in the process of developing the policy and recommendations leading up to the decision to formulate and introduce a bill. The first is *Tsuu T'ina Nation v. Alberta (Environment)*, 2010 ABCA 137, [2010] 10 W.W.R. 627 [*Tsuu T'ina Nation*] where the First Nation applied for judicial review and sought a declaration that Alberta had a duty to consult with and accommodate its claimed treaty and Aboriginal rights and failed to discharge that duty in adopting a water management plan. I do not find this case of particular relevance, if only because the Cabinet and the ministers were acting as delegates pursuant to legislative authority. Section 9 of the *Water Act*, R.S.A. 2000, c. 3, allowed the Minister of Environment to require that a water management plan be developed by a Director or another person; the Director was also required to engage in such public consultation as the Minister considered appropriate. This is clearly a very different situation from the case at bar, where the ministers are acting as legislators and not as administrative decision-makers.

[34] The second case relied upon by the respondent is the decision of this Court in *Native Women's Association of Canada v. Canada*, [1992] 3 F.C.R. 192, 95 D.L.R. (4th) 106 (FCA) [*Native Women's Association*, FCA] in which the Native Women's Association of Canada (NWAC) challenged the government's refusal to grant them equal funding to other, allegedly male-dominated, Aboriginal organizations for the purpose of participating in the inquiry of a parliamentary committee on constitutional reform in the wake of the upcoming 1995 referendum in Québec. After finding that the refusal to grant funding violated the NWAC members' freedom

of expression, the Federal Court of Appeal distinguished between the "formulation and introduction of a bill" occurring at the policy development stage from the process occurring once a policy has been decided upon and which sees steps being taken to implement it by way of legislation. In light of this distinction, the Court concluded that it could interfere with the committee's process at the policy-making stage. The Supreme Court of Canada reversed the Federal Court of Appeal on the finding that the NWAC's freedom of expression had been violated. Accordingly, it did not discuss whether the court could have interfered with the committee's process (see *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, 119 D.L.R. (4th) 224).

[35] The *Native Women's Association*, FCA decision does not strike me as particularly helpful for a number of reasons. First, as just mentioned, the distinction drawn by the court between the "preparation of a bill for introduction after it has been decided that the subject-matter is to be dealt with" and the "consultation, public or private, by Parliamentary Committee or otherwise, which the government may choose to undertake after deciding that it might be desirable that a matter be dealt with by legislation but before it has decided how it wishes the legislature to deal with it or whether a legislative proposal is politically acceptable" (*Native Women's Association*, FCA at para. 41), has not been endorsed by the Supreme Court.

[36] Second, the process that was at stake in that case was of a constitutional nature and involved the formulation of a constitutional resolution for the purposes of amending the fundamental law of the country, as opposed to the normal legislative process. While this crucial distinction was not discussed by either the Federal Court of Appeal or the Supreme Court of

Canada in *Native Women's Association*, FCA, it is not a given that the same considerations apply to both of these processes. In fact, there the courts were not commenting on the scope of the definition of a federal board for the purposes of filing an application for judicial review under section 18 of the *Federal Courts Act*, but rather on the broader issue of justiciability and the separation of powers which may arise in any form of judicial proceeding.

[37] Finally, it appears that the availability of a section 18 remedy rested on the assumption that the decision to invite some designated Aboriginal organizations to engage in a process parallel to that of the Parliamentary Committee tasked to make recommendations on proposals for constitutional amendments, as well as the decision to allocate federal funding to those organizations, had been made by an authorized emanation of the federal government and that the funding must have been made by a federal board. As stated by this Court:

> […] As I understand our Constitution, the expenditure of funds must have been authorized by Act of Parliament. If, as it appears, the invitation to join in the process was not authorized by Act or regulation, it must have been an exercise of Crown prerogative.
>
> *Native Women's Association*, FCA at para. 34

[38] For all of the above reasons, I find this case manifestly insufficient to support the proposition put forward by the respondent and to depart from the well-established principles governing the jurisdiction of the Federal Court pursuant to sections 18 and 18.1 of the *Federal Courts Act*. The source of the power that the appellant ministers exercised and which is the true object of the respondent's complaint was, in my opinion, legislative in nature and derived from their status as members of Parliament. Therefore, the matter is not a proper subject for an application for judicial review under the *Federal Courts Act*.

[39] The matter could come to an end here, since the foregoing reasoning is sufficient to dispose of the matter. There is, however, a more fundamental and principled reason why the application for judicial review brought by the respondent cannot be entertained, to which I shall now turn.

B. *Did the Judge err by failing to respect the doctrine of separation of powers or the principle of parliamentary privilege?*

[40] As previously alluded to, there is a clear tension in the case law between the doctrine of the separation of powers and the duty to consult that has been developed as a result of the enactment of section 35 of the *Constitution Act, 1982*. While the separation of powers doctrine is not explicitly entrenched in the Canadian Constitution, courts have frequently recognized the normative value of that principle (see, for example, *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at p. 389, 100 D.L.R. (4th) 212; *R. v. Power*, [1994] 1 S.C.R. 601 at p. 620-621, 165 N.R. 241; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at paras. 33-34, [2003] 3 S.C.R. 3; *Newfoundland (Treasury Board) v. N.A.P.E.*, 244 D.L.R. (4th) 294 at paras. 104-105, [2004] 3 S.C.R. 381; *Canada (House of Commons) v. Vaid*, 2005 SCC 30 at para. 21, [2005] 1 S.C.R. 667; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44). The duty to consult, on the other hand, is now more firmly established, but its contours are still imprecise, both with respect to the extent of its application and with regard to its variable requirements.

