AN UNSUITABLE INTEGRATION: THE DUTY TO CONSULT AND ENVIRONMENTAL ASSESSMENTS IN CANADA

by

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Bachelor of Arts (Political Science and Psychology) University of Prince Edward Island

2018

A Thesis Submitted in Partial Fulfillment

of the Requirements for the Degree of

Master of Arts

in the Graduate Academic Unit of Political Science

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This thesis is accepted by the

Dean of Graduate Studies

THE UNIVERSITY OF NEW BRUNSWICK

January 2021

ABSTRACT

The purpose of this thesis is to analyze the integration of the duty to consult and the environmental assessment process and exhibit the unsuitable nature of this integration. The duty to consult is a reconciliatory measure, and its constitutional nature warrants conditions that are not present within the environmental assessment process. Implementation of the duty through the EA process is damaging to the duty, both jurisprudentially and procedurally. The duty to consult is procedurally and substantively ambiguous in nature, with the responsibility of its development being left to the courts. The EA process itself is proven to be flawed, and, due to issues including a penchant for over-delegation, confusion of responsibility, prioritization of efficiency over the protection of rights, short timeframes, lack of cooperation, and an ignorance of reconciliatory approaches, the EA process as it currently operates is not a suitable process within which to integrate the constitutional duty to consult.

DEDICATION

For Addison, Emilia, and Hannah, who will move mountains. And for Shirley, who already has.

ACKNOWLEDGEMENTS

I would like to begin by acknowledging that the land on which we gather is the traditional unceded territory of the Wəlastəkwiyik (Maliseet) Peoples. This territory is covered by the "Treaties of Peace and Friendship" which Wəlastəkwiyik (Maliseet), Mi'kmaq and Passamaquoddy Peoples first signed with the British Crown in 1726. The treaties did not deal with surrender of lands and resources but in fact recognized Mi'kmaq and Wəlastəkwiyik (Maliseet) title and established the rules for what was to be an ongoing relationship between nations.

I would like to extend my appreciation to those whose support and assistance was integral to the completion of this thesis. Firstly, I would like to recognize the invaluable guidance provided to me by my supervisor, Dr. David Bedford, without whom this piece of work would not have been possible. His extensive knowledge and expertise were fundamental at each stage of this project. I would also like to extend my appreciation to UNB's Graduate Studies Director, Dr. Suzanne Hindmarch, whose compassion and advice were a vital part of this process. Further, I would like to express my sincere gratitude to my friends and family. In particular, I would like to thank my friend Alexia Hawkey-Noble, who encouraged me when I needed it most; my parents, whose support and belief in me has guided me throughout my entire schooling experience; and my partner, Nick Dupuis, whose ever-present reassurance, support, and understanding I could hardly put to words. Lastly, I would like to extend my thanks to Dr. Peter McKenna, without whom I may never have pursued this project in the first place.

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CHAPTER 1: THE DUTY TO CONSULT AND ENVIRONMENTAL ASSESSMENTS

The duty to consult is a fundamental element of the legal relationship between Canadian governments and Indigenous peoples in Canada. The duty is a legal doctrine that "arises when the Crown has knowledge, real or constructive, of the potential existence of [an] Aboriginal right or title and contemplates conduct that might adversely affect it."[1] Canadian provincial, federal, and territorial governments have a duty to consult, and, where appropriate, accommodate Aboriginal groups when considering conduct that might negatively impact potential or established Aboriginal or treaty rights.[2] Regarding the duty to consult, the Government of Canada states the following: "The common law duty to consult is based on judicial interpretation of the obligations of the Crown (federal, provincial and territorial governments) in relation to potential or established Aboriginal or Treaty rights of the Aboriginal peoples of Canada, recognized and affirmed in section 35 of the Constitution Act, 1982."[3] Although the formulation of the duty to consult is a significant milestone in the relationship between Canadian governments and Aboriginal peoples, it is still a relatively new and underdeveloped concept. As a result, there is an overarching issue of ambiguity within the duty to consult in general. This creates a number of problems within the duty to consult as it operates

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[1] Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009), 12.
[2] Government of Canada and the Duty to Consult." *Government of Canada; Indigenous and Northern Affairs Canada*, April 2019.
[3] "Aboriginal Consultation and Accommodation," (AANDC, 2011), 6.

through the environmental assessment process. This will be expanded upon throughout the coming chapters.

The duty to consult carries the potential to embody several integral principles that could improve the relationship between Canadian governments and Aboriginal peoples, such as consideration for history and tradition, the honouring of treaties, fostering cooperation, and respect; but its current application neglects these fundamental concepts, particularly when the duty is enmeshed within the environmental assessment process. Despite the appearance of the duty as a mechanism that is beneficial to Aboriginal groups in Canada, there are many flaws in the concept as well as its application, and these issues make the duty a dissonant concept: one that presents itself as a shining beacon of hope to Aboriginal peoples when, in reality, it does very little to progress Aboriginal interests, protect Aboriginal rights and concerns, and pursue reconciliation. This will be discussed in detail throughout this paper. This paper will explain the duty to consult, its legal basis, and how it is applied in the Canadian legal system, as well as several cases that have laid the foundational bricks for the duty, and the ensuing cases that continued its development. This paper will also examine the effectiveness and appropriateness of the environmental assessment process as an avenue for the duty to consult, and how that process damages the duty and neglects reconciliation of the relationship between Canadian governments and Aboriginal peoples.

Three case studies will be presented, each of which will offer an analysis of the duty to consult as it operates within the environmental assessment process. The first of these case studies is *Gitxaala Nation v. Canada,* a 2016 Federal Court of Appeal case concerning a Joint Review Panel decision to approve the Northern Gateway Pipeline

project. The following case study examines two companion cases from the Supreme Court of Canada, *Hamlet of Clyde River Petroleum Geo-Services Inc. and Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* These two cases concerned offshore seismic testing, and changes to Enbridge's Line 9 pipeline, respectively. The final case study concerns *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office),* a British Columbia Court of Appeal case that dealt with the construction of a sand and gravel mine under the BC Environmental Assessment Office's *Reviewable Projects Regulation.* Each of these case studies provides an analysis of the unique circumstances of the case at hand, as well as the general theme of this paper; that the environmental assessment process is an inappropriate, insufficient, and unacceptable host for carrying out the duty to consult.

