IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Squamish Nation v. British Columbia (Community, Sport and Cultural Development),* 2014 BCSC 991

Date: 20140604
Docket: S133374
Registry: Vancouver

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Between:

Squamish Nation as represented by Chief Gibby Jacob on his own behalf and on behalf of the members of the Squamish Indian Band and Lil'wat Nation as represented by Chief Lucinda Phillips on her own behalf and on behalf of the members of the Mount Currie Indian Band

Petitioners

And

Her Majesty the Queen in Right of British Columbia, as represented by the Minister of Community, Sport and Cultural Development, The Honourable William Bennett and The Resort Municipality of Whistler

Respondents

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Petitioners:	G.J. McDade, Q.C. P.J. Millerd
Counsel for the Respondents, British Columbia (Community, Sport and Cultural Development), and The Honourable William Bennett:	G.R. Thompson A.K. Cousins
Counsel for the Respondent, The Resort Municipality of Whistler:	R. Harding
Place and Date of Trial/Hearing:	Vancouver, B.C. November 18 - 22, 2013, and January 27 - 29, 2014
Place and Date of Judgment:	Vancouver, B.C. June 4, 2014

[1] The Squamish and Lil'wat Nations (the "Nations") have brought this petition to challenge the decision of the Minister of Community, Sport and Cultural Development (the "Minister") made pursuant to s. 11 of the *Resort Municipality of Whistler Act,* R.S.B.C. 1996, c. 407 ("*RMOW Act*"), to approve the Resort Municipality of Whistler's ("Whistler" or "RMOW") 2011 Official Community Plan ("OCP").

[2] The Nations argue that the Province did not fulfill its duty to consult with them regarding potential adverse impacts that the OCP may have on land which is subject to Aboriginal title claims. The particular concern of the Nations focuses on those portions of the OCP that restrict Whistler's accommodation capacity, which the Nations say could adversely affect their economic interests in their traditional territory.

[3] This petition raises three issues. First, whether the honour of the Crown required the Province to engage in consultation before the Minister approved the 2011 OCP. Second, if there was a duty to consult, what scope of consultation was required. Third, whether the Province's consultation process fulfilled the duty to consult.

[4] I will first describe the Petitioners and the Respondents, the legislative context in which they operate and the background of negotiations and agreements they are parties to. I will then outline the consultation process that took place leading up to the approval of the OCP before turning to my analysis of the legal issues.

[5] For the reasons which follow I have concluded the Minister incorrectly assessed the nature and scope of the consultation duty arising under these circumstances and that the consultation which occurred between the Minister and the Nations was not adequate to maintain the honour of the Crown.

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The Petitioners

[6] The Squamish and Lil'wat are both bands within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. It is not disputed the Squamish and Lil'wat people are both "aboriginal peoples" within the meaning of s. 35 of the *Constitution Act, 1982*.

[7] The Nations assert shared Aboriginal title over the area within the boundaries of Whistler. In 2001, the Nations entered into a formal protocol in which they recognized they shared a joint claim to title and agreed to work together on issues of concern relating to their asserted claim.

[8] The Nations have entered into various agreements with the Province and Whistler which deal with the interests of both parties. I will review these agreements later in this decision.

The Province and Whistler

Relevant Legislation

RMOW Act

[9] Whistler is one of the few local governments in British Columbia which is required to have its OCP approved by the Minister. Sections 9 to 11of the *RMOW Act* provide:

> **9** (1) The minister must, by regulation, enact an official community plan for the municipality.
>
> (2) An official community plan under subsection (1) has the same effect as if it were adopted by council under Division 2 of Part 26 of the *Local Government Act* and may be amended in accordance with the provisions of that Division or by a regulation made by the minister.
>
> **10** (1) Without limiting sections 1 to 9, the minister may make regulations as follows:
>
> > …
> >
> > (e) enacting or amending an official community plan under section 9, and
> >
> > …
>
> **11** (1) An official community plan does not take effect until it is approved in writing by the minister.
>
> …

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***Local Government Act*, R.S.B.C. 1996, c. 323 ("*LG Act*")**

[10] An OCP is described in s. 875(1) of the *LG Act* as "a statement of objectives and policies to guide decisions on planning and land use management, within the area covered by the plan, respecting the purposes of local government."

[11] The effect of an OCP is set out in s. 884 of the *LG Act*:

> **884** (1) An official community plan does not commit or authorize a municipality, regional district or improvement district to proceed with any project that is specified in the plan.
>
> (2) All bylaws enacted or works undertaken by a council, board or greater board, or by the trustees of an improvement district, after the adoption of
>
> > (a) an official community plan, or
> >
> > (b) an official community plan under section 711 of the *Municipal Act*, R.S.B.C. 1979, c. 290, or an official settlement plan under section 809 of that Act before the repeal of those sections became effective,
>
> must be consistent with the relevant plan.
>
> [Emphasis added.]

[12] Although the Province can order a municipality to change or amend an OCP to address a provincial interest pursuant to s. 874 of the *LG Act*, the Province acknowledged in its argument that this authority would likely be utilized only under "extraordinary circumstances".

[13] Section 879 of the *LG Act* creates a statutory mandate for the local government to engage in public consultation, including consultation with First Nations:

> **879** (1) During the development of an official community plan, or the repeal or amendment of an official community plan, the proposing local government must provide one or more opportunities it considers appropriate for consultation with persons, organizations and authorities it considers will be affected.
>
> (2) For the purposes of subsection (1), the local government must
>
> > (a) consider whether the opportunities for consultation with one or more of the persons, organizations and authorities should be early and ongoing, and
> >
> > (b) specifically consider whether consultation is required with

(i) the board of the regional district in which the area covered by the plan is located, in the case of a municipal official community plan,

(ii) the board of any regional district that is adjacent to the area covered by the plan,

(iii) the council of any municipality that is adjacent to the area covered by the plan,

(iv) first nations,

(v) school district boards, greater boards and improvement district boards, and

(vi) the Provincial and federal governments and their agencies.

[Emphasis added.]

(3) Consultation under this section is in addition to the public hearing required under section 882 (3) (d).

[14] Section 895(1) of the *LG Act* reads:

> **895** (1) A local government that has adopted an official community plan bylaw or a zoning bylaw must, by bylaw, define procedures under which an owner of land may apply for an amendment to the plan or bylaw or for the issue of a permit under this Part.

[15] Section 903 provides that a local government may by bylaw, amongst other things, regulate the location, use and density of lands, buildings and other structures within its boundaries.

Background

[16] Whistler was created by statute in 1975 to facilitate the growth of a destination mountain resort community in the southern portion of the Squamish-Lillooet Regional District ("SLRD").

[17] The current boundaries of Whistler encompass over 60,000 acres of land, the vast majority of which is undeveloped Crown land. The Whistler Land Use Map includes an Urban Development Containment Area and a large area of Crown land, which includes the Whistler/Blackcomb Controlled Recreation Area.

[18] The population of the SLRD has been growing rapidly since Whistler was created, nearly doubling from 16,000 to 35,000 residents from 1976 to 2006. The population is projected to double again in the next 30 years. About a third of this

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population live in Whistler, although on peak holiday weekends Whistler attracts up to 45,000 people.

[19] Bed units are used by Whistler as a measure of development which is "intended to reflect servicing and facility requirements for one person. Different accommodation types and sizes are allocated a specified number of bed units based on the gross floor area of the unit …" (2011 OCP definition).

The 1993 OCP

[20] The immediately preceding OCP for Whistler was enacted in 1993 ("1993 OCP"). That plan had been amended many times prior to Whistler commencing the process to draft the new OCP which is the subject of this litigation.

[21] The 1993 OCP, as amended, limited the development of accommodation to "development areas" and established criteria for bylaw amendments increasing bed unit capacity. There was little or no reference to First Nations territorial claims or interests (or indeed any reference to either First Nation) in the 1993 OCP.

[22] The 1993 OCP contained these provisions concerning growth, bed units and residential accommodation:

> 4.1 RESIDENTIAL AND COMMERCIAL ACCOMMODATION
>
> *BACKGROUND*
>
> *There is concern in Whistler with the changes that will occur as the community grows from its current capacity of approximately 30,000 bed units to the current committed size of approximately 52,600 under current OCP and zoning designations. <u>At present, there appears to be little need to further increase the ultimate size of Whistler, as the community already has considerable remaining approved capacity for all forms of development.</u> It is imperative to make good use of the "breathing room" afforded over the short term to comprehensively address questions about the long-range future of Whistler. <u>Because there is already significant capacity for additional development, the Municipality will be very careful about considering additional approvals.</u> The Comprehensive Development Strategy describes how the Municipality will use the results from the extensive monitoring system and community consultation to determine what kinds and amounts, if any, of additional development capacity should be approved.*
>
> …

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4.13 EVALUATING PROPOSALS FOR OCP AND ZONING AMENDMENTS (Bylaw 1938, 2010)

BACKGROUND

The approach to considering development proposals is based entirely on the growth management strategy and policies contained in the Comprehensive Development Plan.

Proposed amendments to the OCP or Zoning Bylaw, especially those which would significantly increase the accommodation capacity within the existing Municipal boundaries, will only be approved under very special circumstances, and must comply with the criteria under this section. These criteria have been prepared to ensure that the goals and objectives of the Official Community Plan and the Comprehensive Development Plan are satisfied. Proposed OCP amendments or rezonings that are of a minor or technical nature must conform with this Part, but it is assumed that the evaluations can be brief and quickly conducted.

…

4.13.2 Proposed OCP amendments or rezonings that increase the bed-unit capacity of the Municipality will only be considered if the development:

a) provides clear and substantial benefits to the community and the resort;

b) is supported by the community, in the opinion of Council;

c) will not cause unacceptable impacts on the community, resort, or environment; and

d) meets all applicable criteria set out in the Official Community Plan.

The Municipality will annually review its growth management policies and determine what kinds and amounts of additional development, if any, are appropriate, necessary, or regarded as likely to yield benefits to the community and the resort. If this annual review identifies kinds of development that should be considered, the Municipality will consider amending the Official Community Plan.

4.13.3 All proposed developments must meet the following mandatory conditions:

a) The project must be capable of being served by Municipal water, sewer and fire protection services, or by an alternate means satisfactory to the Municipality.

b) The project must be accessible via the local road system.

c) The project must comply with all applicable policies of the OCP.

…

[Emphasis added.]

[23] I turn now to describe some of the negotiations and agreements in place between Whistler, the Province and the Nations.

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Other Agreements and Negotiations between the Parties

Shared Legacies Agreement

[24] On November 22, 2002 the Nations, the Vancouver 2010 Bid Corporation and the Province entered into the agreement Partners Creating Shared Legacies from the 2010 Olympic and Paralympic Winter Games (the "Shared Legacies Agreement").

[25] The preamble states:

> On March 22, 2001, the Squamish and Lil'wat Nations (the Nations) signed an historic Protocol Agreement to work together on issues of concern within their shared territories and identified three major common objectives - to respect the Nations' historic and current presence in the region, to protect the Nations' Aboriginal rights and title, and to take advantage of economic opportunities, including the proposed hosting of the 2010 Olympic Winter Games in areas of Vancouver and of Whistler.
>
> …
>
> Fourteen of the 20 Olympic and Paralympic events are scheduled to take place in the Nations' shared territories, nine Olympic events and all five Paralympic events.
>
> The Nations were invited to participate and have been welcomed by member partners of the Vancouver 2010 Bid Corporation. The Nations have representation on the Board of Directors, on the Executive Committee and all relevant work groups. The Bid Corporation, and the federal and provincial governments have assisted the Nations in establishing an Aboriginal Secretariat to ensure that the Nations' interests are accommodated in the Bid process.
>
> …
>
> Recognizing that the Games would take place in their shared territories, the Nations have welcomed the opportunity to create new partnerships, to help plan and host a successful Games, and to share in the legacies and benefits of the Games.
>
> …
>
> **LANDS FOR ECONOMIC DEVELOPMENT**
>
> - The Province has agreed to provide 300 acres of fee simple land (the lands) for the Nations to pursue economic development opportunities within their shared territories.
> - The lands can be selected as several parcels in different areas or as one continuous parcel.

- The lands, and all surface resources related to the lands, will be transferred to the Nations, or an entity set up by the Nations, at no costs to the Nations or the entity.
- The exact location and use of these lands will be determined by the Nations jointly with the Province after consultation with the Nations' communities and after review of a feasibility study.

[Emphasis added.]

[26] The parties also agreed the Province would contribute funds to provide skill training; to initiate a "Naming and Recognition Project" to provide "recognition and a sense of pride to the Nations in their territories"; and to contribute to the construction of a First Nations "Cultural Centre" within Whistler.

[27] The Province also agreed to provide the Nations with shared ownership of a society which was to own, manage and operate a number of new athletic facilities to be built for the 2010 Olympics and to provide housing and economic opportunities to the Nations by providing significant contract opportunities.