[41] The source of the modern duty to consult is said to be the "honour of the Crown", a concept linked to section 35 of the *Constitution Act, 1982* and sometimes to the *Royal*

*Proclamation of 1763*, and more generally to the objective of reconciliation following Canada's colonial history with Aboriginal peoples.

[42] The duty to consult first appeared in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow*], where the Court laid out the approach to establish a section 35 violation. First, the person invoking the section 35 right must show that (1) it holds an "existing" Aboriginal or treaty right that was not extinguished in 1982, and (2) there has been a *prima facie* infringement of that right in the sense of an unreasonable limitation, an undue hardship or a denial of the preferred means of exercising the Aboriginal or treaty right. Then, the burden is on the Crown to justify the interference based on a valid legislative objective, and to show that the interference is consistent with the honour of the Crown and its fiduciary duty to Aboriginal peoples. At the justification stage regarding the honour of the Crown, consultation with Aboriginal peoples was recognized (along with the issue of minimization of the infringement and fair compensation) as a factor that might justify an infringement of an Aboriginal fishing right caused by fishing regulations.

[43] In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, the Supreme Court elaborated on the justification test for an infringement of Aboriginal title. Noting that Aboriginal title entailed the right to choose how the land would be used, the Court found that there was a duty of consultation, particularly when enacting hunting and fishing regulations relating to Aboriginal lands. More recently, the Supreme Court revisited the test for justification of an infringement to proven Aboriginal title in the decision of *Tsilhqot'in*. The Court found that the Crown, to justify an infringement, would have to show that the procedural duty to consult

had been complied with, that there was a compelling and substantial objective for the infringement, and that the benefit to the public was proportionate to the adverse effect on Aboriginal interest. As such, the duty to consult evolved from a factor to be considered, amongst others, in the justification stage of the infringement analysis, to a necessary condition of a finding of justification of infringement.

[44] The duty to consult was also applied outside of the justification context in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, a decision which involved the interpretation of the "taking up" clause in Treaty No. 8. Mikisew Cree objected to Canada's decision to take up land alongside its reserve to run a winter road, which incidentally cut through a number of its band members' family traplines. The Supreme Court found that when contemplating a proposed taking up of lands under Treaty No. 8, the honour of the Crown imposes a distinct, procedural right to consultation. In other words, the Crown could not invoke the *Sparrow* test to show that regardless of consultation, the infringement of the Mikisew Cree's treaty rights was justifiable. The Crown had to first meet its duty to consult, and absent adequate consultation, the infringement was unjustifiable regardless of the substantive reasons that might justify running a road by the reserve. The same obligations attach to taking up lands under Treaty No. 3 (see generally *Grassy Narrows*).

[45] In 2004, the duty to consult was recognized in the context of asserted, but unproven claims to Aboriginal rights. The Supreme Court of Canada found in *Haida Nation* that it was inconsistent with the honour of the Crown for the province to allow continued logging over territories in a manner that might leave the Haida Nation with meaningless rights over lands of

cultural significance once they managed to prove them in court. The Court found that when the Crown contemplates conduct that may adversely affect an asserted Aboriginal or treaty right, a duty to consult arises.

[46] In *Rio Tinto*, the Supreme Court noted that the duty to consult attaches not only to decisions that directly result in adverse impacts on resources, but also to "strategic, higher level decisions" (at para. 44). This has generally involved decisions relating to the management of a specific resource on the First Nations' traditional territory. Examples of such strategic planning decisions that have given rise to a duty to consult include the following:

- The approval of a forest stewardship plan: *Kwakiutl First Nation v. North Island Central Coast Forest District*, 2015 BCCA 345;
- A municipal land use plan: *Squamish Nation v. British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991, [2014] 8 W.W.R. 742;
- An order-in-council enacting a regional water management plan: *Tsuu T'ina Nation*;
- A decision to designate a project as subject to environmental assessment: *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)*, 2015 BCSC 1180;
- The design of the process for the environmental assessment of a gas pipeline: *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, [2006] F.C.J. No. 1677;
- A non-binding agreement-in-principle between the Crown and another First Nation with overlapping land claims: *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204, [2012] F.C.J. No. 216;

- A minister's refusal to recommend a change to a conservancy boundary prior to its legislative enactment by the lieutenant governor-in-council: *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Attorney General)*, 2011 BCSC 620, [2011] 3 C.N.L.R. 188.