Relationship Between the Canadian State and Indigenous Peoples

Indigenous peoples have struggled under the dominant hand of the Canadian state since the time of colonization. The relationship between the Canadian state and Indigenousa peoples in Canada is characterized by strife, an imbalance of power, and a penchant for exploitation. Comprehension of this relationship is paramount to understanding the duty to consult, and in analyzing the realities, consequences, and effectiveness of the duty as it operates at present. Upon 'discovery' of the new world,

> "European nation-states proceeded to colonize North America by making grandiose territorial claims on the basis of discovery, papal bulls, symbolic acts of possession,

> royal charters, and settlement, as though the continent was juridically vacant and the Indigenous peoples living there did not have sovereignty."[4]

Crown sovereignty in Canada was claimed on the basis that the land's Indigenous peoples did not possess sovereignty. It was upon this basis that the concept of Crown sovereignty in Canada was built, and that remains to this day. The relationship between the Crown and the Indigenous population in Canada is based upon the assumption that sovereignty was available for the taking at the time of colonization, and that assumption has affected the lives of Indigenous peoples in a multitude of ways through the establishment of the power relationship that has controlled and condemned Indigenous peoples for centuries.

The duty to consult does not return sovereignty to Indigenous peoples, nor does it provide Indigenous peoples with any power; it is simply a fulfillment of a constitutional requirement to recognize and affirm Aboriginal and treaty rights, and thus the basis of the duty itself comes from legislation that exists as a result of Crown sovereignty. The meaning of sovereignty is significant to the duty as it dictates the power relationship between Indigenous peoples and the Crown. If not for the Crown's claim to sovereignty, there would be no duty to consult: Indigenous peoples would have independent decision-making powers and would maintain authority over their asserted territory. There is a lack of consensus amongst Indigenous peoples in Canada on the role of the Crown regarding Indigenous rights, title, and governance, and there is disagreement regarding the

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[4] Kent McNeil, "Sovereignty and Indigenous Peoples in North America," (Toronto: Osgoode Hall Law School, 2016), 82.

definition of Crown sovereignty. Some scholars deny that the Crown gained legal sovereignty over Indigenous peoples to begin with, as Indigenous groups never ceded their territory and were never rightfully conquered by the Crown.[5] As Taiaiake Alfred has observed, "[t]he challenge before us is to detach the notion of sovereignty from its current legal meaning and use in the context of the Western understanding of power and relationships. We need to create a meaning for 'sovereignty' that respects the understanding of power in indigenous cultures.'"[6] It is difficult to imagine how a Crown-invented notion such as the duty to consult could truly serve Indigenous peoples when it is designed to avoid interference with Crown sovereignty in any way. The Crown maintains power over Indigenous peoples in Canada at every opportunity, and this power is relinquished only when its retention becomes legally impossible-which is a rarity. Cases involving the duty to consult are exemplary of this.

The notion that Indigenous peoples were eligible to be controlled and conquered was the basis upon which Canadian laws and systems were formulated, and those laws and the associated consequences have reverberated throughout time, pulsing through society today. As mentioned, there is a severe imbalance of power that exists between Canadian governments and Indigenous peoples, and this imbalance affects all aspects of the relationship. Indigenous peoples in Canada have been murdered, imprisoned, abused, mistreated, marginalized, and forced to assimilate by Canadian governments for centuries, and these atrocities have suppressed the progress and well-being of Indigenous

[5] Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (*Supreme Court Law Review*, 2005), 435.
[6] McNeil, "Sovereignty and Indigenous Peoples in North America," 83.

peoples for as many years. The Canadian state has gradually forced Indigenous peoples into a position of dependence, and circumstances of control and mistreatment have kept them there with little opportunity to escape. The notion of Indigenous people as inferior has become ingrained in Canadian society, and institutional racism is rampant in the Canadian political and legal systems. As a result, positive change in favour of Indigenous groups is rare, extremely difficult to achieve, and slow to develop. The duty to consult is no exception, with court cases taking years to resolve, and backlash from the Canadian public occurring at nearly every turn. The element of economic development adds yet another level of obstacles to the progression of the duty, wherein the interests of project proponents and the benefits to industry are given priority over the protection of Indigenous rights and concerns.

The Duty to Consult Explained

The duty to consult is rooted in section 35 of the *Constitution Act, 1982*, but its jurisprudential development as well as procedural clarifications are dependent upon decisions made in court. There are three cases in particular that laid the foundation for the duty to consult in Canada: *Calder v. British Columbia,* which recognized Aboriginal title; *R. v. Sparrow,* which recognized Aboriginal rights; and *Delgamuukw v. British Columbia,* which confirmed the existence of Aboriginal title. In the years following these foundational cases, a number of cases contributed to the further development of the duty. These landmark cases include *Haida Nation v. British Columbia, Taku River Tlingit v. British Columbia, Mikisew Cree First Nation v. Canada, Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* and *Tsilhqot'in Nation v. British Columbia.* This chapter will

briefly outline each of these cases in order to provide context for the case studies and analysis that will follow.

Legal Basis of the Duty to Consult

The basis for the duty to consult lies within section 35 of the *Constitution Act, 1982,* and the duty is both legal and constitutional in nature. Section 35 (1) states the following: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[7] Albeit seemingly simplistic, this statement is the substratum upon which the duty to consult has since been developed. *Calder v. British Columbia,* a case which occurred prior to the *Constitutiton Act, 1982* along with post-1982 cases such as *R. v. Sparrow* and *Delgamuukw v. British Columbia* serve as the foundation for the duty; and cases such as *Haida Nation v. British Columbia, Taku River Tlingit v. British Columbia, Mikisew Cree First Nation v. Canada, Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* and *Tsilhqot'in Nation v. British Columbia* becoming the bricks that have developed procedural and jurisprudential elements of the duty to consult as it stands today.

The level of consultation required in each case exists on a spectrum, upon which the scope of the duty is directly proportional to the strength of the claim and the severity of the negative potential effect upon that claim.[8] According to Rachel Ariss, "this spectrum exemplifies the range and flexibility of the duty in various circumstances."[9]

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[7] Thomas Isaac, *Aboriginal Law,* Toronto, Ontario: Thomson Reuters, 2016, page 356.
[8] *Haida Nation v. British Columbia (Minister of Forests),* 513.
[9] Ibid.