Legacy Land Agreement ("LLA")

[28] The LLA, dated May 23, 2007 was a further agreement between both Nations and Whistler to resolve issues that arose from the 300 acres granted to the Nations (the "Legacy Lands") by the Shared Legacies Agreement. The agreement followed Letters of Mutual Understanding signed between the Province and the Nations and Whistler and the Nations which concerned the transfer and development of the Legacy Lands.

[29] The LLA reflected a series of agreements reached on issues arising under the two Letters of Mutual Understanding concerning the development of the Legacy Lands, including "development rights for the Legacy Lands, the reallocation of Bed Units to the Nations and support by the Nations for a municipal boundary extension by Whistler". The parties agreed to "continue to work collaboratively to support their respective goals and objectives in connection with the 2010 Olympic and Paralympic Winter Games and related shared legacies".

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[30] The LLA provided that both Whistler and the Nations "respects the lawful jurisdiction of the others."

[31] Part 2 of the LLA covered "Land Use Development by the Nations" and included the following "Guiding Principles":

> 2.1 In relation to the land use decision making process expressly addressed in this Part, the following principles apply:
>
> (a) land use decisions in Whistler will be guided by Whistler 2020 and consistent with the Official Community Plan;
>
> (b) Whistler's Council and any officers when making land use decisions will consider the Squamish Nation's Xay Temixw Land Use Plan and Lil'Wat Nation's land use plan as approved by their respective Councils, as those plans may be amended by their Councils from time to time;
>
> (c) land use decisions in Whistler will be made in compliance with the *Community Charter*, *Local Government Act*, other applicable provincial and Whistler enactments, land use covenants granted in favour of Whistler and Whistler's other planning policies, guidelines and standards;
>
> (d) the land use decision making authority of Whistler Council's approving officer, or any other Whistler officers making discretionary land use decisions cannot be fettered;
>
> (e) the Nations' Councils' discretionary decision making cannot be fettered;
>
> (f) Whistler and the Nations will work collaboratively to support the tourism economy;
>
> …
>
> [Emphasis added.]

[32] Section 2.10 contained specific reference to "Bed Units":

> In recognition of the Bed Units allocated to the Nations or their nominees by the Province and Whistler, Whistler will, subject to section 2.1 and 2.7, consider rezoning applications made by the Nations or their nominees, as applicable, in accordance with Whistler's Policy for Residential Bed Units and Growth Management adopted by Whistler's Council on August 2, 2005. As of the reference date of this Agreement, Whistler will allocate approximately 224 Bed Units from the existing inventory of undeveloped Bed Units available from the Cressey and Holburn developments as Bed Units that are available for future development by the Nations or their nominees, and allocate 228 Bed Units previously surrendered to the Province as

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> Bed Units that are available for future development by the Nations or their nominees.
>
> [Emphasis added.]

[33] The LLA contained these further provisions concerning Whistler's bylaws and future development:

> **Whistler's Bylaws**
>
> 2.13 Land and improvements held by the Nations in Whistler and any development by the Nations in Whistler will be subject to all lawful Whistler bylaws and orders despite any rule of law, court decision or enactment to the contrary that would exempt the Nations because of their aboriginal status.
>
> **Future Development**
>
> 2.14 Whistler will, from time to time, consider in accordance with section 2.1 the securing of Bed Units for the Legacy Land, other than the Alpine North Lands, within the then existing Bed Unit cap.
>
> [Emphasis added.]

[34] In Part 4, "Land Transfers from Province to Whistler", the parties stated:

> 4.1 The parties acknowledge that this Agreement is not intended to be an agreement in respect of consultation or accommodation for aboriginal rights and title, and nothing in this Agreement will be construed as consultation or accommodation for any future specific project, action or decision that would otherwise require or create a duty for consultation or accommodation of the Nations' aboriginal rights or title, pursuant to or under the constitution or the laws of Canada.

Agreement on Land Use Planning - The Squamish Nation ("SLUP")

[35] The SLUP was entered into between the Squamish Nation and the Province (Minister of Agriculture and Lands) on July 26, 2007, reflecting negotiations between the parties concerning land use planning within the Sea to Sky Land and Resource Management Plan area ("LRMP"), which included portions of the claimed traditional territory of the Squamish Nation.

[36] In the SLUP the parties recognise the position of the other regarding their respective claims to title: that the Squamish Nation asserts it holds Aboriginal title, rights and other interests to its traditional territory and claims "inherent sovereignty, jurisdiction and collective rights" over its "lands, waters and resources" and "intends

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to manage lands and resources in accordance with its laws, policies, customs and traditions" and that the Province asserts the lands, waters and resources within the Sea to Sky Management Plan area are Crown lands subject to the sovereignty of the Crown.

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[37] The positions of the parties regarding title to the lands are set out in the SLUP "to ensure that neither Party is taken to have admitted or acquiesced in the views of the other on these matters, for litigation purposes or otherwise".

[38] The SLUP defines certain "Wild Spirit Places", conservancies for the protection of biological diversity, wild land zones for the protection of wildlife habitat, remote wilderness places and their spiritual and cultural importance to the Squamish, special cultural management areas and cultural and village sites.

[39] Clauses 32 and 33 read:

> 32. The Parties agree to establish a government to government process on the following issues and continue to meet to seek agreement on issues not addressed in this agreement:
>
> > (a) Strategic land use for Payákéntsut (Callaghan) and Kwayatsut (Cheakamus) Wild Spirit Places;
> >
> > (b) Land use issues in the areas of the LRMP not covered by this agreement;
> >
> > (c) Crown Land development in the Front Country Zone; and
> >
> > (d) Other issues as agreed to by the Parties.
>
> 33. <u>This Agreement does not consider land use issues within municipal jurisdiction</u>.
>
> [Emphasis added.]

[40] As Clauses 32 and 33 provide, the SLUP does not deal with the portions of the traditional territory of the Squamish Nation that lie within the boundaries of Whistler. Rather, the SLUP establishes a government-to-government process, the Crown Lands Development Process, for reaching agreement on land use issues within the boundaries of Whistler.

[41] As of the date of the hearing of this petition, the parties have not yet come to an agreement regarding Crown land development, a large portion of which falls within Whistler.

[42] The Parties specifically dealt with the duty to consult and accommodate:

> 34. In consideration of this agreement and its implementation, the Squamish Nation agrees that it has been meaningfully consulted on that portion of the Sea to Sky LRMP covered by this Agreement.
>
> …
>
> 38. The Parties agree they will undertake a Crown lands development process, and that this agreement is not to be construed as resolving issues related to transfers, alienations or other changes in use of Crown land for development purposes.

Land Use Planning Agreement - Lil'wat Nation ("LLUP")

[43] A similar agreement to that entered into with the Squamish Nation was entered into with the Lil'wat Nation on April 11, 2008.

[44] Again the agreement set out the claim each party made to jurisdiction over the lands falling within the territory subject to the LLUP.

[45] The Lil'wat had drafted a land use plan representing their vision for managing the lands within their asserted territorial jurisdiction. That jurisdiction overlapped with the Sea-to-Sky LRMP. The parties agreed to engage in a process of "Government to Government land use discussions with a goal of harmonizing the LLUP and the Sea to Sky LRMP". The agreement identifies a number of site specific spiritual, cultural and ecological important areas and other areas of interest to the Lil'wat, including participation in tourism and recreational opportunities.

[46] The parties agreed to set up a consultation protocol within 12 months of the signing of the LLUP to govern land tenure decisions.

[47] The agreement provided:

> …
>
> 11.3.2 the protocol will be aimed specifically at decision on tenures for use of land and resources in Lil'wat Territory being

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considered by the Integrated Land Management Bureau of the Ministry of Agriculture and Lands;

11.3.3 the goal of the protocol is to establish appropriate levels of engagement and a meaningful role for the Lil'wat Nation in decisions affecting the use of land and resources in Lil'wat Territory, including involvement in a determination of the scope of consultation required and availability of adequate resourcing for a meaningful consultation process;

11.3.4 the Parties will explore specific opportunities to streamline and harmonize the consultation process;

…

11.3.6 the protocol will be consistent with the law on consultation.

11.4 The Parties may hold parallel discussions to explore opportunities for the Lil'wat Nation to participate in new economic opportunities for which the Integrated Land Management Bureau is the tenuring agency.

Other Agreements with the Nations

[48] In addition to the above agreements the Provincial Crown entered into agreements with both Nations in the Sea-to-Sky Highway Agreement (2005), the Forest and Range Agreement (2005) and the Forest Consultation and Revenue Sharing Agreement (2011).

[49] Whistler 2020 is a strategic planning document created in 2006 by Whistler to guide the municipality's growth. A Whistler Council report dated November 2, 2010, which recommended that the Council endorse consultation during the development of the OCP, stated that the "OCP update will create a regulatory framework for the ongoing implementation of Whistler 2020."

[50] The Sea-to-Sky LRMP is a sub-regional land use plan for the approximately 1,091,000 hectares of land stretching to the north of Greater Vancouver and to the east of the Sunshine Coast. LRMPs fall under the jurisdiction of the Province and do not apply to areas administered by municipal governments like Whistler. The LRMP "provides direction for future planning and management of natural resources, and a framework to resolve land use issues." It was approved by the Minister of Agriculture and Lands in April 2008, following a five year process of development and consultation between the Province, First Nations, and the public.

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[51] In June 2010 the Squamish Lillooet Regional District adopted bylaw No. 1062, a regional growth strategy ("RGS"), which was accepted by Whistler. The RGS recognized the importance of enhancing relationships with the Squamish and Lil'wat Nations in land use planning and servicing issues. Although the local First Nations are not signatories to the RGS, the document provides that the "strategic direction under RGS recognizes the implications for aboriginal communities and endeavors to set up processes to align Regional District and First Nations' visions and plans, without prejudice to the treaty negotiations or other negotiations with senior governments, recognizing that we have a common interest in a sustainable future."

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[52] Finally, the Province, through the Ministry of Forests, Lands and Natural Resources Operations, is currently in a formal consultation process with the Squamish and Lil'wat Nations in relation to the proposed extension of the Master Development Agreement for the Whistler and Blackcomb ski resort, a development which falls within Whistler's boundaries.

[53] I note that several of the agreements referred to above were entered into on a "without prejudice" basis to the parties' positions as to title of the lands subject to the agreement. I refer to the agreements not for the particular content but only because they are important to the background in this case and demonstrate the Crown and the Nations have, in the past, been involved in various relationships where they have engaged in consultations which have led to an accommodation of their respective interests.

The OCP Consultation between Whistler and the Nations

[54] Section 879 of the *LG Act*, as set out above, requires municipalities to engage in consultations with various persons, organizations and authorities prior to enacting a new OCP, including First Nations.

[55] In addition, the Ministry encourages local governments to engage directly with First Nations with regard to the latter's interests in the development of OCPs and to document their engagement efforts and provide a record of such engagement to the

Ministry in cases where the Minister is required by statute to ultimately approve the proposed OCP. The Minister then reviews the proposed bylaw and considers whether there are any potential adverse impacts on asserted Aboriginal rights or title which would give rise to a duty to consult.

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[56] I will set out the engagement process that took place between Whistler and the Nations in detail, as the Province ultimately relied on this engagement record in forming its conclusion about the consultation owed to the Nations.

[57] On May 21, 2010 Whistler wrote to both Nations advising them it was "preparing to begin the community process of rewriting our OCP" and informing them that as "a first step we would like to engage with both nations to understand the past historical use of the area as part of the lead in to the document".

[58] Little appears to have happened at least insofar as consultation with First Nations was concerned until the spring of the following year when Whistler passed a resolution at a special Council meeting on March 17, 2011 which read:

> AND WHEREAS Council is seeking further consultation on the draft Plan that it proposes to introduce for First Reading;
>
> AND WHEREAS the Lil'wat Nation and Squamish Nation have general claims and have indicated they claim aboriginal rights and entitlement in respect of areas within the Resort Municipality and therefore are an affected party within the meaning of section 879 of the *Local Government Act*;
>
> NOW THEREFORE Council resolves to direct staff to deliver the draft Plan to the Lil'wat Nation and Squamish Nation for further consultation under section 879 of the *Local Government Act*, and will give each First Nation 45 days to respond to the Resort Municipality, and staff will contact the administrators or Chiefs of the two First Nations directly to follow up prior to the expiry of the 45 days.

[59] The issue of the bed unit limit appears to have been raised at one of the first consultation meetings between the parties on June 10, 2011. Representatives of both Nations expressed concerns the bed unit limit would restrict their ability to develop the Legacy Lands and to take advantage of other opportunities for economic development. Whistler's meeting minutes note that the then mayor stated that there "has always been a cap on development and this will not grow unless

there is something special." There was a further meeting of June 13, 2011 which, in the main, dealt with sites of significance, a context statement and general cultural issues.