[47] When it comes to whether Crown conduct having the potential of triggering the duty to consult includes legislative action (as opposed to being limited to decisions purely administrative in nature), this matter has been expressly left open by the Supreme Court in *Rio Tinto*. In the first appellate case where the issue was squarely raised and addressed, the Alberta Court of Appeal concluded that the duty to consult does not apply to the legislative process (see *R. v. Lefthand*, 2007 ABCA 206, [2007] 10 W.W.R. 1 [*Lefthand*]). Slatter J. found that there is no obligation to consult prior to the passage of legislation because this would be an interference with the functioning of the legislature:

> The duty to consult is of course a duty to consult collectively; there is no duty to consult with any individual. There can however be no duty to consult prior to the passage of legislation, even where aboriginal rights will be affected: *Authorson v. Canada (Attorney General)*, [2003| 2 S.C.R. 40. It cannot be suggested there are any limits on Parliament's right to amend the *Indian Act*. It would be an unwarranted interference with the proper functioning of the House of Commons and the Provincial Legislatures to require that they engage in any particular processes prior to the passage of legislation. The same is true of the passage of regulations and Orders in Council by the appropriate Executive Council. Enactments must stand or fall based on their compliance with the constitution, not based on the processes used to enact them. Once enactments are in place, consultation only becomes an issue if a *prima facie* breach of an aboriginal right is sought to be justified: *Mikisew Cree* at para. 59.
>
> *Lefthand* at para. 38

[48] Slatter J. added that consultation might be relevant to justification, but that it was not a threshold validity issue (*Lefthand* at para. 49). Watson J. endorsed these comments, and added

that courts should be wary of declaring justiciable a legislative process when the result of that process is already sufficiently vulnerable to constitutional evaluation and the consequences of the legislation are capable of remedy under law if need be. In her concurring reasons, Conrad J. approached the case from a different angle, framing the issue as a conflict between the *Sparrow* framework and the approach adopted in both *Haida Nation* and *Mikisew*. She concluded that since the regulation at issue was already enacted and the treaty rights proven, the circumstances more closely resembled those which arose in *Sparrow*; as such, Conrad J. found that consultation should be considered as a factor in the justification analysis.

[49] The Alberta Court of Appeal revisited the issue in *Tsuu T'ina Nation*, where two First Nations submitted that they were not consulted nor accommodated by the Province of Alberta with respect to the development of the Water Management Plan for the South Saskatchewan River Basin (SSRB). As previously mentioned, section 9 of the *Water Act* allows the Minister of Environment to require that a water management plan be developed by a Director or another person. The Minister accordingly asked a Director to develop such a plan for the SSRB. The Director was required to engage in such public consultation as the Minister considered to be appropriate, in accordance with paragraph 9(2)(f) of the *Water Act*. Commenting on the Crown's argument that legislation cannot be invalidated because of a failure to consult, the Court relied on a passage from Slatter J. in *Lefthand* recognizing that whether a duty to consult arises beyond the passage of legislation and regulations is not yet clear. Therein, Justice Slatter provided examples of the duty being recognized for administrative decision-makers whose orders may impact Aboriginal rights and in the case of study groups tasked with making recommendations which may affect Aboriginal interests. The Court then stated the following:

> Accordingly, even if the Legislature itself does not have a duty to consult prior to passing legislation, the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions. Here, the Director and the Department of the Environment were directed to develop a water management plan for the purpose of making recommendations to the Lieutenant Governor in Council for his approval. The *Water Act* requires consultation with stakeholders in developing a plan. The situation appears similar to that spoken of by Slatter J.A. above, where he recognized that consultation may be appropriate in the case of a study group established to make regulations respecting the fisheries covered in Treaty 7.
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> *Tsuu T'ina Nation* at para. 55

[50] Despite the seemingly broad language of the first sentence of this excerpt, I am of the view that it cannot be used by the respondent in support of its argument. First of all, I note that the *Water Act* itself required consultation with stakeholders (which included First Nations) to take place in developing a water plan and before making recommendations to the executive branch of government. Second, the consultations in *Tsuu T'ina Nation* occurred outside the legislative context, as they were to be conducted well after the enactment of the legislation. This is obviously much different from the type of consultation that the respondent has in mind in the case at bar, which would arise as part of the process leading up to the enactment of legislation by Parliament.

[51] This is not to say that a statutory regime that would not allow for consultation and that would fail to provide any other equally effective means to acknowledge and accommodate Aboriginal claims would be immune from a constitutional challenge. As the Court of Appeal for Yukon found in *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 at paragraph 37, 358 D.L.R. (4th) 100, such a statute would probably be defective and vulnerable if relied upon to justify a decision susceptible to impede or prevent the enjoyment of some Aboriginal

rights. But this is a far cry from saying that governments are constitutionally required to consult with First Nations before introducing legislation.

[52] The self-restraint that courts have so far shown when called upon to impose a duty to consult in the context of the legislative process rests on solid, principled grounds. Parliamentary sovereignty and the separation of powers doctrine are well-established pillars of our Constitution and have been recognized by the Supreme Court on numerous occasions, most recently in *Criminal Lawyers' Association*. It is in recognition of these unwritten constitutional principles that the Supreme Court found in *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40 [*Authorson*] (admittedly in a different context) that the due process protections found in section 1(a) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III do not require that veterans receive notice and a hearing before Parliament prior to the passage of expropriative legislation. As the Court stated, "[l]ong-standing parliamentary tradition makes it clear that the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent" (at para. 37).