Although the duty itself is easily triggered, its scope is quite flexible.[10] It is, however, important to note that this is theoretical rather than functional. Consultation itself is required to be 'meaningful,' and does not have specific expectations but is, rather, expected to be carried out in 'good faith.'[11] In order to be meaningful and performed in good faith, consultation must be engaged early in the process, well before the decision is made, and must continue throughout said process. It must also take place before any activities that impact the land, rights, or relevant claim have taken place.[12]

Alongside legal precedents and its constitutional foundation, the duty to consult is grounded in a traditional principle known as the honour of the Crown, and that principle is the operational basis upon which the duty must be based. The basis of the honour of the Crown is said to be found in the *Royal Proclamation of 1763*. The honour of the Crown arises from the Crown's assertion of sovereignty over Aboriginal peoples. According to the Supreme Court in *Haida,* the honour of the Crown requires that Aboriginal rights be determined, recognized and respected.[13] The honour of the Crown is a legal doctrine that has been an element of common law for centuries, but, because of the novelty of the *Constitution Act 1982* relative to Crown concepts, its use to interpret s.35 is relatively new. "It is the latest manifestation of a line of jurisprudence that attempts to balance federal and provincial legislative authority with the constitutional recognition and

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[10] Rachel Ariss, et al. "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" 10.
[11] Ariss, 10.
[12] Ariss, 10, citing *Mikisew Cree First Nation v. Canada, supra note 3 at para 67.*
[13] *Haida Nation, supra* note 1 at para 25.

affirmation of existing Aboriginal and treaty rights."[14] The honour of the Crown is the concept upon which the Supreme Court of Canada relies to interpret s. 35. The doctrine was, for example, referred to in the justification analysis in the two-part test of infringements on Aboriginal rights that was created in *R. v. Sparrow*. In this context, the honour of the Crown dictates how governments are meant to deal with Aboriginal groups in situations that involve the duty, and it provides the court with a lens through which to examine the government's conduct while assessing whether the duty was met. "Justice and the law are deemed to flow from the Crown. As the law is for the benefit of the Crown's subjects, the premise was that the Crown should not cause harm to private individuals."[15] It is this concept that dictates all Crown interactions with Aboriginal peoples, including Crown dealings with Aboriginal groups that are owed a duty to consult, and what this may look like varies depending on the circumstances. Conceptually, the honour of the Crown is a bit of a logistical nightmare; whether it has been applied can be easily skewed, and what is required through the honour of the Crown-'honourable' dealings- lacks clarity. The doctrine itself is ultimately based upon the exertion of Crown sovereignty.

The duty to consult does not come from a fiduciary duty on the part of the Crown, and this is integral to the concept.[16] In cases of fiduciary duty, the Crown has a legal obligation to act in the best interest of another party. Although the Crown does have a fiduciary duty towards Aboriginal peoples in regards to other areas, such as reserve

[14] Thomas Isaac, *Aboriginal Law*, 315.
[15] Isaac, 341.
[16] Isaac, 355.

management and resources, this is not the case with the duty to consult. The Crown is not obligated to act in the best interest of Aboriginal peoples regarding the duty to consult, but, rather, must find a balance between societal and Indigenous interests, all while acting honourably in respect to Aboriginal rights and treaty rights. "While the court prefers negotiation over litigation as a way forward, the consultation trilogy has stated quite plainly that Aboriginal groups do not have a veto over Crown plans that impact their rights."[17] The lack of veto and the severe imbalance of power it creates in consultation and accommodation is of detriment to concerned Aboriginal groups. Because the requirement is, in most cases, limited to consultation, agreement between the government and the affected group is not mandated. This creates serious hindrances for Aboriginal groups' pursuit of their interests and defense of their concerns, as they do not have leverage to utilize to their advantage in these instances. The Crown's duty to act honourably is a stark contrast to fiduciary duty, as the honour of the Crown requires the Crown to "take a purposive approach, not solely legal approach, to the interpretation of a promise made to Aboriginal peoples or a constitutional obligation and the Crown must act diligently to fulfill such promise or obligation, including the Crown's duty to consult Aboriginal peoples."[18] Thus, under the honour of the Crown, governments must simply act diligently in pursuit of fulfillment of the *purpose* of a promise or obligation. They are not obligated to fulfill that promise and must only prove that they pursued their purpose in a manner that can be considered "diligent." In addition, the Supreme Court has stated

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[17] Ariss, "Towards Reconciliation?" 11.
[18] Isaac, *Aboriginal Law,* 355.

that not every individual mistake made in the implementation of constitutional obligations breaches the honour of the Crown, and the honour is broken only by a "persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise."[19] Therefore, the honour of the Crown provides a failsafe for government conduct, wherein mistakes are forgiven provided they are not repeated or committed through indifference.

History and Development of the Duty to Consult

Because the duty to consult is not well defined in legislation, the courts are given the responsibility of defining the duty, and determining the triggering of the duty as well as the associated responsibilities when it is triggered. Foundational cases such as *Calder v. British Columbia, R. v. Sparrow,* and *Delgamuukw v. British Columbia* established the opportunity for the duty to consult to emerge. The Crown's duty to consult was discussed first in *R. v. Sparrow* in 1990, and later affirmed in *Delgamuukw v. British Columbia* in 1997. The first foundational case, *Calder v. British Columbia*, established Aboriginal title as a right recognized by contemporary Canadian law.[20] Before the Supreme Court of Canada laid down the Calder decision on January 31 of 1973, the Canadian government categorically rejected the notion of Aboriginal title. *Calder* was considered by many to be a turning point in Aboriginal law in Canada, and many positive changes and progressions have been made as a result of the *Calder* case. It was this groundbreaking decision made

[19] Isaac, 11.
[20] John Sutton Lutz et al. *Let Right Be Done Aboriginal Title, the Calder Case, and the Future of Indigenous Rights*, 2003.

in *Calder* that laid the first foundational brick for the duty to consult, despite the fact that it was not directly addressed.

Foundational Cases

Calder et al. v. Attorney-General of British Columbia

Calder et al. v. Attorney-General of British Columbia involved Frank Calder, a member of the Nisga'a Tribal Council, and several other members of four other Indian bands. The plaintiffs sued the Attorney-General of British Columbia for a declaration that "the Aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory...has never been lawfully extinguished."[21] The associated territory consisted of 1000 square miles in Northwestern British Columbia. The action went to trial but was dismissed, and the appeal was rejected, at which point the appellants appealed to the Supreme Court of Canada. The Supreme Court was divided in the *Calder* decision, with three justices concurring and three dissenting. Pidgeon J. had the deciding vote, and he refused to rule on the decision, holding that the appeal should be dismissed on a technicality. All judges, however, agreed that Aboriginal title existed in common law, and its existence would persist unless extinguished by the Crown.[22] This was the significant takeaway from *Calder.* The appeal by the Nisga'a was dismissed and their declaration request was denied due to Pidgeon J.'s dismissal of the appeal.

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[21] *Calder et al. v. Attorney-General of British Columbia,* page 313.
[22] Isaac, *Aboriginal Law,* 71.