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[60] On August 23, 2011 the Nations sent a joint letter to Whistler and the Province:

> …The Squamish and Lil'wat Nations have aboriginal rights and title throughout the RMOW boundaries and, in particular, we have a substantial legal and cultural interest in relation to the future of Provincial Crown lands within the RMOW boundaries. Those lands also represent potential economic interests important to our Nations' futures.
>
> We wish to express our concern that your present OCP Draft and Planning Process does not adequately reflect or recognize the significant First Nation interests on those Crown lands.
>
> We respect RMOW's desire to control development through the OCP and PAN policy, but we ask that those policies also respect the legitimate aspirations of our Nations as well as our aboriginal rights and title. As presently contained within your draft OCP and PAN policy, we do not think that First Nation interests have been adequately considered. We are particularly concerned about the extent of provincial Crown land will be impacted by your draft plan.
>
> We note that Squamish and Lil'wat Nations are the owner of lands within RMOW boundaries acquired though accommodation agreements with the Province and can be expected to acquire more in the future. As First Nations, the Squamish and Lil'wat Nations also have aboriginal title that precedes the jurisdiction of RMOW and commands careful consideration. The OCP must reflect the present and potential future First Nation lands, and must reconcile our Nations' cultural and development objectives with those of RMOW within our overlapping boundaries.
>
> We appreciate that you have gone through a significant public process with your community members, and are well advanced in the planning process. We also appreciate your offer to consult with us and to allow us to write a "context statement" in the Introductory chapter.
>
> Unfortunately, we do not believe that this offer resolves the need to address substantive changes in the OCP itself, and to address the issue of First Nation interests in the Crown land areas within your boundaries. We believe a more robust consultation process with us is required, and will require that the OCP be redesigned to accommodate our concerns and allow for a more meaningful partnership between the RMOW and our Nations.
>
> We also expect that the Province will recognize the need to address First Nation interests and their own consultation obligations in respect of the OCP within a Resort Municipality, which will require changes to the OCP. We have not heard from the Province yet. We are prepared to address those changes in a co-operative discussion with yourselves and the Province, but that will

> mean that the OCP must remain in draft form until a more comprehensive consultation process can be completed.

[61] Whistler's Council responded by passing a resolution directing its staff to invite the Nations to a workshop to consult on the draft OCP and requested them to make final submissions before October 21, 2011.

[62] Legal counsel for the Nations met with Whistler representatives on October 18, 2011. Notes created of the meeting by a Whistler representative record that the Nations' legal counsel advised Whistler representatives the "current version of the OCP does not reflect the rights of each Nation to develop Crown land within the boundaries of the RMOW." Whistler responded that "rights to develop Crown land within RMOW boundaries are within provincial and federal authority, which trumps municipal jurisdiction. Therefore OCP policies are not relevant to the asserted rights and interests of these Nations in Whistler."

[63] On November 2, 2011 Whistler extended the deadline for the Nations to provide their final submissions on the draft OCP to December 2, 2011 and scheduled a subsequent meeting.

[64] Whistler gave First reading to the draft OCP on November 15, 2011, notwithstanding requests made by the Nations to wait until the result of a scheduled consultation meeting.

[65] A further consultation meeting was held November 17, 2011 between representatives of Whistler, the Nations and their legal counsel. The discussion quite quickly became focused on the Nations' intent that the 2011 OCP include reference to its economic interests, including land use and development, removal of the bed unit limit and Whistler's interest in restricting development. The Nations were not reassured by Whistler's insistence that it could consider individual development applications in the future and could amend the OCP after consideration of applications on a project by project basis. Whistler's minutes of the meeting reflect the then mayor as noting "the challenges presented in the conversations had today,

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and saw these as being another form of Provincial downloading, as the Province has failed to address the Nations['] land needs".

[66] Following the meeting and municipal elections, which occurred in late November 2011, the Nations sent Whistler proposed amendments to the OCP.

[67] The proposed amendments included the following addition:

> The Legacy Land Agreement was specific to those particular lands. The aboriginal title of the Lil'wat and Squamish Nations to other Crown lands within RMOW boundaries remains unresolved. The Lil'wat and Squamish Nations seek further economic activities on those Crown lands which must be resolved between the Province and the First Nations before this OCP can be effective.
>
> First Nations have economic as well as environmental and cultural aspirations within RMOW's boundaries. The development that has occurred to date within the RMOW has largely been without the participation of the Squamish and Lil'wat Nations. The historical development limits and bed unit caps have been placed without consultation with the First Nations, and without recognition of their legitimate rights to economic development of their aboriginal title lands. As Crown lands are returned to the First Nations through various processes, it would not be fair to apply to those fixed development limits and bed unit caps in a manner which would preclude fair opportunities for economic development with the First Nations. The Lil'wat and Squamish Nations and RMOW will need to work together to identify a means for priority application of remaining bed units to the First Nations, or to ensure that there will be exemptions for any First Nation-lead development.
>
> The constitutional obligations to First Nations have a greater precedence in law than the OCP, and this OCP should not be read or applied to exclude or restrict such First Nations development.
>
> …
>
> **Supporting Tourism and Economic Development**
>
> - Working with Whistler and the Province to further develop relationships and to explore opportunities to work together on economic and tourism related initiatives.
> - Planning sustainable First Nation developments on existing and future First Nation private lands within RMOW boundaries.
> - Working with Whistler and the Province to create appropriate land use planning tools to address First Nations economic development interests in Whistler.
>
> …
>
> The interests of First Nations to legitimate economic development must be considered in any growth management strategy. RMOW must work with First Nations to determine a strategy to prioritize First Nation access to bed units

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or to exempt them from the restrictions herein on Crown land. This OCP should not be read or applied to exclude or restrict such First Nations development.

[68] Representatives of Whistler and the Nations met April 2, 2012 and on July 13, 2012 Whistler sent the Nations a further revised draft OCP. The revisions to the OCP proposed by Whistler were substantial, and, while addressing some of the Nations' concerns, did not address the Nations' specific concern regarding economic development and the bed unit limit.

[69] The proposed revision included the following:

> The Sea to Sky Land and Resources Management Plan (LRMP) adopted by the Government of B.C. in 2008 serves as the primary land use planning document for the First Nations and the Province. The Squamish and Lil'wat Nations have each ratified a land use planning agreement with the Province that is included in the Sea to Sky LRMP. This OCP supports the land and resource management plan including the ratified land use planning agreements.
>
> RMOW recognizes the authority of the provincial and federal governments to address unresolved Aboriginal rights and title and their responsibility to the [sic] reach understanding with these First Nations to address their interests. RMOW is prepared to participate in these discussions, where applicable, and to work cooperatively towards solutions that meet the needs of all parties. The provisions of the OCP that protect certain lands from development furthers the opportunities for productive outcomes related to these matters in future.
>
> The OCP strives to continue and build on the effective partnership among the provincial government, First Nations and the RMOW initiated through the Legacy Land Agreement, further developed through the Sea to Sky LRMP and reconfirmed and strengthened by this plan. Consultation with First Nations conducted during the preparation of the plan identified the following specific First Nations interest in relation to matters addressed in the plan …

[70] Whistler scheduled a public open house to discuss the draft OCP for August 8, 2012 and a revised first reading and second reading of the OCP for August 21, 2012.

[71] Counsel for the Nations objected to the revised draft OCP in a letter to Whistler of July 31, 2012, advising the draft did not address a "key concern" of the Nations, that is "the purported application of the OCP to Crown lands, which are still subject to unresolved aboriginal rights and title, and the unfair impact upon First

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Nations of the consequential development freeze. The economic component of aboriginal title is a key issue that my clients desire to see addressed."

[72] Whistler deferred first and second reading of the OCP and agreed to meet with the Nations on September 10, 2012.

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[73] The proposed OCP contained a number of statements recognizing the Nation's traditional territory fell within the boundaries of Whistler and expressing Whistler's interest in pursuing and developing the Nations' cultural, historical and economic interests. The proposed OCP:

- included a separate First Nations context statement in which Whistler acknowledged that Whistler was in the traditional territory of both Nations;
- noted several economic, natural resource and cultural objectives identified by the Nations during the consultation process;
- contained a statement that Whistler would continue to work with the Nations to further their relationship and to explore opportunities to work together on economic and tourism related initiatives; and
- committed Whistler to work with the Nations to integrate First Nations' history and culture within Whistler and to consider documented heritage and cultural resources for the Nations' use.

[74] The September 10, 2012 meeting clearly identified the issue the parties were seeking to address. The Nations' concern was that the OCP applied to Crown lands and that the bed unit limit had the effect of freezing future development on those Crown lands. The Nations questioned Whistler's right to plan development or non-development on lands that were still subject to discussion between the Crown and First Nations.

[75] Whistler's position was that the issue of the right of the First Nations to develop Crown lands within its boundaries was a matter to be negotiated between

the First Nations and the Provincial government and that while Whistler could be part of any such future discussions, it was not appropriate to articulate such rights in the OCP of a local government created by the Provincial Crown.

[76] On September 28, 2012 the Nations wrote to Whistler:

> …
>
> We understand the difficulty that RMOW faces in its desire to have its planning process encompass large amounts of Crown land, while wanting to defer to the Province the responsibility to address unresolved aboriginal rights and title on those Crown lands.
>
> We believe this is a shared problem. We are willing to work with you to resolve it, and to include the Province in those discussions. We have, however, expressed our firm resolve that RMOW cannot proceed unilaterally and either ignore the problem, or delegate it back to the Province to resolve.
>
> If you believe that it is the Province's sole duty to resolve our concerns, then it would not be appropriate for you to claim to the Province that you are fulfilling consultation with us. If you direct us to the Province for consultation on the OCP, then we believe that will greatly increase the time for the OCP to be approved, and it will require the Province to have the power to make amendments to your OCP. We prefer to work together.
>
> We have expressed our willingness to work with you in amending the OCP to make it neutral to First Nations' rights and title, and not purport to freeze First Nations' economic development opportunities on these Crown lands.
>
> …

[77] On October 9, 2012 the Nations and Whistler met again. Whistler advised the Nations that it had no ability to address the Nations' concern regarding the bed unit limit and that it intended to move forward with the next steps in the OCP approval process.

[78] On October 15, 2012, Whistler wrote to both Nations advising that the Council had directed staff to initiate the bylaw approval process by bringing the draft OCP Bylaw before Council for first and second readings on October 16, 2012. The Nations responded in a letter the same day indicating that in their view, the consultation process had not been completed and requested Whistler to reconsider proceeding with the scheduled readings.

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[79] On October 16, 2012 Whistler rescinded the first reading given on November 15, 2011 and gave a revised first reading and second reading to a bylaw containing the new OCP. On November 20, 2012 the OCP bylaw passed third reading.

[80] On December 3, 2012 Whistler provided the Minister with its OCP decision package and its engagement record with the Nations.

[81] The OCP sent to the Minister for approval set a bed unit limit of 61,750. As of 2010 61,217 bed units had been allocated to existing developments or to undeveloped zoned lands. The Nations say that the remaining 533 bed units have already been allocated to developers and are unavailable.

[82] Section 3.3.3.4 of the OCP reads:

> *Any land use or development proposal that:*
>
> - *does not conform with [the Whistler Urban Development Containment Area]; or*
> - *proposes to raise the bed unit limit; or*
> - *does not confirm to the Whistler Land Use Map,*
>
> *should not be favourably considered unless it is a strategic opportunity that demonstrates extraordinary benefits to the resort community and will substantially strengthen Whistler's progress towards achieving its vision. Any such proposals shall be subject to significant community engagement to obtain the views of community members and stakeholders, and this shall be in addition to the statutory public hearing process.*
>
> [Emphasis added.]

The Province's Interest in Whistler's OCP

[83] The Province's interests in Whistler's new OCP were set out in a December 15, 2010 briefing note prepared by Ministry staff for the Deputy Minister entitled "Provincial Interests in Whistler's Future". The briefing note included this statement:

> The Province has had a long involvement in supporting the development of Whistler into a premier destination ski resort that generates tax revenue for the Province (see Attachment One). The municipality was created in 1975 under the *RMOW Act* to facilitate and promote the development of a ski resort. The new community has unique features that set it apart from other municipalities including: significant provincial investment, large amounts of crown land, a system for promoting the resort; and the provincial interest is seeing the new community succeed.

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> Whistler has studied other ski areas in North America that evolved from resort communities into typical residential areas and in doing so lost their attractiveness and competitive edge. In 2009, through a series of meetings with the Ministers and senior provincial officials, the RMOW shared its concerns with the Province about local economic conditions and Whistler's future as a premier, would-class destination resort. Included in its concerns, is making sure growth is managed, consistent with the regional growth strategy, to maintain the natural character of the region. On November 5, 2009, the mayor of Whistler wrote to Ministers Krueger and Bennett requesting that the Province "…articulate the Provincial interests or framework that the RMOW should consider when undertaking the Official Community Plan process." Whistler sees this as important input into an official community plan review process that was officially launched on April 13, 2010 and is now underway.
>
> …

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[84] The briefing note then identified several provincial interests in Whistler's future including:

- "Collaborative Planning in the Region" which identifies collaboration with the Squamish Lillooet Regional District to support implementation of the regional growth strategy;
- further develop relations with the First Nations to explore opportunities to work together on economic and tourism related initiatives; and
- consistency between the OCP and the Sea to Sky LRMP.