[53] That courts will only come into the picture after legislation is enacted and not before (except when their opinion is sought by a government on a reference) is a well-established principle (see *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at p. 785, 1 C.R.R. 59; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 at para. 59, 177 D.L.R. (4th) 73). It was probably best captured by Sopinka J., writing for a unanimous court in *re Canada Assistance Plan*. In that case, the Supreme Court was asked to consider whether a procedural duty of fairness prevented Parliament from enacting legislation that cut spending on provincial

programs which had been promised under a number of federal-provincial agreements. In that context, the Court found that no duty of fairness attached to the formulation and introduction of a bill in Parliament, and that courts would not "meddle" with the exercise of legislative functions:

> The formulation and introduction of a bill are part of the legislative process with which the courts will not meddle. So too is the purely procedural requirement in s. 54 of the *Constitution Act, 1867*. That is not to say that this requirement is unnecessary; it must be complied with to create fiscal legislation. But it is not the place of the courts to interpose further procedural requirements in the legislative process. I leave aside the issue of review under the *Canadian Charter of Rights and Freedoms* where a guaranteed right may be affected.
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> *re Canada Assistance Plan* at p. 559

[54] It is not entirely clear what Justice Sopinka meant by his last sentence, beyond the recognition that statutes are always reviewable for constitutional infirmity. What is certain, however, is that the dichotomy between the executive and Parliament that the respondent seeks to draw here in order to contend that the government is constrained by the obligation to consult is devoid of any merit. In Sopinka J.'s view, such a submission "ignores the essential role of the executive in the legislative process of which it is an integral part" (*re Canada Assistance Plan* at p. 559). He added that "[a] restraint on the executive in the introduction of legislation would place a fetter on the sovereignty of Parliament itself" (*re Canada Assistance Plan* at p. 560). It is hard to conceive of a more explicit statement.

[55] The scope of the courts' power to impose procedural restraints on the legislative process was discussed in the *Charter* context in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 [*Health Services*]. In that case, health care sector workers challenged legislation that effectively invalidated portions of their collective agreements without consulting their unions, on the basis that it violated their

collective bargaining rights under section 2d) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The majority found that section 2d) protected the procedural right to collective bargaining and that the legislation substantially interfered with that right, but took care to note the following:

> Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged consultation with the affected parties, in choosing to adopt its preferred approach.
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> *Health Services* at para. 157. See also, in a similar collective bargaining setting, *Meredith v. Canada (Attorney General)*, 2015 SCC 2 at para. 45, [2015] 1 S.C.R. 125

[56] In other words, there is no free-standing right to be consulted on legislation that may affect one's *Charter* rights, but that legislation might be harder for the government to justify under section 1 in the absence of consultation. This approach mirrors the development in Aboriginal law of the duty to consult, as previously discussed in relation to *Sparrow*.

[57] Justice Hughes properly distilled in his reasons the consequences flowing from the separation of powers principle. After quoting extensively from the Supreme Court in *Criminal Lawyers' Association* (at para. 23) and *re Canada Assistance Plan* (at paras. 26-27), and stating that "respect for the principle of separation of powers ensures the preservation of the integrity of Canada's constitutional order" (Reasons for Judgment at para. 24), he found that the ministers were acting in their legislative capacity when they made a set of policy choices that led them to create a legislative proposal for Cabinet that led to the formulation and introduction of the omnibus bills in Parliament (Reasons for Judgment at para. 66). He also emphatically stated that

"[…] a restraint on the Executive's policy choice to formulate and introduce a bill into Parliament is a restraint on the sovereignty of Parliament itself" (Reasons for Judgment at para. 65).

[58] Having concluded that the duty to consult cannot trigger judicial intervention before a bill is introduced into Parliament, the Judge then proceeded to issue a declaration requiring the Crown to consult upon introduction of the bills in Parliament. This is based on his assumption "that the steps that Cabinet Ministers undertake during the law-making process prior to introducing a bill into Parliament do indeed constitute Crown conduct that can give rise to the duty to consult" (Reasons for Judgment at para. 84). Having found that the bills in question triggered the duty to consult because they had the potential to harm fishing and trapping rights protected by Treaty No. 8, he therefore inferred that notice should have been given to the Mikisew Cree in respect of those provisions that might have reasonably been expected to impact their rights, together with an opportunity to make submissions, upon the introduction of each omnibus bill into Parliament.

[59] With all due respect, the Judge erred by issuing that declaration. Not only is it inconsistent with his previous findings that courts shall not intervene in the law-making process as it would be an undue interference with Parliament's process and sovereignty, but it also fails to recognize that no court has ever claimed jurisdiction over the introduction of legislation in Parliament. If there is one principle that is beyond any doubt, it is that courts will not supervise the legislative process and will provide no relief until a bill has been enacted (see, for example, *Beauchamp v. Canada (Attorney General)*, 2009 FC 350 at para. 19, 189 C.R.R. (2d) 269;

*Canada (Attorney General) v. Campbell*, [1999] B.C.J. No. 233 at paras. 28-29, 4 B.C.T.C. 110 (BCSC); *Chief Mountain v. Canada*, 2000 BCCA 260 at paras. 5-9). This principle has recently been most forcefully reiterated by Rennie J. (as he then was) in *Galati v. Canada (Governor General)*, 2015 FC 91. Asked to set aside the decision of the Governor General to grant royal assent to a bill, he wrote (at paras. 34-36):

> The courts cannot intervene in the legislative process. The Supreme Court of Canada explained in *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 785, that courts "come into the picture when legislation is enacted and not before (unless references are made to them for their opinion on a bill or a proposed enactment)". Courts respect the right of Parliament to exercise unfettered freedom in the formulation, tabling, amendment, and passage of legislation.
>
> The courts exercise a supervisory jurisdiction once a law has been enacted. Until that time, a court cannot review, enjoin or otherwise engage in the legislative process unless asked by way of a reference framed under the relevant legislation. To conclude otherwise would blur the boundaries that necessarily separate the functions and roles of the legislature and the courts.
>
> […] If the decision to grant royal assent was justiciable so too would the decision to introduce legislation, to introduce a bill in the Senate as opposed to the House, or to invoke closure. No principled line would limit the reach of judicial scrutiny into the legislative process. […]