R. v. Sparrow

In the 1990 case *R. v. Sparrow*, Ronald Edward Sparrow was charged with fishing with a drift net longer than was permitted under his Band's Indian food fishing license. He defended this charge on the grounds that he had an existing Aboriginal right to fish and that the net length restriction contained in the Band's license was unconstitutional. *R. v. Sparrow* was the first case that directly addressed the duty to consult, and the first to test s. 35 of the *Constitution Act*. In this foundational case, the court described a legal test that would temper the power of the Crown, and it was this test that provided the first glimpse of the duty to consult as a legal concept. This legal test was designed to determine whether governments are justified in their infringement of Aboriginal rights. The Sparrow case explains several questions that must be asked to determine whether the legislation at hand is justifiable, and the government is responsible for bearing the burden of providing justification for any legislation that has the potential to negatively affect any Aboriginal right that is protected under s. 35.[23]

The Sparrow Test first asks whether an Indigenous right has been infringed upon, which is determined by the following criteria: it imposes an undue hardship on First Nations; it is considered unreasonable by the court; it denies the rights holders their preferred means of exercising their right. The second part of the test asks what might justify the infringement of an Indigenous right, which is determined by the following: it serves a valid legislative objective; it involves as little infringement as possible to achieve

[23] *R. v. Sparrow*, 1078.

the intended result; it is for the purposes of expropriation and fair compensation is provided; the government has consulted with the Indigenous group in question about conservation measures being implemented.

Delgamuukw v. British Columbia

Delgamuukw v. British Columbia concerned the definition, extent, and the content of Aboriginal title. The ruling in this case was influenced by *Calder,* and would later influence landmark cases such as *Tsilhqot'in.* The case was initiated by the Gitxsan and Wet'suwet'en hereditary chiefs who, on behalf of their houses, claimed separate portions of a 58000 square kilometre tract of land in British Columbia.[24] Originally, the claim was for ownership of the land, but was altered to a claim for aboriginal title over the associated land. British Columbia submitted a counterclaim to declare that the appellants had no right or interest in the land, and that the appellants should pursue compensation from the Government of Canada in lieu.[25] The B.C. Supreme Court determined that the plaintiffs had failed in all the claims they pursued,[26] while the B.C. Court of Appeal issued three sets of reasons involving some adoption of the claims. In 1997, the Supreme Court of Canada concluded that, due to a defect in the pleadings, the Court could not reconsider the merits of the appeal and, as a result, a new trial was ordered.[27] The Supreme Court found that the provincial government did not possess the right to extinguish Indigenous rights to their ancestral territories. The court reaffirmed the

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[24] *Delgamuukw v. B.C.*, 1011.
[25] *Delgamuukw,* 1011.
[26] Isaac, *Aboriginal Law,* 73.
[27] Isaac, 73.

decision in *R. v. Van der Peet*, establishing oral history as evidence that should be considered equal to other types of evidence. The SCC also clarified the content and definition of Aboriginal title, expanding on what was given in *Calder.* Aboriginal title was defined "in terms of the right to exclusive use and occupation of land,"[28] and the SCC established a test in order to determine how title must be demonstrated by Indigenous groups, based on sufficient evidence of continuous, exclusive territorial occupation.

Landmark Cases

Following the three foundational cases, there have been several landmark cases that have contributed to the building of the duty to consult both as a legal concept and an applied process. The cases included in this paper are as follows: *Haida Nation v. British Columbia, Taku River Tlingit v. British Columbia, Mikisew Cree First Nation v. Canada, Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* and *Tsilhqot'in Nation v. British Columbia*

Haida Nation v. British Columbia

The Supreme Court of Canada released its decision on *Haida Nation v. British Columbia* in 2004. For over a century, the Haida people have claimed title to the lands of Haida Gwaii and the surrounding waters. This title, however, has not yet been recognized.[29] In 1961, the Province of British Columbia issued a Tree Farm License (T.F.L. 39) to a forestry firm, permitting that firm to harvest trees in the area of Haida

[28] *Delgamuukw*, para 155.
[29] As of 2019.

Gwaii referred to as Block 6. In 1981, 1995, and 2000, the BC Minister of Forests replaced T.F.L. 39, and in 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Co.-one of the world's largest timberland and forest products companies. The Haida challenged in court the replacements and the transfer of T.F.L. 39, all of which were made without their consent. The Haida had been actively objecting since 1994. The area covered under Tree Farm Licence 39 contained several areas of old growth red cedar, which is culturally significant to the Haida for its use in crafting totem poles, canoes, and log houses.[30] The Haida Nation insisted that large portions of this old growth forest be protected from clear cutting, for not only cultural but environmental reasons. The chambers judge dismissed the petition submitted by the Haida people, but found that the government had a moral, not a legal, duty to negotiate with the Haida.[31] The Court of Appeal reversed the decision, and stated that both the government and Weyerhaeuser Co. have a duty to consult with and accommodate the Haida regarding the harvesting of timber from Block 6.[32] The Supreme Court of Canada, however, found that third parties cannot be held liable for failure to discharge the Crown's duty to consult and accommodate.[33]

In *Haida*, the SCC also found that, in addition to federal governments, provincial governments are subject to the duty to consult when applicable. In *Haida Nation v. B.C.*, the SCC asserted that balance and compromise become necessary when there is

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[30] Bob Joseph, "Haida Case," Indigenous Corporate Training Inc., October 2014.
[31] *Haida Nation v. British Columbia*.
[32] *Haida.*
[33] *Haida,* 514.

disagreement regarding the adequacy of the government's response to Aboriginal concerns.[34] Prior to *Haida,* the Supreme Court generally considered the existence of Crown sovereignty over Indigenous peoples to be legally unassailable.[35] *Haida* served to clarify several issues surrounding the duty to consult as a concept as well as an actionable process. The case was groundbreaking mainly because it held that proof of title is not required to trigger the duty to consult, which has significant consequences. Prior to *Haida* (following *Delgamuukw)* the Crown was not obligated or compelled to consult concerned Aboriginal groups in cases where Aboriginal title had not yet been proven in court. In *Haida,* the Supreme Court found that this was unreasonable considering the significant amount of time it can take to prove Aboriginal title.

In the *Haida* case, Chief Justice McLachlin established the fundamental elements of the duty to consult:

> "The Crown, acting honourably, cannot cavalierly run roughshod over aboriginal interests where claims affecting theses interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances...the honour of the Crown may require it to consult with and reasonably accommodate aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the aboriginal claim to that resource, may be to deprive the aboriginal claimants of some or all of the benefit of the resource. That is not honourable."[36]

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[34] *Haida,* 534.
[35] Slattery, "Aboriginal Rights," 435.
[36] *Haida, supra* note 12 at para. 33.