[85] The briefing note was forwarded to Whistler as part of the process of Whistler developing the OCP.

<u>The OCP Consultation between the Province and the Nations</u>

[86] A draft of the OCP had been sent to the Minister's office on July 24, 2012.

[87] On August 1, 2012 counsel for the Squamish Nation wrote the Minister seeking confirmation he had received the draft and that the draft had been circulated to provincial agencies for review and comment. Counsel pointed out that the Nations had received no notice from the Ministry in respect of reviewing the draft OCP and

sought confirmation “that the Province’s view is that it has delegated the duty of consultation to RMOW.” Counsel advised the Minister:

> …
>
> The proposed OCP will purport to regulate a very substantial amount of Crown land which is of significant importance to the Squamish and Lil’wat Nations, and upon which there is unresolved aboriginal rights and title. The proposed OCP would effectively freeze all future development on those lands, rendering Crown land uneconomic to the First Nations for any future use, and determining any land use should the lands be transferred.
>
> The significant implications of this proposed OCP require a direct discussion and consultation between the Provincial Crown and the First Nations themselves. It is not acceptable to ‘delegate’ that duty to a Municipality who has no duty to reconcile their interests with the First Nations, and who has shown no inclination to do so.
>
> The law of consultation requires that the Crown consult at the earliest stage of decision-making. We ask that you do not complete you agency review, and that you provide no comments to RMOW or progress any further with the OCP review until you have met your obligations of consultation and accommodation with the Squamish Nation.
>
> …

[88] The Lil’wat Nation sent a similar letter to the Minister on August 3, 2012.

[89] A representative from the Minister’s office responded on August 16, 2012 advising the Minister had not delegated the Crown’s duty to consult but rather, for local government planning bylaws which required Ministerial approval prior to adoption, the Crown’s approach “is to encourage local governments to dialogue directly with First Nations about their interests and to modify bylaws to address concerns raised by First Nations where there is agreement.”

[90] The Ministry further explained that local governments are required to document their efforts and provide the engagement record to the Ministry as part of the request for statutory approval; that once the Ministry receives the engagement record, it would then review “the effect and content of the proposed bylaw on First Nation rights and title, the level of engagement that occurred, and how concerns from First Nations were considered.” The Ministry also noted that other provincial agencies had “been participating through a referral process and providing their input as well.” The Ministry concluded by confirming that it had received a draft on July 24,

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2012 and it was working with other agencies "to determine if there are any conflicts with provincial interests. This process is in addition to the OCP discussions with First Nations."

[91] The Ministry received the OCP package for approval and the engagement record with the Nations on December 3, 2012.

[92] On January 23, 2013 the Assistant Deputy Minister ("ADM"), wrote both Nations advising the Minister had received the proposed OCP with a request for approval by the Minister. The letter stated:

> Given that the purpose of an OCP is to provide a *guiding framework* for local planning and land use decisions, there would appear to be fairly low potential for impacts to aboriginal rights or title claims. Additionally, although an OCP can speak to Crown land within the area covered by the plan, other Crown decisions are required prior to the actual use of Crown land. The OCP does not bind the Crown when making those future land use decisions. Further, the land use designations for Crown land in the new OCP reflect existing zoning and are unchanged from the current OCP. Notwithstanding that our view that the potential impacts of this OCP - by its very nature - are low, we understand the importance of carefully considering our consultation obligations
>
> …
>
> Due to the apparently low potential for this OCP to impact [the Nations'] aboriginal rights and title claims, it is my preliminary view that the Province's consultation obligation falls at the lower end of the spectrum, requiring the Ministry to provide [the Nations] with notice of the request to approve the OCP, an opportunity to comment on the draft OCP, and to consider any responses. If you have <u>new information or perspectives</u> regarding potential impacts of the RMOW OCP on your aboriginal rights and title claims that were not previously shared with RMOW, it is respectfully requested that you provide that information to the Ministry by February 28, 2013.
>
> [Italicized emphasis in original, underline emphasis added.]

[93] The consultation process that then followed between the Province and the Nations may be described as short and unproductive.

[94] On February 22, 2013, not having received submissions from the Nations, the Minister's office wrote the Nations again inviting them "to provide information or perspectives regarding potential impacts on your aboriginal rights claims arising from the OCP by February 28, 2013." The letter reiterated the Ministry's "preliminary view"

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that the bylaw had a low potential to impact the Nations' Aboriginal rights outlining a number of reasons for its conclusion:

- An OCP provides a guiding framework for local planning and land use decisions.
- Although an OCP can speak to Crown land within the area covered by the plan, other Crown decisions are required prior to the actual use of Crown land.
- The OCP does not bind the Crown when making future land use decisions.
- The land use designations for Crown land in the new OCP reflect existing zoning and are unchanged from the current OCP.
- Engagement records provided by RMOW indicate that changes were made to the bylaw to address Lil'wat and Squamish First Nations interests.

[95] The Squamish Nation responded on February 26, 2013 and the Lil'wat Nation on February 27, 2013. The content of both letters is similar. Both expressed the view there had been a "lack of meaningful consultation" or that the consultation process had been "seriously flawed", that the bed unit limit proposed by Whistler represented a development freeze on Crown land within the boundaries of Whistler and represented a breach of the SLUP and LLUP agreements in which the Province agreed to establish a government to government process to identify development which could occur on Crown lands within Whistler's boundaries.

[96] The letters from the Nations expressed surprise at the Province's suggestion that Whistler had forwarded to the Province an "extensive engagement record". The Nations asked for a copy of the record so that they could review it for inaccuracies and have an opportunity to respond. The Squamish Nation set out its view of Whistler's efforts as follows:

- We met with Whistler in June 2011, but at that point RMOW offered only to allow the First Nations to write a "context statement", but not to make substantive changes.
- We met with RMOW on November 17, 2011. We were assured by the (outgoing) Mayor and his staff that they recognized that consultation had not been adequate and that the new Council post-election would consult with us, and would be willing to make amendments.

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- We wrote to the new Mayor on December 6, 2011 to request that promised further consultation, and to discuss amendments to address our aboriginal title issues.
- Despite our request for a meeting, no further meeting was forthcoming between December 2011 and July 2012.
- In February 2012, we forwarded potential amendments to the OCP designed to address our aboriginal rights and title issues. We received no response to that draft.
- On July 17, 2012, we became aware that RMOW was moving forward with a new draft of the OCP. There had been no consultation with us about that draft. Although there were some minor changes made, purportedly to address our concerns, the key recommendations that relate to aboriginal rights and title issues were rejected (which Whistler later advised was because these were matters the Province would deal with us on). RMOW had not met with us in preparing their new draft, and clearly was not interested in hearing our concerns.
- We wrote to RMOW on July 31, 2012 to note there had been no consultation on the new draft, or with the now Mayor and Council (we also wrote to the Province on the following day).
- The first consultation meeting took place with the new Mayor and staff to discuss our concerns on September 10, 2012. It was at that meeting that RMOW advised us that the Province would have to be "at the table" to address our issues, and told us they had "no authority" to consider or respond to our concerns in respect to unextinguished aboriginal rights and title on Crown lands (even though their plan claimed the jurisdiction to freeze development on those lands).
- We wrote again to the Mayor on September 28, 2012 offering to work with them to find ways to amend the OCP to make it neutral to First Nations rights and title.
- No changes were made. RMOW did not accept our invitation to work with them.
- On October 9, 2012, the Mayor and some staff held a final teleconference with us, where the Mayor advised that we should be "frank with one another", and [declared] that RMOW would not make further changes, and was not interested in further dialogue. In their view, it was the obligation of the Provincial government to resolve our concerns, and she directed us to take those up with you.

[Emphasis in original.]

[97] Both Nations disagreed with the Crown's assessment that the proposed OCP had a low potential impact on their aboriginal title claims. Both asserted there were "very real and practical limitations on the economic potential of First Nation lands". The Lil'wat were of the view the proposed OCP appears "to be having a very real

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impact on the scale and scope of any potential accommodation available to [the Nations] in the context of the Whistler Blackcomb Master Development Agreement consultation".

[98] The letters reiterated that both Nations had been seeking consultation with the Province since their letter to the Ministry August 1, 2012. The Nations requested a meeting with the Ministry in order to commence a consultation process.

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[99] The Ministry responded to the Nations on March 27, 2013 repeating its view that the potential impact on the Nations s. 35 rights was low. The Minister made the following points:

1) OCPs have "no legal effect whatsoever in terms of directing the Province in its decision-making regarding Crown land" and the "fact that this OCP has no direct impact on any decision of the Province with respect to the use or disposition of Crown land means that it will not adversely affect the exercise of Section 35 rights";

2) a bed unit cap policy had been in place since 1982 and was consistent with the previous OCP;

3) most of the Crown lands within the RMOW's boundaries are identified as being in "non-urban use area" of the 2011 OCP and the potential for adverse effects on claimed aboriginal rights was low because such designation ensured the lands remained in their current state;

4) the proposed OCP contained "several key and positive concepts and policies that address interests raised by First Nations during the RMOW's engagement;

5) the proposed OCP could be "amended periodically to address changing circumstances and new opportunities. The letter pointed out that if "a First Nation were to acquire or purchase Crown land at

some future date in fee simple, they could approach RMOW to discuss potential uses for that land. The municipality would be under a legal obligation to consider any such proposals brought forward by a First Nation. Lands transferred under a future treaty would be outside any OCP constraints by virtue of First Nations' legal jurisdiction over them"; and

6) the Province has the legal authority to require changes to an OCP to address "a significant Provincial interest", although such authority would "likely be utilized only under extraordinary circumstances and as a last resort".

[100] On March 28, 2013 representatives of the Ministry and the Lil'wat held a conference call to discuss the March 27th letter. The Lil'wat sought an assurance the Minister would not make a decision without first sitting down with the Chiefs of the Nations. Meeting minutes recorded by a Ministry representative noted that the ADM said he would "like [the] Nations['] perspectives" to assist the Minister in making a decision but stated that "there is a limited window" since "before the writ drops I am bound to bring [the OCP] before [the] Minister to see whether he makes a decision".

[101] During the call the Lil'wat sought to involve a "decision-maker" from the Ministry of Forests, Lands and Natural Resources Operations under the Master Development Agreement. Representatives of the Province advised the Nation that those discussions were not part of the OCP decision making process but was a discrete discussion process.

[102] The ADM agreed to wait until April 9 or 10 for the Lil'wat's response to the March 27 letter.

[103] On April 5, 2013 counsel for the Squamish Nation wrote the Minister's representative advising the March 27 letter did not address the Crown's obligation to consult with the Squamish, particularly having regard to the Crown's obligations contained in the SLUP or the Master Development Agreement. Counsel also

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expressed the view the Crown had made an error in law by concluding its obligation to consult was "low" as the proposed OCP would have significant adverse impacts on the Nation's economic rights by imposing a development freeze.

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[104] Counsel also advised that the Squamish had only recently received a copy of the engagement record, needed more time to respond and asked the Minister not to consider "an overly hasty approval without proper process and without consideration of the evidence and submissions the Squamish Nation wishes to make in respect of their title and land aspirations" and objected to the apparent need to make an "urgent decision" based on the election timing as "arbitrary".

[105] On April 8, 2013 the Lil'wat responded to the ADM's letter of March 27 and the subsequent conference call. The Lil'wat made a number of points:

1) while the Nation accepted the Province was not "legally bound" by statements in a municipal OCP, the Lil'wat's experience with the Legacy Lands was that the Province had "not effectively protected our aboriginal economic interests within the Legacy Lands";

2) although prior OCPs had contained bed unit limits, consultation on the draft OCP was the Nation's "first real opportunity to be involved in planning and development decisions for Whistler", which lay in the "core of the Lil'wat Nation territory where we have strong evidence to assert our aboriginal title";

3) the "concepts and policies" included in the OCP by Whistler as an attempt to address Aboriginal rights, title and interests are "limited to cultural and ecological values that amount to very little change in the overall objectives and strategies of the RMOW," that these were "easy" solutions which did not address the Nations substantive concerns; and

4) the Nation's concern in acquiring land within Whistler was not an issue for some future date but rather "we are currently engaged in negotiations with the Province regarding the acquisition of Crown Land within the RMOW

for development purposes" through the LLA and accordingly the issue was one of "immediate concern and relevance" to the consultation process.

[106] The two Nations and their legal representatives had a conference call with the ADM and representatives from the Ministry on April 9, 2013. The Nations requested deferral of the meeting for one week. The ADM is recorded in the minutes kept by the Ministry as responding a delay was "[n]ot acceptable" as the Minister needed to have a decision before him "promptly". The minutes note the ADM "makes reference to timing Re: Elections".

[107] The Nations expressed surprise that the Province would "go ahead without full consultation" and suggested no harm would come to Whistler if there was a delay in the OCP approval. The Nations sought a joint meeting which got "all players in the room": the Ministry, the Ministry of Forests, Lands and Natural Resources Operations, Whistler and the Nations to address their economic interest in the development of Crown lands within Whistler and how the bed unit limit would apply to those lands.