[60] I am therefore of the view, for all the foregoing reasons, that the legislative process, from its very inception where policy options are discussed and developed to the actual enactment of a bill following its adoption by both Houses and the granting of royal assent by the Governor General, is a matter solely within the purview of Parliament. Imposing a duty to consult at any stage of the process, as a legal requirement, would not only be impractical and cumbersome and potentially grind the legislative process to a halt, but would also fetter ministers and other members of Parliament in their law-making capacity. As Justice Hughes astutely observed, "[…] intervention into the law-making process would constitute undue judicial interference on

Parliament's law-making function, thus compromising the sovereignty of Parliament" (Reasons for Judgment at para. 71).

[61] This does not leave the respondent and other First Nations without any recourse. First, ministers are free to consult, and it is good politics to engage stakeholders such as Aboriginal groups on legislative initiatives which may affect them or regarding which they have a keen interest, before introducing legislation into Parliament. Indeed, the Government of Canada (as well as most provinces) has developed the *Aboriginal Consultation and Accommodation, updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), a consultative process which is to be followed by federal departments in their dealings with Aboriginal communities. This document refers to changes "in regulation or policy that may restrict land use" as a form of governmental conduct which may call for consultation.

[62] Moreover, it is open to First Nations and band representatives to lobby government officials and members of Parliament to ensure that their interests and grievances are taken into account. They may also seek to be heard before parliamentary committees once a bill is introduced in the House of Commons or the Senate. While these various forums may not be sufficient to meet the obligations deriving from the duty to consult, they can, at the very least, serve to alert parliamentarians and inform the public of any objections a group may have with a proposed course of legislative action. Voicing concerns in such a way may lead to amendments being adopted within the various stages of review of a bill which occur before a statute has been formally enacted.

[63] Of course, consultation and accommodation may be necessary in carrying out a statutory regime. It is at that stage that strategic planning decisions are made which may adversely impact asserted treaty or Aboriginal rights. To the extent that the impugned decisions directly derive from the policy choices embedded in a statute, the validity of such a statute may be called into question and consultation prior to the adoption of that statute will be a key factor in determining whether the infringement of an Aboriginal or treaty right is justified. But courts cannot and should not intervene before a statute is actually adopted. To come to the opposite conclusion would stifle parliamentary sovereignty and would cause undue delay in the legislative process. This is the very vehicle through which many reform initiatives, including those necessary for the proper development and recognition of Aboriginal rights and interests, are adopted.

## V. Conclusion

[64] For all of the foregoing reasons, I am therefore of the view that the appeal should be granted and that the declaration made by the Federal Court should be struck, with costs in the Federal Court and in this Court. As a result, the cross-appeal should also be dismissed without costs.

"Yves de Montigny"

J.A.

"I agree

Wyman W. Webb J.A."

**PELLETIER J.A.(Concurring Reasons)**

[65] I come to the same conclusion as my colleague but for different reasons.

[66] The Attorney General objects to the Mikisew Cree First Nation's (the Mikisew Cree) proceeding on the ground that it does not meet the procedural constraints imposed by sections 2, 18 and 18.1 of the *Federal Courts Act*, specifically that it does not challenge a decision of a federal board, commission or tribunal. She also argues that the relief sought by the Mikisew Cree amounts to an impermissible encroachment on Parliament's right to legislate as it sees fit, without any procedural constraints other than those specifically provided for in the Constitution. The Attorney General therefore asks that her appeal be allowed and that the Mikisew Cree's notice of application be dismissed with costs.

[67] The Mikisew Cree take issue with the Attorney General's characterization of their proceeding. They say that they are simply seeking a declaration that the Ministers and public officials who prepared the policy statements which were put before the Cabinet as a basis for the environmental legislation contained in Bills C-38 and C-45 had a duty to consult with them in the process of elaborating the policy positions which ultimately became the basis for the amended environmental legislation. They ask that the Federal Court's decision be set aside and that their claim for relief should be allowed in full.

[68] I would allow the appeal, set aside the decision of the Federal Court and dismiss the Mikisew Cree's notice of application with costs in the Federal Court and one set of costs in this Court. As a result, I would also dismiss the cross-appeal.

[69] For ease of reference, I will refer to the amendments to environmental legislation which the Mikisew Cree say triggered the Crown's duty to consult them as the Amendments. More specifically, the Amendments refer to amendments to the *Fisheries Act*, R.S.C. 1985, c. F-14, the *Species at Risk Act*, S.C. 2002, c. 29, the *Navigable Waters Protection Act (*renamed the *Navigation Protection Act*), R.S.C. 1985, c. N-22 and to the repeal of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 and the enactment of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

[70] The Attorney General's argument with respect to section 18 depends upon her view that the Mikisew Cree have drawn an invalid distinction between the executive portion of the legislative process and the purely legislative part of that process. The Attorney General's position is that the legislative process is indivisible, relying upon jurisprudence such as *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 1991 CanLII 74 at paragraph 63 [*Reference re Canada Assistance Plan (B.C.)*]. The Attorney General concludes from this that every step that precedes the introduction of a bill into Parliament is an aspect of the Parliamentary process and as such is immune to challenge pursuant to section 18 of the *Federal Courts Act* because Parliament is specifically excluded from the definition of a "federal board, commission or other tribunal" in section 2 of the *Federal Courts Act*.