Taku River Tlingit v. British Columbia

Taku River Tlingit v. British Columbia involved a mining company's application to reopen and build a road to the Tulsequah Chief Mine in British Columbia. During the environmental assessment, the Taku River Tlingit objected to the building of the road as it crossed their asserted traditional territory. In March 1998, the project was approved after a long Environmental Assessment process. In 1999, the Taku River Tlingit brought forward a petition for judicial review of the decision to approve the project. The Chambers Judge concluded that "the decision makers had not been sufficiently careful during the final months of the assessment process to ensure that they had effectively addressed the substance of the Taku River Tlingit's concerns."[37] The project approval was placed on hold and the Ministers were told to reconsider the decision. When the case went to the British Columbia Court of Appeal, the majority upheld the decision and agreed that the Province had failed to meet its duty to consult and accommodate the Taku River Tlingit.[38] The Supreme Court, however, found that the Taku River Tlingit were sufficiently consulted, as they were part of the Project Committee and were involved in the EA process from the beginning. The SCC stated that the Taku River Tlingit were entitled to more than minimal consultation due to the fact that the road posed a high potential for negative derivative impacts on the Taku River Tlingit's claims. The SCC did, however, state that, because the Taku River Tlingit were involved in the EA process and their concerns were presented to the decision-makers, the duty to consult was

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[37] *Taku River Tlingit First Nation v. B.C.*, 551.
[38] *Taku River*, 551.

fulfilled."[39] There was no duty to reach agreement with the Taku River Tlingit; thus, failure to do so was not a breach of their obligation under the duty to consult.[40]

Taku River Tlingit raises an interesting question: if the duty to consult was sufficiently upheld, and the Taku River Tlingit were, in fact, sufficiently involved and considered in the EA process, why were they so dissatisfied and frustrated with the result? Because there was no obligation to accommodate, the decision itself ultimately played no part in the province's fulfillment of its duty, and this demonstrates the issue of the effectiveness of the duty to consult. What true purpose does the duty serve if the results are beneficial only to the government? Consultation with the Taku River Tlingit was simply a formality and, ultimately, the conclusion of the process highlights one of the issues with the duty to consult: it can be legally fulfilled without having any influence on the result. With no fiduciary duty and no duty to accommodate, the concerned Aboriginal group has little hope of having their interests and objections taken seriously.

Mikisew Cree First Nation v. Canada

Mikisew Cree First Nation v. Canada concerned a piece of land that was included in Treaty 8. Under Treaty 8, created in 1899, an 840000 square kilometre area (what is now northern Alberta, northeastern British Columbia, northwestern Saskatchewan and the southern portion of the Northwest Territories) was surrendered to the Crown by First Nations in return for reserves and benefits such as the right to hunt, trap, and fish on the surrendered land. There was, however, a stipulation that the Crown maintained the right

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[39] *Taku River*, 552.
[40] *Taku River*, 552.

to "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading, or other purposes."[41] The Mikisew Cree First Nation was a signatory of Treaty 8, and the Mikisew reserve is located within Treaty 8 territory. In 2000, the federal government approved a project to create a winter road that would run through the Mikisew's reserve, and the approval was made without consulting the Mikisew. After the Mikisew protested the decision, the road plan was rerouted around the boundaries of the reserve, and this change was also made without consultation. This was significant because the Mikisew's issue with the road was not only surrounding its path through their reserve, but also concern that the road would have a negative impact on their traditional lifestyle, which is "central to their culture."[42] The Federal Court set the decision aside based on a breach of the Crown's duty to consult, and an interlocutory injunction against the construction of the road was granted. The court maintained that the public notices and open houses were not sufficient consultation, and that the Mikisew were entitled to an independent consultation process. The Supreme Court, however, found that the road was properly classified as "taking up" of the surrendered land referred to in Treaty 8, and was therefore not an infringement of the Mikisew's treaty right.

Rio Tinto Alcan v. Carrier Sekani Tribal Council

The *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* case took place when the BC government sought approval from the British Columbia Utilities Commission for an Energy Purchase Agreement for excess electricity. The roots of the case, however,

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[41] *Mikisew Cree First Nation v. Canada*, 389.
[42] *Mikisew*, 389.

were planted in the 1950s when the BC government authorized the building of a dam and a reservoir that would alter the water flow in the Nechako River. The First Nations claim the Nechako Valley as their ancestral homeland, and they lay claim to the right to fish in the Nechako River, "but, pursuant to the practice at the time, they were not consulted about the dam project."[43] Since 1961, excess energy produced by the dam has been sold to BC Hydro under EPAs. After decades of objections and frustrations over those EPAs, the First Nations of the Carrier Sekani Tribal Council formally objected to the 2007 EPA, stating that it should be subject to consultation. The BC Utilities Commission found that consultation was not necessary because the 2007 EPA would not have a negative impact on Aboriginal interests.[44] After the BC Court of Appeal reversed the Commission's orders, remitting the case to the Commission to find whether a duty to consult was present and, if so, whether it had been met.[45] BC Hydro and Alcan appealed, and that appeal was allowed with confirmation of the approval of the 2007 EPA. The SCC found that the Commission was not unreasonable in their approval of the 2007 EPA, as the EPA would have "neither physical impacts on the Nechako River or the fishery nor organizational, policy or managerial impacts that might adversely affect the claims or rights of the First Nations."[46]

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[43] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*.
[44] *Rio Tinto*, 652.
[45] *Rio Tinto*, 652.
[46] *Rio Tinto*, 654.

Tsilhqot'in Nation v. British Columbia

The next landmark case, *Tsilhqot'in Nation v. British Columbia,* was initially a land claim case that involved a piece of land in central British Columbia claimed by the Xeni Gwet'in band of the Tsilhqot'in. In 1983, a commercial logging licence was given by the B.C. government for logging on this tract of land that is part of Tsilhqot'in traditional territory, and, as a result, the Tsilhqot'in Nation objected to the licence and pursued a prohibition on commercial logging on the land. The Tsilhqot'in claim to the land was later expanded to include a claim to Aboriginal title. The British Columbia Court of Appeal held that the claim to title had not been established, but the Supreme Court found that the appeal should be allowed and, in accordance with the trial judge's decision, declaration of Aboriginal title over the land should be granted. In cases where Aboriginal title has been successfully established, the Crown is obligated to comply not only with its "procedural duties," but it must also justify infringement on aboriginal title by proving that its actions are "substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982,*" and the fiduciary duty owed by the Crown to the affected Aboriginal group.[47] Therefore, it was deemed that the province could infringe on Aboriginal title provided the infringement is justified according to certain criteria, which are as follows: the incursion must be necessary to achieve the government's goal (rational connection); the government must go no further than necessary to achieve it (minimal impairment); and the benefits that may be expected to flow from that goal must not be