[108] While agreeing there would be "some value likely in all [the parties] sitting down to talk" and that that was a "target for the future" the Ministry's position essentially remained unchanged, that is, that the draft OCP had no impact on the Crown's ability to negotiate with the First Nations and there was an ability in the future to amend the bed unit limit.

[109] Following the April 9 teleconference the Nations wrote a joint letter to the Minister in which they requested he defer his decision to approve the OCP "until a proper consultation process can be held with us". The letter stated:

> You should also be aware that the Provincial Crown is at an advanced stage of consultation with us in respect of the proposed extension of the term of the Master Development Agreements for the Whistler and Blackcomb Ski Resorts. These resorts and the ski hill areas are an integral part of the Resort Municipality of Whistler, and those consultations are potentially closely connected to the OCP. The effect of the approval of the OCP could be to sterilize any potential option for economic participation in the MDA. Those discussions are scheduled to resolve in June. It would be, in our respective

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> view, a breach of the honor of the Crown to approve this OCP now, without consideration of the impact on other consultations.
>
> We were only recently advised (on March 29) that the Province has put a deadline of next week for the making of your decision on the OCP. We view that as arbitrary. The only justification we have been given for that deadline - imposed without prior notice - is the upcoming provincial election. While we understand there can be no Ministerial decisions for a 30 day period during the election, your staff was unable to identify any other reason for urgency, or any prejudice to the RMOW from a short delay.
>
> We believe there is a possibility of a fruitful outcome for all parties, if the time for proper consultation and discussion is made available. We ask that you respect our interests and ensure that your approval does not take place in the absence of further discussions.

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[110] The ADM wrote both Nations on April 10, 2013 advising the Ministry was referring the draft OCP to the Minister “for decision immediately”.

[111] That letter outlined the Ministry’s response to a number of the positions taken by the Nations:

- Based on a Ministry review of “all of the readily available documentation” on the Nation’s asserted s. 35 Aboriginal rights within the boundaries of the RMOW, the potential for adverse effects on those rights “is low - both now and for the foreseeable future”.

- Based on the above view as well as the “substance and extent of input” provided by the Nations to Whistler during the “OCP engagement process, we have determined that the obligations to consult on the Minister’s decision regarding the OCP bylaw is at the lower end of the *Haida* spectrum…”; that the “process requirements associated with the conclusion of a low potential impact on the Nation’s asserted s. 35 rights are greater than ‘notification’ but not ‘deep’; and that such a view had “shaped the approach that we have pursued with your Nations for the past three months”.

- The constraints in the proposed OCP did not constitute a “substantial impact, whether actual or potential, on your Nations’ ability to exercise s.

35 aboriginal rights"; that the "purported 'freezing of all economic development potential on Crown lands'" does not "impair the ability of your communities to utilize those lands for traditional uses of the kind considered to be s. 35 rights".

- The Master Development Agreement consultation with the Ministry of Forests, Lands and Natural Resources Operations was a "separate process" and that the Province "takes the view that the OCP will not affect that process".

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[112] On April 10, 2013 the ADM forwarded a three page Briefing Note to the Minister with a recommendation the draft OCP bylaw be approved. I will quote several extracts:

> Bylaw 1983 provides a framework for 5-10 year to implement Whistler's sustainability plan "*Whistler 2020*" and maintain a focus on a tourism economy. The OCP is a critical document for regulating private land use and development standards in the municipality. The OCP also affirms Whistler's policy of a 61,000 bed unit development cap with an urban containment boundary to focus growth in the Village and to preclude establishment of new settlement areas. Whistler currently has 53,000 bed units with over 8,000 left to be developed in the future (327 single family lots; 22 duplex units; 524 commercial accommodation; 87 multi-family; and 382 resident restricted units).
>
> The OCP also includes policies to address climate change, economic development, affordable housing and energy efficiency. While the OCP cannot regulate Crown land, the OCP includes general objective statements in support of continuing existing uses on Crown land which include resource development, parks, and back country recreation.
>
> …
>
> **First Nation Engagement:** The RMOW boundary is within the traditional territories of the Squamish and Lil'Wat First Nations (the Nations). The RMOW had several meetings and exchanges about the OCP with the Nations. …
>
> **Discussion:** Since 1975, the Province and RMOW have worked together to build Whistler into a global destination resort. Of the 13 destination resorts in the Province, Whistler-Blackcomb constitutes approximately 60% of the total ski royalty revenue to the Crown, about $2 million annually. There was a significant level of collaboration with the province during the development of the OCP. …
>
> … A preliminary assessment by Ministry staff and counsel from Legal Services Branch indicated that the bylaw's potential to negatively impact First

> Nations s 35 aboriginal rights was so low therefore the Province's consultation duty was also at the low end of the spectrum. …
>
> The main concerns expressed by the Nations revolve around perceived development constraints on land they currently hold in fee simple within municipal boundaries and that the RMOW's growth management policies will restrict their ability to derive economic benefit from provincial Crown land that they might secure through future negotiations. The Nations want assurances from the Province and RMOW that they will be able to determine use on lands they may acquire. If the Province were to transfer land in fee simple in the future, it will be up to the three parties (Province, municipality and First Nations) to negotiate and agree on how such lands could be developed at that time.
>
> …
>
> … Ministry staff do not consider this to be a section 35 rights matter and believe the potential for adverse impacts to First Nation aboriginal rights, directly related to the bylaw, is low. …
>
> …
>
> The Ministry is the last step in the process before Council can adopt the bylaw. In the absence of any major provincial concern the Ministry tries to approve bylaws as soon as possible so as to not hold up the community process and to ensure certainty.
>
> …

[113] On April 11, 2013 the Minister wrote both Nations advising he considered it to be in the "broad public interest" to approve the draft OCP bylaw. In that letter he advised:

> …
>
> First, I wish to assure you that I appreciate the interest you have expressed in pursuing economic development opportunities in your respective traditional territories. It is the policy of the Province to enter mutually acceptable arrangements with First Nations for sharing benefits from development activities on Crown lands and to pursue reconciliation and seek a more permanent resolution of the land and governance matters through negotiations under the treaty process. The former Crown lands acquired by you as Olympics-related legacy lands are one example of the Province and First Nations advancing reconciliation. In negotiating those legacy lands agreements the Province, First Nations and Whistler all recognized that the purpose of those lands was to provide economic development opportunities to your communities while recognizing the lands would be under the same local government legal framework as any other fee simple lands within Whistler.
>
> … the Whistler OCP neither changes the land use designations currently placed on Crown lands within the municipality nor in any way constrains the Province's ability to make decisions about future uses of those lands,

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> including decisions related to the Whistler Blackcomb Master Development Agreement.
>
> … I would agree with you that Whistler is not able to discharge the Provinces' consultation obligations to First Nations … It is the Province's view that the consultations that have occurred between staff and First Nations representatives over the past months are consistent with our *Haida* obligations given our assessment that the potential degree of impact on your Nation's asserted s 35 aboriginal rights is low.
>
> …

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[114] The Minister approved the draft 2011 OCP on April 15, 2013.

[115] Whistler Council formally adopted the OCP on May 7, 2013.

Issues

[116] As stated, this petition raises three issues. First, whether the honour of the Crown required the Province to engage in consultation before the Minister approved the 2011 OCP. Second, if there was a duty to consult, what scope of consultation was required. Third, whether the Province's consultation process fulfilled the duty to consult.

Petitioners' Position

[117] The Petitioners argue that the OCP is a strategic, higher level decision that has the potential to create future adverse impacts on lands and resources subject to Aboriginal rights and title, such as the decisions discussed in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para. 44. Under these circumstances the Petitioners submit that the honour of the crown required deep consultation to fulfill the duty to consult.

[118] The Petitioners submit that the Minister erred in law by relying on the consultation process Whistler engaged in to fulfill the Crown's duty to consult when Whistler actively denied any obligation or ability to address the concerns of the First Nations throughout its process. In addition, the Petitioners say that the Minister brought the consultation process to a hasty end in order to approve the OCP before

the election writ was dropped and in doing so, improperly took an irrelevant consideration into account.

[119] The Petitioners argue that the consultation process engaged in by the Crown would not have been enough to fulfill even a low duty to consult.

[120] The Petitioners take the position that the standard of review regarding the existence, nature and scope of the duty to consult is correctness. They argue that when the Crown misconceives the strength of an Aboriginal group's claim and the impact of the proposed conduct the Crown has proceeded on a decision that is incorrect at law.

Province's Position

[121] The Province concedes that a duty to consult arose when approving the OCP. It maintains that the Minister fulfilled that duty. The Minister assessed the duty to consult as falling on the lower end of the *Haida Nation* spectrum, however, the Province says that it provided a meaningful process of mid-range consultation.

[122] The Province submits it was correct to inform itself through Whistler's engagement record and at no time did it abdicate its ultimate legal responsibility for consultation and accommodation by doing so.

[123] The Province denies that it concluded the consultation process prematurely as a result of the election writ and says consultation was terminated because the process was complete.

[124] The Province accuses the Petitioners of taking an inflexible, hardline position that they ought to be exempt from the provisions of the OCP that had the potential to prevent future development. The Province contends that the First Nations were seeking a particular form of accommodation to which they are not entitled.

[125] Despite the acknowledgement that there was a duty to consult and the submission that a mid-range level of consultation was engaged in, the Province argues that the OCP creates no adverse impact on assertions of Aboriginal title and

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rights. The Province further submits that any such adverse impacts could be addressed through future engagement and consultation with Whistler and the Province as and when specific future projects are proposed by the Nations on land held or on land which may in the future be granted to them under the various negotiations or agreements with the Province.

[126] The Province submits that the appropriate standard of review as to whether the Minister correctly assessed the scope of its duty to consult the First Nations is a mixed question of fact and law and should be judged on a standard of reasonableness. Similarly, the Province asks this Court to review whether the consultation process was adequate using a reasonableness standard.

Whistler's Position

[127] Whistler submits that no duty to consult arose in respect of the Minister's decision to approve the OCP. Whistler argues the Petitioners have not identified any specific Aboriginal right that might be adversely effected by the OCP.

[128] Whistler further claims that the OCP will not apply to any Aboriginal title lands that may be granted in the future and that no duty of consultation can arise in relation to lands held by the First Nations in fee simple. It argues that the Petitioners have not shown a causal relationship between the approval of the OCP and any potential adverse impacts and as such any infringement on Aboriginal rights or title is speculative.

[129] Whistler submits the Petitioners exaggerate the effect that the OCP has on development. It argues that the OCP is a policy document that does not itself preclude development and has no regulatory effect. In addition, Whistler says it can amend the OCP to accommodate any future economic development proposal which may be received from the Petitioners. Whistler states that the OCP in fact protects Crown resources and therefore tends to preserve their availability for the Petitioners' purposes at such time as the Petitioners may secure Aboriginal title.

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[130] Whistler argues that if the 2011 OCP did create adverse effects on the Petitioners' title claim, the Petitioners are only entitled to consultation by the Minister in respect of the adverse effects of the 2011 OCP as compared with the 1993 OCP that it replaced. It argues that the onus is on the Petitioners to establish that the "net adverse impact" of the 2011 OCP created a consultation duty, and in fact the 2011 OCP contains substantially greater acknowledgement and accommodation of the interests of the Petitioners than the 1993 OCP.

[131] In the alternative, Whistler says that any duty to consult was met by the statutory consultation process they engaged in pursuant to the *LG Act*. It submits that the scope of the Crown's duty to consult in these circumstances is at the low end of the spectrum and the consultation which occurred was more than adequate to discharge any duty.

Did the Crown have a Duty to Consult?

[132] Although the Province concedes that the Minister was under a duty to consult before approving the OCP, I will briefly address this issue given Whistler's contention that no duty arose in the circumstances of this case and the Province's submission the OCP had no adverse impact on the Nations' claims.

[133] The duty to consult with a First Nation arises when (1) the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal claim or right; (2) the Crown contemplates a decision or conduct that engages the Aboriginal claim or right; and (3) the contemplated Crown decision or conduct may adversely affect the Aboriginal claim or right: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 35; *Rio Tinto* at paras. 40-50; *Ehattesaht First Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849 at para. 51.

Standard of Review

[134] The standard of review I must use in considering whether there was a duty to consult is correctness: *Haida Nation* at para. 61; *Da'naxda'xw/Awaetlala First Nation*

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v. British Columbia (Environment), 2011 BCSC 620 at para. 128; *Ehattesaht First Nation* at para. 45.

Analysis

[135] The first element of the three part *Haida Nation* test that triggers a duty of consultation is easily met. It is uncontested that the Crown had knowledge of the Squamish and Lil'wat Nations' claims of Aboriginal title and rights over their respective traditional territories, which include Crown lands located within the boundaries of the Whistler municipality. The Province has participated in multiple negotiations with the Nations based on their Aboriginal title claims in the Whistler area.

[136] It is also clear that the second element of the *Haida Nation* test is met. The *RMOW Act*, s. 11 requires the Minister to approve Whistler's OCP. The Minister's decision to approve the OCP is a Crown decision that engages the Nations' title claims.