[71] In my view, even if the Mikisew Cree's notice of application fails as an application for judicial review, it is nonetheless justiciable as a claim for relief against the Crown pursuant to section 17 of the *Federal Courts Act*, even though it may be procedurally flawed. This is because of the nature of the relief sought by the Mikisew Cree.

[72] At this point, it is useful to refer to the prayer for relief in the Mikisew Cree's notice of application.

> The Applicant makes application for:
>
> 1. A declaration that all or certain of the Ministers have a duty to consult with Mikisew Cree First Nation regarding the development of environmental policies described in detail below:
>
> 2. A declaration that all or certain of the Ministers had and continue to have a duty to consult with Mikisew Cree First Nation regarding the development and introduction of Bill C-38 and Bill C-45, to the extent that the legislation addressed or implemented the environmental policies;
>
> 3. A declaration that all or certain of the Ministers breached and continue to breach their duty to consult Mikisew Cree First Nation regarding the federal environmental policies, including Bill C-38 and Bill C-45;
>
> 4. A declaration that the Ministers and the Governor in Council are required to consult with Mikisew Cree First Nation regarding the matters set out above to ensure that the Government of Canada ("Canada") implements whatever measures are necessary for it to fulfill its obligations under Treaty 8;
>
> 5. An order that the Ministers not take any further steps or action that would reduce, remove, or limit Canada's role in any environmental assessment that is being carried out, or that may be carried out in the future, in Mikisew Cree First Nation's traditional territory until adequate consultation is complete;
>
> 6. Such directions as may be necessary to make this order effective;
>
> 7. An order that any party may apply to the Court for further directions with respect to the conduct of the consultation as may be necessary;
>
> …

[73] The relief sought is primarily declaratory with ancillary orders in support of the declarations. The order sought at paragraph 5 of the prayer for relief could be characterized as injunctive relief but the drafters of the application chose not to do so. Declaration and judicial review are not coterminous. As this Court said in *Ward v. Samson Cree Nation No. 444*, 247 N.R. 254, 1999 CanLII 8641 (F.C.A.) at paragraphs 35-36:

> Actions for declarations of right have been recognized in the law long before the notion of judicial review of administrative action was ever conceived. To contend, as the appellants do, that whenever a party seeks a declaration, that party is seeking judicial review, is to place a limitation on the jurisdiction of this Court that is not only unwarranted, but is wrong in law.
>
> Rule 64 of the *Federal Court Rules 1998*, clearly recognizes the jurisdiction of this Court to grant a declaration of right *simpliciter*. That Rule reads:
>
> | | |
> |---|---|
> | 64. No proceeding is subject to challenge on the ground that only a declaratory order is sought, and the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed. | 64. Il ne peut être fait opposition à une instance au motif qu'elle ne vise que l'obtention d'un jugement déclaratoire, et la Cour peut faire des déclarations de droit qui lient les parties à l'instance, qu'une réparation soit ou puisse être demandée ou non en conséquence. |

[74] A declaration can be obtained by application or by action. One example among many of an action seeking a declaration in the Aboriginal Law context is *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6, [2013] 2 F.C.R. 268 where a group of Métis brought an action seeking a declaration confirming their status as Indians, within the meaning of section 91(24) of the *Constitution Act, 1867*, as well as declarations confirming the Crown's fiduciary obligations to them and their right to be consulted about decisions affecting their rights and interests as an Aboriginal people. The action was not challenged on procedural grounds, nor could it have been.

[75] If a declaration can be obtained in an action as well as in an application, then the fact that a declaration is sought in an application (as opposed to an action) against someone other than a federal board, commission or tribunal does not doom it to failure. While such a proceeding may not be an application for judicial review – it does not challenge the exercise of executive power derived from Crown prerogative or an Act of Parliament – it may nonetheless seek a remedy which the Federal Court has the power to grant under section 17 rather than section 18 of the *Federal Courts Act*.

[76] This can be seen when one examines relevant portions of sections 17, 18 and 18.1:

| | |
|---|---|
| 17 (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown. | 17 (1) Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, la Cour fédérale a competence concurrente, en première instance, dans les cas de demande de reparation contre la Couronne. |
| 18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction | 18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour : |
| (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and | a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral; |
| (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal. | b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral. |
| (3) The remedies provided for in | (3) Les recours prévus aux |

| | |
|---|---|
| subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1. | paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire. |
| 18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. | 18.1 (1) Une demande contrôle judicaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. |

[77] It may be that relief in the nature of a writ *certiorari*, a writ of prohibition, a writ of *mandamus* or writ of *quo warranto* does not lie against anyone other than a federal board, commission or tribunal so that a proceeding which seeks that relief against anyone else cannot succeed. But because declaration (and injunction) is available by way of action against the Crown, the characterization of the respondent as a federal board, commission or tribunal is not critical to the success or failure of a proceeding seeking a declaration.

[78] Section 18 does not constrain the jurisdiction of the Federal Courts granted by section 17. Rather, section 18 is a constraint on the jurisdiction of the provincial superior courts: *Canada (AG) v. Telezone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at para. 5. Combined with section 18.1, it restricts the availability of certain remedies against federal boards, commissions and tribunals to applications to the Federal Court for judicial review. Though declarations are listed as one of the types of relief, section 18 does not restrict the availability of declaratory relief in proceedings other than judicial review of federal boards, commissions and tribunals.