[47] *Rio Tinto,* 654.

outweighed by adverse effects on the Aboriginal interest (proportionality of impact).[48] Allegations of infringement or failure to adequately consult can be avoided by obtaining the consent of the interested Aboriginal group.[49]

Assessment of the Duty to Consult

As previously mentioned, the duty to consult must operate through the honour of the Crown, and it is designed to uphold that honour. The case of *R. v. Sparrow* demonstrated that relevant legislative objectives must not only uphold the honour of the Crown, but also must be "in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples."[50] Thus, in theory, the duty to consult serves this unique relationship, not only through opportunities for Aboriginal groups to protect their constitutional rights, but also by providing the opportunity for governments to pursue reconciliatory measures with Aboriginal groups. In reality, however, this is not the case. The outcome of cases involving the duty serve governments and proponents more than it does Aboriginal groups and does little to progress reconciliation. This is not to discredit what Aboriginal groups have achieved through the avenues provided by the duty to consult: it is, rather, important to understand the concept itself is ambiguous, and the duty to consult does not resolve issues in a system that is deeply broken. Although it applies the honour of the Crown as it is meant to do, the duty to consult is not sufficient as a reconciliatory measure, and it therefore is not effective in fulfilling its purpose. The honour of the

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[48] *Tsilhqot'in Nation v. British Columbia*.
[49] *Tsilhqot'in*, 262.
[50] *R. v. Sparrow*.

Crown itself is ambiguous, relying on expectations rooted in archaic ideologies used by monarchs from hundreds of years ago to regulate complex modern dealings.

"While the principles informing the duty to consult and accommodate are clear, recognized applications of and processes for fulfilling these principles are still emerging through judicial decisions."[51] Because its development occurs through court decisions, progress occurs slowly, and thus the effectiveness of the duty is hindered. Both conceptually and in application, it is not yet fully developed. Court decisions and stipulations are continuously affecting the duty and the consequences of its application, and that is why such significant change can be made to the duty to consult in a single court decision such as *Haida Nation v. British Columbia* and *Delgamuukw v. British Columbia.* The progression of the duty occurring in court has other implications as well. The pursuit of a court action takes not only considerable time, but also significant financial resources. The costs associated with pursuing a case are unfathomable for many Aboriginal groups, and this presents yet another issue created by the current reality of the duty to consult. Aboriginal and treaty rights are rooted in the past: thus, there are significant complications that arise when attempting to apply them in the 21st century. This is where the ambiguity of the duty to consult can be useful; because it is not clearly defined in law, there is a flexibility that allows Indigenous peoples the opportunity to fight for their rights on a case-by-case basis. "While the court prefers negotiation over litigation as a way forward, the consultation trilogy has stated quite plainly that

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[51] Ariss et al., "Towards Reconciliation?" 9.

Aboriginal groups do not have a veto over Crown plans that impact their rights. The lack of veto, and the imbalance of power it creates in consultation and accommodation in favour of the Crown, remains a serious concern for Aboriginal groups and legal scholars."[52] Because the requirement is, in most cases, limited to consultation, agreement between the government and the affected group is not mandated. This creates serious hindrances for Aboriginal groups.

The Duty to Consult as a Reconciliatory Measure

Mikisew Cree established the purpose of the duty to consult and accommodate as "reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[53] The purpose of fulfilling the duty to consult is to progress reconciliation, which is described by the court as "a process flowing from rights and aimed at building just relations between communities."[54] This purpose is contradicted by the idea that the duty to consult also provides an avenue for governments to exploit land and resources, all the while justifying their actions through their fulfillment of the legal obligation presented by the duty. According to the Truth and Reconciliation Commission, reconciliation is defined as:

> "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. For that to happen, there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour."[55]

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[52] Ariss et al., 11.
[53] *Mikisew Cree First Nation v. Canada.*
[54] Newman, *Revisiting the Duty to Consult Aboriginal Peoples*, 31.
[55] *Canada's Residential Schools: Reconciliation.* Truth and Reconciliation Commission, 2015, 3.

The TRC mandate describes "reconciliation" as

> "an ongoing individual and collective process, and will require commitment from all those affected including First Nations, Inuit and Métis former Indian Residential School (IRS) students, their families, communities, religious entities, former school employees, government and the people of Canada."[56]

Reconciliation in the context of the duty to consult is problematic in and of itself; albeit seemingly positive in definition, the concept has been critiqued for being a pacification that does not challenge colonialism.[57] Hence, a problem arises in the context of the duty to consult, where the notion of reconciliation is used as a piece of token terminology that lacks consequence. Reconciliation is used to legitimize government actions and to appease Aboriginal groups, creating an appearance of cooperation and resolution even when neither is present. A relationship as severely and deeply damaged as that between Canadian governments and Aboriginal peoples cannot be rectified by a legal obligation that often amounts to little for Aboriginal peoples, while often providing significant gains for Canadian governments. It becomes clear throughout the contents of this paper that the duty to consult as it currently operates does not contribute to the broader goal of reconciliation.

A Way Forward: The Duty's Positive Potential

Despite the shortcomings of the duty to consult, there is potential for it to serve the relationship between the Canadian state and Aboriginal peoples in a positive way.

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[56] *Canada's Residential Schools*, 11.
[57] Ariss, et al., "Reconciliation?" 13.

The notion of reconciliation, as discussed above, may not be effectively serving its intended purpose in the context of the duty; but, should it be applied as an actionable concept that will allow for respect, cooperation, and mutual understanding in the state-Aboriginal relationship, it could become a much more effective mechanism. As mentioned, reconciliation requires "actions that change behaviour," and, as of yet, the duty to consult provides little opportunity for these actions to occur. The duty should not be used as a justification for exploitation, nor should the concept of reconciliation be used to pacify Aboriginal peoples into submission: these concepts should be used to serve the relationship in a way that is both fair and respectful. As mentioned, the duty to consult is a relatively new and undeveloped concept, and that is a benefit in this regard: it means that, provided there is motivation to do so, the concept may be further developed to be fairer and more respectful of Aboriginal concerns. The flexibility and relative novelty of the duty provide significant opportunity for improvement: timeliness, more required accommodation, and more severe consequences for failure to fulfill the duty may be included in these potential improvements. The issue, not unlike many others involving Aboriginal peoples in Canada, comes back to the power imbalance and the damaged relationship between the state and Aboriginal peoples. The lack of power held by the latter prevents them from having influence over the development of the concept, and the prevention of its development perpetuates that lack of power. Should the duty to consult become more representative of its stated purpose- "reconciliation of aboriginal peoples

and non-aboriginal peoples and their respective claims, interests and ambitions-"[58]it would allow for progression of reconciliation in a meaningful way, provide opportunities to Aboriginal groups to become more independent and productive, and create positive change in the relationship between the Canadian state and Aboriginal peoples in Canada.