[137] I do not accept Whistler's argument that the OCP is simply a policy document rather than a regulatory one, which does not engage the duty to consult. *Haida Nation* does not stand for the proposition that the duty to consult only arises when the Crown contemplates new law or regulation; the judgment and subsequent authorities say the duty to consult is engaged upon when the Crown contemplates conduct or a decision. In *Sambaa K'e Dene Band v. Duncan*, 2012 FC 204, Mactavish J. observed:

> [165] If it is to be meaningful, consultation cannot be postponed until the last and final point in a series of decisions. Once important preliminary decisions have been made there may well be "a clear momentum" to move forward with a particular course of action: see *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2004 BCSC 1320, 34 B.C.L.R. (4th) 280 at para. 75. Such a momentum may develop even if the preliminary decisions are not legally binding on the parties.
>
> [Emphasis added.]

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[138] I also do not accept Whistler's argument that the Nations have an onus to establish the "net adverse impact" of the 2011 OCP as compared to the 1993 OCP triggered a duty to consult. In my view, this submission mischaracterizes the point of law that no duty to consult arises from past wrongs, including previous breaches of the duty to consult: *Rio Tinto* at para. 45. The 2011 OCP was a new plan contemplated by the Province and as such was a current course of conduct capable of triggering the duty to consult.

[139] The 1993 OCP was made long before *Haida Nation* was decided and thus before the legal precepts surrounding the duty to consult were developed. It is unsurprising that the 1993 OCP was made without consulting the Nations and it contains little to no reference to their interests.

[140] Similarly, I am of the view that the Respondents' arguments that the OCP can be amended in the future are not useful. The fact that the Crown may make subsequent decisions or may decide not to proceed with contemplated conduct does not mean there is no duty to consult. If the decision has the potential to adversely affect asserted Aboriginal rights or title the duty arises: *Da'naxda'xw* at paras. 180-181; *Kwikwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68 at paras. 59-60.

[141] If the OCP requires amendment to allow development in the future this fact serves as an answer to Whistler's argument that the OCP does not impose a limitation on development. If the OCP has to be amended before development can proceed then it does in fact have the potential to infringe on land that the Petitioners may acquire title to in the future.

[142] In addition, a request for an amendment or an exception to the OCP would be dealt with by Whistler. The Province acknowledged in argument that it would only become involved in an amendment process under "extraordinary circumstances" and such circumstances have never before arisen.

[143] The approval process of the OCP by the Minister may be the only opportunity the First Nations have for consultation with the Crown on potential infringements on

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their s. 35 rights. The Court of Appeal made it clear in *Neskonlith Indian Band v. Salmon Arm*, 2012 BCCA 379 at paras. 68, 70 that the honour of the Crown which gives rise to the duty to consult with First Nations does not apply to municipalities:

> …As the third order of government, municipal councils are simply not in a position to, for example, suspend the application of bylaws or the terms of OCPs, grant benefits to First Nations or indeed to consider matters outside their statutory parameters. (See *Westfair Foods Ltd. v. Saanich (District)* (1997) 49 B.C.L.R. (3d) 299 (B.C.C.A.); *511784 B.C. Ltd. v. Salmon Arm (District)* 2001 BCSC 245, 19 M.P.L.R. (3d) 232 at paras. 49, 56; *Yearsley v. White Rock (City)* 2009 BCSC 719, at paras. 25-6, 28; *0742848 B.C. Ltd. v. Squamish (District)* 2011 BCSC 747, 84 M.P.L.R. (4th) 1 at paras. 13-8.) *A fortiori,* local governments lack the authority to engage in the nuanced and complex constitutional process involving "facts, law, policy and compromise" referred to in *Rio Tinto*.
>
> …while it is true that First Nations may experience difficulty in seeking appropriate remedies in the courts in cases like this one, it is also true that as creatures of statute, municipalities do not in general have the authority to consult with and if indicated, accommodate First Nations as a specific group in making the day-to-day operational decisions that are the diet of local governments.

[144] The OCP obliges Whistler to make decisions regarding OCP amendments or zoning and development decisions in the best interests of Whistler. The Ministerial approval of the OCP as required under the *RMOW Act* was the point in time when the Crown, in right of the Province, was engaged through its statutory decision making process. Such a decision must maintain the honour of the Crown.

[145] In *Rio Tinto*, McLachlin C.J.C. stated for the Court at para. 45 that "[t]he claimant must show a causal relationship between the proposed government conduct or decision and a potential for adverse impacts on pending Aboriginal claims or rights." While a "potential for adverse impact suffices" (para. 44), "[m]ere speculative impacts" will not (para. 46). Courts must take "a generous, purposive approach to this element" (para. 46).

[146] I do not agree with the Respondents' argument that any assertion of infringement on Aboriginal title is speculative. Whether OCPs apply to land held pursuant to Aboriginal title is an undecided question of law. As long as there is the potential for the OCP to apply to such lands, there is potential that it will adversely

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impact the development uses the Nations can put their land to. In my view, the comments of McLachlin C.J.C. in *Rio Tinto* at para. 47 are applicable:

> …high-level management decisions or structural changes to the resource's management may also adversely affect Aboriginal claims or rights even if these decisions have no "immediate impact on lands and resources": Woodward, at p. 5-41. This is because such structural changes to the resources management may set the stage for further decisions that will have a *direct* adverse impact on land and resources…
>
> [Emphasis in original.]

[147] Land use decisions often give rise to a duty to consult: *Haida Nation* at para. 76; *Rio Tinto* at para. 44; *Da'naxda'xw* at para. 142; *Adams Lake Indian Band v. Lieutenant Governor in Council*, 2012 BCCA 333 at para. 70. The reason for this is that land use planning is often a strategic, higher level decision, such as the kind discussed in *Rio Tinto* that might have an impact on Aboriginal rights and title in the future.

[148] Using the generous and purposive approach mandated in *Haida Nation*, I find that the decision to approve the OCP was a land use planning decision that had the potential to infringe the Squamish and Lil'wat Nations' title claims. This is particularly true given that the approval of the OCP took place in the context of several other land use negotiations between the Province and the Nations as described above.

[149] Justice Fisher similarly found in *Da'naxda'xw* at para. 129 that a decision regarding an amendment to the boundaries of a conservancy to allow development of a hydroelectric power project must be considered

> in the broader context of the extensive consultation between the Crown and the Da'naxda'xw in the LRMP process and government-to-government negotiations that created the Upper Klinaklini Conservancy in the first place, the Collaborative Agreement, and the on-going negotiations for a government-to-government process for managing conservancies and considering boundary amendments. There is no question that the Crown had a duty to consult with respect to the land use designation and the boundaries of the Upper Klinaklini area. I view the Da'naxda'xw's request to amend the boundary as part of an ongoing process of consultation.

[150] In addition, once the OCP is approved, the Province has virtually no control over future OCP amendments or zoning decisions. This reduced Crown control

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makes the duty to consult even more significant. I find the situation in the present case is similar to the example discussed in *Rio Tinto* at para. 47, which McLachlin C.J.C. warned could create an adverse impact:

> …For example, a contract that transfers power over a resource from the Crown to a private party may remove or reduce the Crown's power to ensure that the resource is developed in a way that respects Aboriginal interests in accordance with the honour of the Crown. The Aboriginal people would thus effectively lose or find diminished their constitutional right to have their interests considered in development decisions. This is an adverse impact: see *Haida Nation*, at paras. 72-73.

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[151] I do not accept the Respondents' argument that because this OCP limits future development, and therefore preserves the status quo, there is no potential adverse impact on Aboriginal rights or title. The purpose of consultation is to listen to and consider the concerns of the First Nations whose rights and title may be adversely impacted by a decision. The Crown cannot avoid the duty to consult by unilaterally deciding that the land should be conserved in its current state.

[152] I adopt the following reasoning of Fisher J. in *Da'naxda'xw*, in which she considered whether the Crown had a duty to consult before deciding against an amendment to the boundaries of a conservancy that effectively precluded a development project that the Da'naxda'xw Nation proposed:

> [130] …I disagree with the government that conduct which contemplates conserving the *status quo* necessarily means that Aboriginal interests will not be adversely affected.
>
> …
>
> [139] I accept that in some circumstances, decisions preserving lands or the *status quo* may not have an adverse impact on Aboriginal claims. [*Tsuu T'ina Nation v. Alberta (Minister of Environment)*, 2010 ABCA 137] is an example of this. However, I do not interpret *Haida Nation* as establishing a duty to consult only for the purpose of preserving land from development. I agree with Mr. Elwood's submission that there was an economic component to the Haida's claim to the lands and forests of their traditional territory, and another aspect of the Crown's conduct in issue was the exclusion of the Haida from the benefits of the forest resource. Proposed conservation measures could have an adverse affect on claimed Aboriginal rights and title, as they may limit future uses of land. The LRMP process and the government-to-government consultations regarding the Upper Klinaklini area clearly demonstrate this. In my opinion, limiting the duty to consult in the manner suggested by the government is inconsistent with the "generous, purposive

> approach" to this element of the duty to consult as described in *Rio Tinto* and inconsistent with the goal of achieving reconciliation.

[153] The Petitioners have demonstrated a causal relationship between the approval of the OCP and a potential for adverse impacts on their pending Aboriginal title claims. As Lamer C.J.C. pointed out in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 166, "lands held pursuant to Aboriginal title have an inescapable economic component" (emphasis in original). The OCP has the potential to restrict the uses to which the Nations can put land they acquire in the future. Such a potential mandates the Province engage in consultation, and if necessary, accommodation.

What was the Scope of the Required Consultation?

[154] The scope of the Crown's duty to consult is proportionate to (1) the strength of the First Nations' claim and (2) the seriousness of the potentially adverse effect on the right or title claimed. These two factors determine the content of the consultation required to maintain the honour of the Crown. The varying duties that may arise in different situations were described by McLachlin C.J.C. in *Haida Nation* at paras. 43-45 as falling along a spectrum:

> …At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice…
>
> 44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.
>
> 45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change

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> as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

Standard of Review

[155] In *Haida Nation* McLachlin C.J.C. explained the standard to be applied in reviewing the Crown's assessment of the scope of the duty owed as follows:

> 61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55. On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[156] More recently in *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 Binnie J. wrote for the majority:

> [48] In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate

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> consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?

[157] Courts have differed in their interpretation of the standard of review regarding the scope of the duty to consult. The Petitioners take the position that the standard of review regarding the existence, nature and scope of the duty to consult is correctness, relying on *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 and *Halalt First Nation v. British Columbia*, 2012 BCCA 472.

[158] In *West Moberly* the Court of Appeal issued three sets of reasons. Chief Justice Finch did not address what standard of review should be used in assessing the scope of the duty to consult, but instead considered whether the consultation process that took place was reasonable (at para. 141). In concurring reasons, Hinkson J.A., as he then was, found that "the appropriate standard of review in consultation cases for the Crown's assessment of the extent of its duty to consult is correctness, and that the appropriate standard of review for assessing the process adopted for a particular consultation and the results of that process is that of reasonableness" (at para. 174).

[159] In dissenting reasons, Garson J.A. stated:

> [193] I agree with the *dicta* of Grauer J. in *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 C.N.L.R. 110, where he summarized and applied *Haida Nation* at para. 34:
>
>> As mandated in the *Haida* case, *supra*, the *extent* of the duty to consult or accommodate is a question of law to be judged on the standard of correctness, <u>although it is capable of becoming an issue of mixed law and fact</u> to the extent that the appropriate standard becomes that of reasonableness. The *adequacy* of the consultation process is governed by a standard of reasonableness.
>>
>> [Italic emphasis in original; underline emphasis added.]

She went on to say that the apparently elevated standard of review articulated in *Beckman* was due to the fact that a modern comprehensive treaty was being interpreted in that case, which was distinguishable from a consultation process

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where there was less specificity and it was more difficult to ascertain the "correct" process. She concluded that "the Crown's determination of the scope and extent of its duty to consult must be assessed on a correctness standard" but that the adequacy of the consultation and the outcome of the process "must be assessed on a reasonableness standard" (at para. 198).

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[160] In *Halalt First Nation* Chiasson J.A. simply commented for a unanimous court:

> [112] I agree with the judge's articulation of the standard of review in para. 89:
>
> > ...the Crown must correctly determine the extent or scope of its duty to consult, and must then engage in consultation that is adequate in the circumstances. The outcome of the consultation process (that is, the accommodation) must fall within the range of reasonable outcomes in the circumstances.

[161] The Province urges this Court to follow cases that accord more deference to the Crown's determination of the scope of consultation owed. The Province relies on the decision briefly mentioned above, *Klahoose First Nation v. Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, as well as *Huu-ay-ah First Nation et al. v. Minister of Forests et al.*, 2005 BCSC 697 and *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354.

[162] In *Klahoose First Nation* at para. 34 Grauer J. found that the extent of the duty to consult was a question of law to be judged on a standard of correctness, although it was capable of becoming a question of mixed fact and law to be judged on a reasonableness standard if the factual underpinnings for the assessment were inextricably woven in.