[79] It may be that the Mikisew Cree's proceeding was not properly commenced as an application but Rule 57 of the *Federal Courts Rules*, SOR/98-106 provides that "[a]n originating

document shall not be set aside only on the ground that a different originating document should have been used." The result is an irregularity which could have been corrected at an earlier point in these proceedings pursuant to Rules 56 and 58-60. While it remains a procedural irregularity, it is not determinative of the outcome.

[80] On the other hand, if I were to accept the Mikisew Cree's characterization of the actions taken by public servants and Ministers leading up to the introduction of a bill (what the Mikisew Cree refer to as steps 1 to 3 in the process) as actions in their roles as members of the Executive, then the federal board, commission or tribunal requirement in section 18 would be met. Whether these actions constitute an identifiable 'decision' is not a bar to judicial review. In *Krause v. Canada*, [1999] 2 F.C.R. 476, 1999 CanLII 9338 [*Krause*], this Court held that the exercise of jurisdiction under section 18 does not depend upon the existence of a decision or order. The word "matter" in subsection 18.1(1) is wide enough to cover a variety of administrative actions: *Krause* at paras. 21-24.

[81] This Court recently relied on *Krause* in *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605, to the same effect.

[82] As a result, I do not believe that their application is doomed to fail as a result of what may be a simple procedural irregularity. In my view, this simply means that the Mikisew Cree's entitlement to the declarations they seek must be decided on the merits.

[83] The Attorney General raised a second objection to the Mikisew Cree's application, saying that the relief they sought was barred by the doctrine of the separation of powers, recognized in cases such as *Ontario v. Criminal Lawyers Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3 at paragraphs 27-31. One of the incidents of this doctrine is that the courts cannot and will not interfere with the work of the federal and provincial legislatures. This principle has been articulated in *Reference re Canada Assistance Plan (B.C.)* at paragraphs 60-65, and in the other cases cited by my colleague. A further consequence of this doctrine is that courts will only "come into the picture" once the legislature's work has been done: *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 785, 1981 CanLII 25.

[84] In my view, the argument as to separation of powers conflates two questions. Does the duty to consult arise? If it does arise, how is it to be given effect? If there is a right, it is not beyond the ingenuity of the Courts to craft an appropriate remedy.

[85] In drafting their application, the Mikisew Cree have been careful to limit the duty to consult to the policy development stage, asserting that this is a separate and distinct activity in the legislative process to which the duty to consult may apply. This was a carefully considered choice, one of the consequences of which is that the Mikisew Cree have not directly challenged the validity of the Amendments.

[86] While the Mikisew Cree did not dwell on the scope of the legislation under contemplation in the policy development process, it may be that their proposition looks rather different depending upon the scope of the legislation. A single purpose law which authorizes a

particular project affecting a particular First Nation's interest in a specific territory may give rise to different considerations than a law of general application which affects the whole of Canada's territory and all of its occupants, albeit in varying degrees.

[87] Putting the matter another way, the duty to consult would undoubtedly be triggered by the executive's approval of a project which adversely affected a First Nation's interest in a given territory. Can it be said that the duty to consult would not be triggered if the same project were approved and set in motion in a special law passed for that purpose? While this is not the case we have to decide, it does highlight the point that the argument that the legislative process is indivisible, from policy development to vice-regal approval, may be problematic in other circumstances.

[88] In this case, we are faced with 2 omnibus bills which, upon being enacted, resulted in the Amendments which are in issue here. The legislative changes are of general application across Canada and affect all Canadians to a greater or lesser extent. The Attorney General conceded that the effect of these legislative changes upon the Mikisew Cree's territory was not speculative. These effects are not limited to the Mikisew Cree's territory and will undoubtedly affect other similarly situated Aboriginal groups.

[89] The Supreme Court has held that the duty to consult arises when Aboriginal peoples whose Aboriginal or treaty claims to the enjoyment or preservation of specific territories are threatened by action over which the Crown has a right of control, either directly or indirectly. At paragraph 46, my colleague sets out a number of such instances where the Crown's action was a

'strategic, higher-level decision.' In those cases, the honour of the Crown requires the Crown to consult with the affected Aboriginal group, to take their concerns into account and potentially to accommodate them when authorizing conduct which may impact upon their use and enjoyment of the territory in which they have an interest: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 511, [2004] 3 S.C.R. 511 at paras. 37, 39 [*Haida Nation*].

[90] The Mikisew Cree seek to extend the duty to consult by invoking it in respect of changes to environmental legislation, changes whose application is not specific to them or to their territory. The impacts of the Amendments, while conceded to be non-speculative in the case of the Mikisew Cree, are of unknown severity and would likely vary in severity in relation to various similarly affected Aboriginal groups. Because of the non-specific nature of these changes, if the Crown owes the Mikisew a duty to consult them, then it also owes the same duty to an unknown number of other similarly situated Aboriginal groups, the content of that duty varying according to the extent of the impact of the Amendments on the territory over which they claim an interest: *Haida Nation* at paras. 43-45.