[58] *Mikisew*, s.1.

CHAPTER 2: LITERATURE REVIEW

Although there is a considerable presence of environmental assessment related literature in the academic world, there has been relatively little scholarly writing on environmental assessments as a platform for the duty to consult. Despite this lack, there is value in examining what literature exists in order to understand the development of the environmental assessment process, and thus to interpret the role the process plays as an avenue for the duty to consult. Literature written on environmental assessments (EA) has focused on a multitude of issues and faults in the EA process. Some of these faults have been resolved as the process itself has evolved, while others have remained since the beginning of the EA process in Canada. Despite the changing evidence that environmental effects and climate change requires greater prudence now more than ever, the EA process has not properly reflected this evidence as it has emerged.

This review will present a sample of the literature that has been written on environmental assessments, as well as the literature on the duty to consult, demonstrating a number of perspectives and conclusions and the relationship between them. This review will also provide an analysis of the literature on Traditional Ecological Knowledge and how it may be used in environmental assessments both as a function of the duty to consult and as a reconciliatory measure. Literature from several different decades was selected for the purpose of providing an understanding of the quality, effectiveness, and efficacy of the environmental assessment process, and how these elements have changed over time. This will present a context within which to situate the duty to consult as it

operates through the EA process.[59] This review will focus primarily on Project EAs rather than strategic environmental assessment (SEA), as SEA is a part of a cabinet directive and is not included in the *Canadian Environmental Assessment Act.* As all case studies included in this paper occurred before the *Impact Assessment Act*, that legislation will be afforded only a short section. It is, however, possible to examine the existing literature on Environmental Assessments and its trajectory, and that is, in part, the purpose of this literature review.

Development of the Environmental Assessment Process

The environmental assessment process in Canada has evolved since its formal introduction in 1973, when the Environmental Assessment and Review Process (EARP) was introduced by cabinet. The EARP was officially implemented in April of 1974 and was merely a cabinet directive with no formal legal basis. In 1992, the *Canadian Environmental Assessment Ac*t became law, replacing the EARP and solidifying the environmental impact assessment process in Canada. In March of 2012, the House of Commons Standing Committee on Environment and Sustainable Development issued the report entitled *Statutory Review of the Canadian Environmental Assessment Act: Protecting the Environment, Managing our Resources.*[60] Within this report, the committee presented twenty recommendations, many of which became a part of the new

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[59] The environmental assessment process in Canada may be referred to as environmental impact assessment (EIA) or, in alignment with current legislation, impact assessment, but will, for the purposes of this literature review, be henceforth referred to as the EA process as is done in the *Canadian Environmental Assessment Act*.

[60] Mark Warawa, *Statutory Review of the Canadian Environmental Assessment Act: Protecting Our Environment, Managing Our Resources*, Report of the Standing Committee on Environment and Sustainable Development.

federal EA law. These recommendations were made with the intention of streamlining the federal EA process.[61] As a result, the new legislation would allow for fewer environmental assessments in addition to the procedural alterations that were made.

With the passage of *Bill C-38,* the previous *CEAA* was repealed and replaced by *CEAA 2012. CEAA 2012* is "an Act respecting the environmental assessment of certain activities and the prevention of significant adverse environmental effects."[62] The Act was assented to on June 29th, 2012, replacing the *Canadian Environmental Assessment Act 1992.* Under *CEAA 2012,* the scope and quantity of environmental assessments would be reduced as only projects designated through regulation or by the Minister of Environment would be subject to a federal EA, whereas under the previous legislation all projects that triggered the *CEAA* required an assessment.[63] The Act applies to the environment defined as "components of the Earth," including land, water, air [including all layers of the atmosphere], all organic and inorganic matter and living organisms, and the interacting natural systems that include the aforementioned components.[64] The stated purposes of the *CEAA 2012* were: to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project; to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and

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[61] Brenda Heelan Powell, "Changes to Canadian Federal Environmental Assessment Law in 2012," *LawNow Magazine,* 2013.
[62] *Canadian Environmental Assessment Act, 2012,* 1.
[63] Heelan Powell, "Environmental Assessment & the Canadian Constitution."
[64] *CEAA, 2012,* s.2.

precautionary manner to avoid significant adverse environmental effects; to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments; to promote communication and cooperation with aboriginal peoples with respect to environmental assessments; to ensure that opportunities are provided for meaningful public participation during an environmental assessment; to ensure that an environmental assessment is completed in a timely manner; to ensure that projects, as defined in section 66, that are to be carried out on federal lands, or those that are outside Canada and are to be carried out or financially supported by a federal authority, are considered in a careful and precautionary manner to avoid significant adverse environmental effects; to encourage federal authorities to take actions that promote sustainable development in order to achieve or maintain a healthy environment and a healthy economy; and to encourage the study of the cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments.[65]

Under *CEAA 1992,* projects are triggered when they involved the federal government as the proponent, federal lands, a prescribed federal permit, or federal financial assistance.[66] Under *CEAA 2012,* only projects found in the *Regulations Designating Physical Activities* (RDPA) are subject to a federal environmental assessment. In addition, the Minister has the power to designate a particular project for

[65] *CEAA 2012,* s. 4(1).
[66] *CEAA 2012,* s. 9(2).

federal environmental assessment on an *ad hoc* basis.[67] They do not, however, legally require all included projects to undergo an EA, aside from certain projects that are linked to the Canadian Nuclear Safety Commission (CNSC) or the National Energy Board (NEB). Only these specific projects are required to undergo an assessment, which is performed by either the CNSC or the NEB as designated by the regulations.[68] Projects that are not in the RDPA but are designated on an *ad hoc* basis by the Minister of Environment are required to undergo a federal EA. In addition, some projects included in the RDPA are required to undergo a federal EA under the Canadian Nuclear Safety Commission (CNSC) or the National Energy Board (NEB).[69] As a result of these changes, the sheer number of environmental assessments is reduced significantly, as was intended when the act was created. It was reported that the Minister of natural resources stated the regulations "should eliminate about 90 per cent of federal [environmental assessments]."[70] A significant number of projects that would be deserving of assessment would, as a result, slide through the cracks with allowance from *CEAA 2012.* It would seem that, as environmental threats and concerns have grown, the associated legislation receded and narrowed as it was reduced to an administrative procedure designed to simply check boxes rather than provide true environmental management.