[163] Similarly, in *Huu-ay-ah First Nation* at para. 95 Dillon J. stated that

> the existence or extent of the duty to consult or accommodate is a legal question requiring correctness. Government misconception of the seriousness of the claim or impact of the infringement is a question of law to be judged by correctness. When infused with an assessment of facts, the standard is reasonableness…

[164] In *Dene Tha' First Nation v. Canada (Minister of Environment)* at paras. 93-94 Phelan J. observed:

> [93] It thus follows that as the question as to the existence of a duty to consult and or accommodate is one of law, then the appropriate standard of review is correctness. Often, however, the duty to consult or accommodate is premised on factual findings. When these factual findings can not be extricated from the legal question of consultation, more deference is warranted and the standard should be reasonableness.
>
> [94] These two standards of review dovetail onto the questions of whether there is a duty to consult and if so, what is its scope …

[165] Although not referenced by the Province, I also note that in *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977 Grauer J. found that the Crown's determination of the scope of its duty to consult was inextricably bound up with its assessment of the underlying question of the impact of the decision, which was the subject of great dispute between the parties who had tendered competing impact/disturbance reports. He considered many of the authorities I have reviewed and concluded as follows:

> [105] I have already reviewed how, as discussed in *Haida Nation*, the standard of review of the question of scope and extent of duty can move from correctness towards reasonableness depending on the extent to which the decision inextricably combined questions of fact and law. In *Beckman*, it seems to me, as in the judgment of Finch C.J.B.C. in *West Moberly First Nations*, we have a hint that the real question comes down to the adequacy of the consultation process which will itself, to an extent, determine the correctness of the scope. In other words, if the process did not accomplish a reasonable result, then it was probably carried out pursuant to an incorrect assessment of its proper scope.
>
> …
>
> [108] …when it comes to the Crown's assessment of the scope and extent of that duty, I conclude that in the circumstances of this case, the "correctness" of the Crown's assessment depends upon the "reasonableness" of that assessment's underpinning. We have a question of mixed law and fact so the standard, in effect, becomes one of reasonableness as noted in the passage from *Haida Nation* quoted above.

[166] *Klahoose First Nation*, *Huu-ay-ah First Nation*, *Dene Tha' First Nation v. Canada (Minister of Environment)*, and *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)* were all trial level decisions and, with the exception of *Dene Tha' First Nation v. British Columbia (Minister of Energy and*

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Mines), all older than both *West Moberly* and *Halalt First Nation* from the British Columbia Court of Appeal. I consider myself bound by these more recent pronouncements of the law by our appellate court, particularly the unanimous decision of *Halalt First Nation* which determined that the standard of review was correctness. The standard of review I will use in considering the Crown's assessment of the scope of the duty to consult is correctness.

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[167] Even had I applied the reasoning used in decisions such as *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)*, I would have concluded that in the circumstances of this case a correctness standard should be used when reviewing the Crown's assessment of the scope of the duty to consult. The assessment by the Minister was not premised on complex factual determinations that were inextricably woven into the decision. I do not agree with the Province's argument that a reasonableness standard is warranted in these circumstances.

[168] I turn now to consider the strength of the Squamish and Lil'wat Nations' claim to Aboriginal title and the seriousness of the potentially adverse effect of the OCP in order to determine the scope of consultation required in this case.

The Strength of the First Nations' Title Claim

[169] On the hearing of a judicial review petition I am not able to make detailed findings regarding the strength of the Squamish and Lil'wat Nations' claim to Aboriginal title. My task in this proceeding is to make a preliminary assessment of the strength of claim: *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)*, 2003 BCSC 1422 at paras. 47-48; *Da'naxda'xw* at para. 153.

[170] The evidence easily establishes that the Squamish and Lil'wat Nations have a strong *prima facie* Aboriginal title claim. The Province concedes as much and submits that the Crown approached the consultation on the basis that the Nations had a good *prima facie* claim to Aboriginal title.

The Seriousness of the Potentially Adverse Effect

[171] Despite the Province's submission that it had a duty to consult and that it fulfilled that duty by engaging in a mid-range consultation, the Province argues that the approval of the OCP did not have the potential to create adverse impacts on the Petitioners' claimed title. The Province argues that the OCP allows the Petitioners to engage in non-residential development and that there are various ways in which the bed unit limit in the OCP can be amended in the future. It points out that the OCP bylaw does not (and cannot) authorize any development of Crown lands or the extraction or exploitation of any resources on Crown lands.

[172] The Petitioners argue that the potentially adverse impacts are serious. They say that as a "guiding framework" the OCP is of strategic importance to land use planning. They submit that the restrictions in the OCP remove development potential on lands which may be acquired by the Nations either in fee simple or as treaty settlement lands.

[173] I begin by noting that the Province's positions in this regard are irreconcilable. If the Province assessed that there was no potential for adverse impact on the Nations' claimed title land then it would be under no duty to consult. However, the preponderance of the evidence demonstrates that the Province engaged in consultation with the Nations with the view that there was a low potential for adverse impacts. I will therefore review the Province's consultation efforts on the basis that it assessed the potential for impact as present, but low.

[174] Many of the Province's arguments regarding the potential for adverse effects have already been addressed when discussing whether a duty to consult was triggered. For similar reasons, the fact the OCP may be amended in the future is not, in my view, useful in considering how serious the potential for adverse impact is. When the Crown is deciding whether to approve an OCP, a strategic planning document approved by the Minister and passed as a bylaw, the possibility that it might be amended does not greatly reduce the seriousness of the potential impact.

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[175] The fact that this OCP does not restrict every type of development, but only development that requires bed units means that the potential for adverse impacts is less serious than a total prohibition on development.

[176] I also note that the reasoning behind the duty to consult as discussed in *Haida Nation* is founded in a concern for depleting resources or damaging lands that may one day be returned to First Nations following treaty processes. As McLachlin C.J.C. articulated at paras. 27, 33:

> …The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests… To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.
>
> …
>
> 33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

[177] The OCP approved by the Minister does not authorize the type of serious impact which was discussed in this passage of *Haida Nation*, such as resource depletion. As the Province argues, the OCP tends to preserve the land from development.

[178] However, in *Da'naxda'xw* Fisher J. found that a decision to maintain land conservancy boundaries and therefore preserve the status quo created a serious potentially adverse impact:

> [180] The concepts of irreversible or irreparable harm are closely related to the law of injunctions and they do form a backdrop to the overall purpose of the duty to consult, as noted in *Rio Tinto* (at para. 41). <u>While they may be relevant, it is not necessary, in my view, to find irreversible or irreparable harm to conclude that a potentially adverse impact is serious.</u>
>
> [181] I have earlier found that the potential impact of the Minister's decision was not speculative. The Minister's decision means that the amendment

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> request will not be considered by Cabinet. While the extent of the Da'naxda'xw's lost economic opportunity is by no means certain, the effect of the decision definitively puts an end to the Project and this future use of the land is now foreclosed. The decision has also established a process of consultation about boundary amendments within the confines of the Ministry's own policy, and this may foreclose future consideration in the government-to-government process that has been the subject of on-going negotiations. In this context, I consider the potentially adverse impact to the Da'naxda'xw to be quite serious.
>
> [Emphasis added.]

[179] In my view, the potential impacts of the OCP were not serious, as there was no plan to deplete resources or cause damage to the lands subject to title claims. However, like Fisher J. I find that irreversible or irreparable harm is not necessary to find adverse impact and that restrictions to a First Nation's economic development potential could infringe s. 35 rights in a serious way.

[180] In considering the facts of this case, I find that the potential for impact was moderate, and certainly more than the Province's characterization of "minimal" or "low". The bed unit limit in the OCP places a limitation on the Nations' potential to develop land in an area where developable land is scarce and is strictly defined. Development that creates bed units, such as residential and tourist accommodation, is important in a tourist-based economy like that in the Whistler area. These facts made it all the more important the First Nations be consulted on the use of land subject to territorial claims.

Analysis

[181] Given the strong case the Squamish and Lil'wat Nations have to support their claim for Aboriginal title and the moderate potential for adverse impacts I am of the view that the honour of the Crown required the Province to engage in a mid-range level of consultation. I am further persuaded in this conclusion by considering other situations in which courts have found a mid-range duty of consultation.

[182] In *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)* the Dene Tha' First Nation ("DTFN") sought judicial review of a decision of the Ministry of Energy and Mines to sell 21 parcels of subsurface oil and gas tenures

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located in their traditional territory. As a signatory to Treaty 8, the petitioners undoubtedly had a right to be consulted; the only question was whether the consultation that took place was sufficient.

[183] The consultation process in *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)* took place between May 2008 and June 2010 and involved lengthy correspondence exchanges, several meetings, and the exchange of several reports on land use and the potential impact of the proposed action. Ultimately, although 21 parcels were sold, a further 31 parcels were deferred due to concerns raised by the DTFN during the consultation process. Justice Grauer found at para. 43 "those representing the [Ministry of Energy and Mines] were working hard to provide the appropriate information and to take into account and respond to the DTFN's legitimate concerns." Ultimately the parties reached "a fundamental disagreement" (para. 85): the DTFN rejected the Minister's preliminary assessment conclusions and considered it critical that the Ministry continue the consultation process, but the Ministry proceeded to sell 21 parcels within the DTFN's traditional territory.

[184] At the time of the consultation the Crown said that the potential for infringement on the DTFN's rights was low and therefore the duty to consult in the pre-sale stage was at the lower end of the *Haida Nation* spectrum. However, before the court the Crown submitted that the scope of consultation that took place was at the mid-range of the spectrum:

> [117] The Crown submits that although it purported to assess the extent of its duty to consult as being towards the lower end of the spectrum at the pre-tenure stage, in fact the scope of consultation in which it engaged was at the middle level of the spectrum. From my review of the consultation record, I agree. The parties did not merely talk together for mutual understanding, nor did the Crown limit itself to giving notice, disclosing information and discussing issues. The DTFN made extensive and wide-ranging submissions. Each party prepared and exchanged Traditional Use Reports. The DTFN commissioned and submitted its MSES Rate of Disturbance Report. The MEM prepared and disclosed its Preliminary Assessment. A great deal of information, economic, environmental, scientific and speculative, was exchanged. The DTFN was not engaged in the actual decision-making process, but processes were put in place to involve the DTFN in ongoing development decisions that could give rise to potential

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> adverse impacts on its treaty rights.
>
> ...
>
> [124] Taking into account the context in which that assessment was made, I find that the Crown's analysis of the risk of adverse impact was within the range of reasonable outcomes at the pre-tenure stage. Accordingly, I find that, in law, the mid-level depth of the consultation in which the Crown engaged was consistent with its duty in the particular circumstances of this case, as well as with the Consultation Agreement between the parties.

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[185] Justice Grauer found that given the scope required, the consultation process the Crown engaged in was reasonable under the circumstances. However, he emphasized several times that this conclusion was based on the fact the consultation process being reviewed was only the initial stage of consultation that would continue on in the future:

> [131] Key to my conclusion in this regard is the context to which I have repeatedly referred, of an ongoing process...
>
> ...
>
> [135] I have concluded that the process in which the Crown has engaged to date complies with these guidelines in so far as the June 2010 dispositions are concerned. But the appropriate depth of consultation will likely become greater, not lesser, as the process continues, as existing parcels proceed into development and further parcels are sought for disposition …

[186] In considering *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)* in relation to the case at bar, it is important to note that there will be no further ongoing consultation process between the Crown and the First Nations. Once the Minister has approved the OCP, the Crown involvement has come to an end and no further consultation will take place except in exceptional circumstances.

[187] *Long Plain First Nation v. Canada*, 2012 FC 1474 was an application for judicial review of a decision by Canada to sell land located within the City of Winnipeg known as the Kapyong Barracks after its use by the military was discontinued. This property was also within the territory dealt with under a treaty known as Treaty No. 1, entered into in 1871 between Her Majesty Queen Victoria and certain Aboriginal bands located within that territory. The Applicants were a number of Aboriginal bands who were successors to the Treaty signatories and were interested in purchasing the land. Despite the fact that several bands expressed

interest in purchasing the land as early as 2001, Canada decided to sell the land to a non-agent Crown corporation for the purpose of disposal by that corporation, a corporation which had no duty to consult with the Treaty No. 1 bands.