[91] In these circumstances, I am of the view that the honour of the Crown vis a vis Aboriginal peoples was not engaged by the Amendments because the duty to consult is not triggered by legislation of general application whose effects are not specific to particular Aboriginal peoples or to the territories in which they have or claim an interest. The origin and development of the duty to consult does not support the view that it requires the Crown to consult with Aboriginal peoples in cases where the governmental action is aimed at the whole of the territory of Canada and all of its peoples. In my view, the question of whether governmental

action giving rise to the duty to consult includes legislative action, a question left open in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 at paragraph 44 must be answered in the negative insofar as the legislation in issue is of general application.

[92] The duty to consult cannot be conceived in such a way as to render effective government impossible. Imposing a duty to consult with all Aboriginal peoples over legislation of general application would severely hamper the ability of government to act in the interests of all Canadians, both Aboriginal and non-Aboriginal. Consultation takes time and the more groups there are to be consulted, the more complex and time-consuming the consultations. At some point the ability to govern in the public interest can be overwhelmed by the need to take into account special interests.

[93] This Court has already recognized the need to be sensitive to the consequences of extending the duty to consult:

> Taken to its extreme, the appellant's position would require the Minister of Finance – before the annual budget speech in the House of Commons, on every measure in it that might possibly affect the investment and development climate – to consult with every First Nation, large or small, whose claimed lands might conceivably or imaginatively be affected, no matter how insignificantly. Such a tenuous triggering and aggressive application of the duty to consult would undercut one of its aims, namely respect for "countervailing Crown interests" – in this example, the Crown's interest in workable governance (citation omitted).
>
> *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737 at para. 120.

[94] In his text, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2004) at 64, Professor Newman urged caution in applying a duty to consult in an area which affects Aboriginal peoples even more directly than the legislation in issue here:

> Moreover, the reform of any pieces of legislation having broad effects on Aboriginal communities, such as the *Indian Act* or such as any legislation relating to Aboriginal education issues, could become even more hampered than at present if subject to the legal technicalities of the duty to consult. Quite simply, there are bound to be a variety of views in different Aboriginal communities, and the application of a technical legal doctrine concerning consultation at the very least complicates dramatically questions related to such legislative reform. Application of the duty to legislative action might seem like just a simple logical extension and a means of protecting Aboriginal communities, but there are some possible arguments that it would have negative effects on democracy generally and on legislative reform in the very areas where Aboriginal communities need reform. In my view, the courts should remain extremely cautious in this particular area.

[95] I would simply add that the caution which he urges is all the more compelling when the legislation at issue is legislation of general application.

[96] A similar note of caution was struck by the Supreme Court in *Reference Re Canada Assistance Plan (B.C.)* at 559. The issue there was the doctrine of legitimate expectations, which does not arise here, but the concerns with respect to the ability of a government to act reflect my own:

> Parliamentary government would be paralyzed if the doctrine of legitimate expectations could be applied to prevent the government from introducing legislation in Parliament. Such expectations might be created by statements during an election campaign. The business of government would be stalled while the application of the doctrine and its effect was argued out in the courts.

[97] This is not to minimize the Crown's obligations to Aboriginal peoples in circumstances where their particular interests are liable to be affected. I accept that the consultation process

may not always be easy and that it may sometimes be difficult and time consuming. So be it. That is the price of meeting the obligations which Canada has to its Aboriginal peoples. But the threshold at which the duty to consult arises cannot be set so low that it is triggered by legislative action which is not aimed at specific Aboriginal groups or to territories in which they have, or claim, an interest. The duty must be found in the decisions by which such legislation is operationalized.

[98] The Yukon Court of Appeal came to the same conclusion in *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100, when it held, at paragraph 39:

> I acknowledge that in *Rio Tinto* the Supreme Court of Canada left open the question of whether "government conduct" includes legislative action. I read that reservation narrowly, however. It may be that the doctrine of parliamentary sovereignty precludes the imposition of a requirement that governments consult with First Nations before introducing legislation (see *Reference Re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525 at 563). Such a limitation on the duty to consult would, however, only apply to the introduction of the legislation itself, and could not justify the absence of consultation in the carrying out of a statutory regime.

[99] If the legislation does not provide any mechanism by which that duty to consult may be invoked, the legislation may itself be defective. As noted above, the Mikisew Cree have chosen not to attack the legislation.

[100] Given my view that there is no duty to consult with respect to laws of general application, the question of where in the legislative process that consultation might occur does not arise. To that extent, the distinction which the Mikisew Cree seek to draw between policy development and the legislative process does not assist them in this case. I arrive at this conclusion not on the

basis that the legislative process is indivisible but rather on the basis that if the duty to consult does not arise, the question of the modalities of that consultation does not arise either.

[101] In the result, I would allow the appeal, set aside the judgment of the Federal Court and dismiss the Mikisew Cree's application with costs in the Federal Court and in this Court. I would dismiss the cross-appeal without costs.

"J.D. Denis Pelletier"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-29-15 |
| **STYLE OF CAUSE:** | THE GOVERNOR GENERAL IN COUNCIL ET AL. v. CHIEF STEVE COURTOREILLE ON BEHALF OF HIMSELF AND THE MEMBERS OF THE MIKISEW CREE FIRST NATION |
| **PLACE OF HEARING:** | EDMONTON, ALBERTA |
| **DATE OF HEARING:** | MAY 12, 2016 |
| **REASONS FOR JUDGMENT BY:** | DE MONTIGNY J.A. |
| **CONCURRED IN BY:** | WEBB J.A. |
| **CONCURRING REASONS BY:** | PELLETIER J.A. |
| **DATED:** | DECEMBER 7, 2016 |

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