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[188] Canada conceded there was a duty to consult, therefore the only issues were what the scope of that duty was and whether it had been fulfilled. Justice Hughes decided that the duty owed fell in the middle of the *Haida Nation* spectrum:

> [72] In the present case, I have found that the Applicants Long Plain, Peguis, Roseau River and Swan Lake have an arguable, but not proven claim in respect of the land occupied by the Kapyong Operational Barracks. I put the scope of the duty to consult at the middle of the range established by the Supreme Court in *Haida Nation.* At the low end of the spectrum, where a claim is weak, that Court in *Haida Nation*, at paragraph 43 wrote that the scope of the duty:
>
> > *"…may be to give notice, disclose information, and discuss any issues raised in response to the notice…"*
>
> [73] At the other end of the spectrum, where a strong prima facie case for the claim is established, that Court wrote at paragraph 44 of *Haida Nation*:
>
> > *"…the consultation at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that the Aboriginal concerns were considered and to reveal the impact they had on the decision."*
>
> [74] In the present case, in putting the duty somewhere in the middle of these two criteria, I find that the scope of Canada's duty lay beyond the minimum of giving notice, disclosure of information and responding to concerns raised, so as to include at least some of the higher duties including a duty to meet with the Applicants, to hear and discuss their concerns, to take those concerns into meaningful consideration and to advise as to the course of action taken and why. I emphasize taking the concerns into meaningful consideration and repeat what the Supreme Court wrote at paragraph 46 of *Haida Nation*
>
> > *"Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations."*

[189] Justice Hughes found that although notice of the sale was given to the Applicants, very little information was provided between 2001 and 2004 and that between 2006 and 2007 Canada simply ignored correspondence from the

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Applicants and requests for a meeting. He found that Canada had failed to fulfill the scope of its duty to consult and observed at para. 78 that

> [e]ven at the minimum level of duty to consult, Canada did not fulfil its obligations. It did not disclose relevant information that it had. It did not respond in a meaningful way to concerns raised by the Applicants and other bands.

[190] The *Da'naxda'xw* case has already been referenced in these reasons. Briefly, this judicial review was brought by the Da'naxda'xw First Nation of a decision of the Minister of Environment refusing to recommend changes to the boundaries of a land conservancy which was within their traditional territory in order to pursue development of a hydro-electric power project. The government argued that the duty to consult was at the low end of the spectrum because the Da'naxda'xw did not have a strong claim for Aboriginal title and the nature of the impact on the claim was entirely speculative and compensable in any event.

[191] Justice Fisher held that the Crown misconceived the strength of the Da'naxda'xw's claim and the impact of the decision:

> [182] Given my conclusions that the Da'naxda'xw's Aboriginal title claim is reasonably credible and the potentially adverse impact of the Minister's decision quite serious, it is my view that the scope of consultation required a meaningful exchange of information with a view to considering a reasonable accommodation, within the mid-range of the spectrum.
>
> …
>
> [197] As I indicated before, the scope of consultation in this case required a meaningful exchange of information within the mid-range of the spectrum. In the particular circumstances here, a meaningful exchange of information required the Minister to consider the Da'naxda'xw's request in the context of the terms of the Collaborative Agreement and the on-going negotiations about a government-to-government process for managing the conservancy and considering boundary amendments, and to provide the Da'naxda'xw with an opportunity to respond to any substantive concerns the Minister may have had. While the Minister was entitled to consider the public interest as described in the government's policy, this required something more than the opportunity for the Da'naxda'xw to make an application within the scope of that policy. It required an opportunity for some dialogue on a government-to-government basis with a view to considering a reasonable accommodation of the Da'naxda'xw's interests in allowing the Project to be assessed in the [environmental review] process.
>
> [198] For all of these reasons, I have concluded that the Crown failed to fulfill its duty to consult. The consultation carried out in respect of the boundary

> amendment request was inadequate. Prior to the enactment of Bill 38, despite the efforts of Ministry staff, the Minister did not consider at all the specific concerns of the Da'naxda'xw regarding the boundary of the Upper Klinaklini Conservancy in relation to the Project. Subsequently, the Minister failed to provide the Da'naxda'xw with an opportunity to respond to his concerns about the potential environmental impacts of the Project and failed to consider any form of accommodation.

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[192] Balancing the Nations' claim to title, which I agree, based on the evidence before me of village sites, sacred places, and cultural sites, appears to be strong, and the potential for moderate adverse impacts, I am of the view the level of consultation required was at the medium level of the *Haida Nation* spectrum.

[193] In my view, the Minister was incorrect in its assessment that the level of potential adverse impact the OCP could have on the Nations' Aboriginal title was low. It follows that the Minister's assessment that a low level of consultation was required was also incorrect.

[194] However, the Province says that while it assessed the level of consultation owed as low, it actually conducted a mid-range level of consultation. I turn now to consider whether the consultation that took place fell within a reasonable range of what constitutes a medium level of consultation.

Was the Consultation Adequate?

[195] In determining whether the duty to consult was fulfilled, courts must consider whether the Crown met its duty to act honourably and provide a meaningful process of consultation, not whether the Crown and the First Nation reached agreement. As McLachlin C.J.C. instructed in *Haida Nation* at para. 63, the focus is not on the outcome, but on the process of consultation and accommodation. Accordingly I must decide whether the consultation process that took place fulfilled the Crown's duty to provide a meaningful mid-range consultation.

Standard of Review

[196] The parties are in agreement that the standard of review in considering whether the Province's consultation process fulfilled the duty to consult is

reasonableness: *Halalt First Nation* at para. 112. As McLachlin C.J.C. stated in *Haida Nation* at para. 62:

> … Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in . . . information and consultation the concept of reasonableness must come into play. . . . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

Analysis

[197] Although every situation is unique and should be approached flexibly and individually, I note some general parameters from the case law on what a mid-range consultation may consist of. It is more than a duty "to give notice, disclose information, and discuss any issues raised in response to the notice" (*Haida Nation* at para. 43). It is less than "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida Nation* at para. 44).

[198] In *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)* Grauer J. found that the government engaged in a reasonable mid-range consultation by giving the First Nation the opportunity to make "extensive and wide-ranging submissions", exchanging reports and a "great deal of information, economic, environmental, scientific and speculative", and setting up processes to involve the First Nation "in ongoing development decisions that could give rise to potential adverse impacts on its treaty rights" (at para. 117).

[199] In *Long Plain First Nation* Hughes J. held that a mid-range consultation required more than the minimum of giving notice, disclosing information and responding to concerns raised. He said the consultation ought to include "at least some of the higher duties including a duty to meet with the Applicants, to hear and

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discuss their concerns, to take those concerns into meaningful consideration and to advise as to the course of action taken and why" (para. 74).

[200] In *Da'naxda'xw* at para. 197 Fisher J. found that a mid-range duty to consult

> required the Minister to consider the Da'naxda'xw's request in the context of the terms of the Collaborative Agreement and the on-going negotiations about a government-to-government process for managing the conservancy and considering boundary amendments, and to provide the Da'naxda'xw with an opportunity to respond to any substantive concerns the Minister may have had. While the Minister was entitled to consider the public interest as described in the government's policy, this required something more than the opportunity for the Da'naxda'xw to make an application within the scope of that policy. It required an opportunity for some dialogue on a government-to-government basis with a view to considering a reasonable accommodation of the Da'naxda'xw's interests in allowing the Project to be assessed in the [environmental review] process.

[201] In the case at bar, the Squamish and Lil'wat Nations were provided with notice and the opportunity to make submissions to representatives of Whistler during an approximately 18 month consultation process. The Province relied on Whistler's consultation record that it received December 3, 2012 to inform itself of the Nations' concerns. The Province asserts that it was correct to take Whistler's engagement record into consideration and that it did not abdicate legal responsibility for consultation and accommodation.

[202] On January 23, 2013 the Province wrote to the Nations and informed them that the Province's preliminary view was that given the low potential for the draft OCP to impact the Nations' Aboriginal rights and title claims, its consultation obligation fell at the lower end of the spectrum, requiring the Province to provide the Nations with notice of the request to approve the OCP and an opportunity to comment on the draft OCP and to consider any responses. The Province asked the Nations if they had any further concerns that were not reflected in the engagement record with Whistler. The Province submits that the Nations responded by reiterating concerns already reflected in Whistler's consultation record and it therefore concluded that the parties had reached an impasse.

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[203] The Petitioners take the position that the duty to consult fell between the cracks of the municipal and provincial governments. From their perspective, they participated with good faith in consultation with Whistler while being told that the municipality had no obligation or ability to consider the concerns they expressed because those were matters for the Province. When the time came to express their concerns to the representatives of the Province who did have the obligation and the ability to consider their concerns, their requests for meetings were denied.

[204] In my view, despite requests by the Nations for further consultation and a meeting with representatives from other ministries who were involved with the development of Crown lands and parties to the various ongoing negotiations, the Province's agenda was solely focused on approval of the OCP before the dropping of the election writ.

[205] During the development of an OCP the *LG Act*, s. 879 requires local governments to consult with, among many other affected persons, organizations and authorities, First Nations who form part of the municipality. This statutorily imposed duty of public consultation is not synonymous with the Crown's constitutional duty to consult with First Nations who have outstanding claims to s. 35 rights or title. The honour of the Crown is not engaged during a local government's public consultation process in developing its OCP.

[206] By virtue of the *RMOW Act*, the Province is required to approve Whistler's OCP. The content of the OCP is ultimately the Minister's responsibility. In deciding whether to approve the OCP the honour of the Crown is engaged and consultation with First Nations who claim s. 35 rights and title is required.

[207] The Crown is entitled to delegate procedural aspects of the consultation process to third parties, such as municipalities, but not its ultimate responsibility for consultation and accommodation: *Haida Nation* at para. 53; *Halalt First Nation* at para. 158. The Minister was acting in accordance with its standard policy in requiring Whistler to produce an engagement record of its correspondence and discussions

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with the Nations throughout Whistler's consultation process to inform itself of the issues which had developed between the First Nations and Whistler.

[208] As much as the Minister's office was entitled to review and inform itself from and to a degree rely upon the engagement record, the *Haida Nation* duty to consult ultimately rested with the Province. It is only the Crown in right of the Province who had the ability to provide sufficient remedies to achieve meaningful consultation and accommodation*: Rio Tinto* at paras. 59-60. As the British Columbia Court of Appeal made clear in *Neskonlith Indian Band* at para. 68, local governments lack the authority to engage in a nuanced and complex constitutional process.

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[209] In my view the Province failed to ensure that the parties to the consultation understood the differences between the two types of consultation processes required. This confusion led to frustration, particularly on the part of the Nations, as the parties with the responsibility and authority were not at the table until the matter reached the Minister's office in December 2012. The Province was obliged to make the s. 35 consultation process "as transparent as possible" and clearly articulate what roles the municipality and the Province were playing in carrying out the consultation: *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 at para. 147.

[210] Once the Ministry received Whistler's engagement record, I am of the view that the consultation process engaged in by the Province relied almost exclusively on Whistler's engagement record. The Province made little attempt to engage in its own consultation: it held no face to face meetings with representatives of the Nations; it made no attempt to involve any other Ministry with whom the Nations dealt in other ongoing negotiations; and it denied requests for further consultation because of time constraints imposed by the upcoming election.

[211] Although the Province had no obligation to agree with or accept the Nation's position, the position of the Province, from beginning to the end of the short consultation period remained intransigent. While appearing to listen the Crown was, in my view, in fact locked into its position from the beginning and ultimately closed

the door to further discussions, advising the Nations the OCP had to be approved before the election writ dropped, thus foreclosing any further consultation.

[212] As, Binnie J. wrote for the Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 54:

> … Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along …

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[213] The evidence before me establishes, and I find as a matter of fact, that the timing of the election played an instrumental role in the Province's decision to bring the consultation process to a close. In the March 28, 2013 and April 9, 2013 conference calls the Province specifically mentioned the timing of the election as a reason that it wanted to complete the consultation process.

[214] The Crown may not conclude a consultation process in consideration of external timing pressures when there are outstanding issues to be discussed: *Dene Tha' First Nation v. Canada (Minister of Environment)* at para. 116; *Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al*, 2005 BCSC 283 at para. 108. As Jack Woodward says in *Native Law* (looseleaf 2014 - release 1), (Toronto: Carswell, 1994), at 5.2040:

> The Crown must give the Aboriginal group a reasonable amount of time to respond to a referral and to engage in consultation. The Crown must be prepared to let consultation run its course; <u>it cannot abort the consultation process because of other time pressures where the Aboriginal group is actively engaged in the consultation process, there remain outstanding issues, and there is value to further discussions.</u>
>
> [Emphasis added, footnotes omitted.]

[215] In the circumstances of this case, I find that the Province did not make reasonable efforts to meet its duty to consult and the consultation that took place was not within a reasonable range to meet a medium duty of consultation.

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Remedy

[216] I conclude the Minister has failed to fulfill the Crown's duty of consultation with the Squamish and Lil'wat First Nations prior to the Minister's approval of the OCP.

[217] Accordingly I quash the decision of the Minister made April 15, 2013 pursuant to s. 11 of the *RMOW Act* to approve Whistler's OCP.

[218] I declare the Crown in right of the Province of British Columbia owes a duty to consult with and, if necessary, accommodate the Squamish and Lil'wat Nations with respect to the decision whether to approve Whistler's OCP.

[219] I declare the Minister was incorrect in concluding the duty to consult was "low" and declare the appropriate duty to consult is at the mid-range level of consultation.

[220] I declare that the Minister did not make reasonable efforts to discharge its duty of medium level consultation.

[221] The Petitioners are awarded their costs of the application.

"Greyell J."