The RDPA was created and implemented with no public or Indigenous consultation, nor were environmental organizations or the Minister of Environment's

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[67] *CEAA 2012,* s. 14(2).
[68] *CEAA 2012,* s.13-15.
[69] Warawa, *Statutory Review of the CEAA.*
[70] Minister John Baird quoted by the Canadian Press, via Arlene Kwasniak, "The Eviscerating of Federal Environmental Assessment in Canada," (2009).

Regulatory Advisory Committee consulted. As a result, the process itself is significantly less likely to include measures that consider the opinions and concerns of the public or Indigenous peoples. The Regulatory Advisory Committee was formed under the *CEAA* and was created to advise the Minister on the course of environmental policies and regulations.[71] In addition, the government did not comply with regulatory policy, which requires departments and agencies to publish potential regulations in the Canada Gazette I, providing an opportunity for public comment that would last at least 30 days. In the case of the RDPA, no public comment period was provided, and the regulations were published directly into Canada Gazette II, which is meant to contain only regulations that are registered and have already become law.[72] *Exclusion List Regulations* was formulated in 2007 to specify which projects will not be subject to environmental assessments because the Governor in Council is "satisfied" that the environmental effects are "insignificant."[73]

The scope of environmental effects under *CEAA 2012* are as follows: fish and fish habitats; aquatic species; migratory birds; changes occurring on federal lands; in a province outside the one where the project is being carried out; outside Canada; with respect to Aboriginal peoples' health, socio-economic conditions, physical and cultural heritage, current use of lands and resources for traditional purposes, or sites, structures, or objects that are of historical, archaeological, paleontological, or architectural

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[71] Kwasniak, "The Eviscerating of Federal Environmental Assessment."
[72] Kwasniak, "The Eviscerating of Federal Environmental Assessment."
[73] *Exclusion List Regulations, 2007.*

significance.[74] In contrast, the previous *CEAA 1992* considered effects on all environmental components: land, water, air, inorganic and organic matter, all living organisms, and interacting natural systems.[75] According to the previous *CEAA 1992,* consideration of the need for the project as well as alternatives to the project was required. This requirement was removed under the *CEAA 2012,* despite evidence that these factors are integral to sustainable practices. *CEAA 2012* also removed the requirement to consider the capacity of renewable resources that may be significantly affected by the project.[76] Under *CEAA 2012,* there are only two kinds of environmental assessments: assessment by a review panel and the standard assessment.[77] Under *CEAA 1992,* many different federal departments were responsible for environmental assessments. Under *CEAA 2012,* on the other hand, an assessment is conducted by the Canadian Environmental Assessment Agency, the Canadian Nuclear Safety Commission, the National Energy Board, or a designated review panel.[78] There are also timelines for the completion of environmental assessments included in *CEAA 2012,* as is a measure wherein a federal assessment could be avoided by allowing a provincial assessment process to either occur as a substitution or be deemed equivalent.[79] These substitution measures are a significant change from the coordination between federal and provincial

[74] *CEAA 2012,* s.5(1).
[75] Kwasniak, "The Eviscerating of Federal Environmental Assessment."
[76] Kwasniak, "The Eviscerating of Federal Environmental Assessment."
[77] *CEAA 2012,* s. 2.
[78] *CEAA 2012,* s. 15.
[79] *CEAA 2012,* s. 37.

governments that was exercised under *CEAA 1992*.[80] Public participation opportunities were required under *CEAA 1992*, and the term "public" was not restricted. *CEAA 2012* also requires public participation under EA processes that are conducted by the NEB or by review panel, but public participation is narrowed by tight timeframes, as well as substitution of federal processes for provincial processes, the variance amongst those processes, and the ensuing lack of funding for those substitutions.[81]

Impact Assessment Act and the Impact Assessment Agency

The *Impact Assessment Act* is not a focus of this literature review as it was not involved in the included case studies, nor has it been in existence long enough to truly understand its implications. It does, however, represent the most recent result of the changing EA process, and is thus worth a brief explanation. The Impact Assessment Agency is a federal body accountable to the Minister of Environment and Climate Change, and was created by the *Impact Assessment Act,* which came into effect on August 28 of 2019. This agency replaced the Canadian Environmental Assessment Agency as dictated by the *Impact Assessment Act,* which also repealed and replaced the *Canadian Environmental Assessment Act*. Many changes were made to the EA process under the *Impact Assessment Act,* and there are implications for Indigenous groups in these alterations. The change from "environmental assessments" to "impact assessments" represents the effort to understand how proposed projects may affect health, social, and economic issues as well as environmental effects. The assessment of certain factors was

[80] *CEAA, 1992*, S.C. 1992, s. 46, https://laws-lois.justice.gc.ca/eng/acts/c-15.2/20021231/P1TT3xt3.html.
[81] R.B. Gibson, "In full retreat: the Canadian government's new environmental assessment law undoes decades of progress" (Impact Assessment and Project Appraisal 30(3), 2012), 184.

made mandatory, including the following: impacts on Indigenous groups, Indigenous rights, traditional knowledge, or Indigenous cultures; the need for the project as well as any alternatives; sustainability concerns and the potential hindrance of Canada's commitments regarding climate change; strategic or regional assessment results; and the intersection of sex and gender with other identity factors.[82] The commitment was also made that decisions would be made with consideration of robust science, evidence, and Indigenous traditional knowledge. This is accomplished primarily through mandated public participation which is required throughout the impact assessment process. The Act also creates opportunities for Indigenous participation, and consultation with Indigenous groups is required not only through the duty to consult but is inherent to the process itself. Some form of Indigenous participation is applied to each step of the process save one: the decision-making stage.

Environmental Assessment Literature

The following section will examine a sample of literature concerning environmental assessments in order to provide context for the analysis of the duty to consult as it operates through EAs.

"EARP at the Crossroads: Environmental Assessment in Canada" by William E. Rees

"EARP at the Crossroads" discusses the status of environmental assessment in Canada in 1980. This publication provides the opportunity to understand how the

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[82] Laura E. Duke, "Impact Assessment Agency: An Overview" (Lawson Lundell LLP, 2018).

Canadian EA process has changed over time. This, in turn, demonstrates some of the most obvious flaws in the current EA process, in particular those which have failed to keep pace with the evolving environmental situation, and allows for observation regarding how the process can and should be altered in order to elevate the process to accommodate the demands of environmental crises as they occur.

Environmental Assessment and Review Process (EARP) was initiated by a cabinet directive rather than through legislation. This particular version of the EA process would never become law. According to Rees, EARP was encountering its greatest challenge with the proposed development of hydrocarbon reserves in the Beaufort Sea. Rees presents many issues with EARP that existed at the time the article was written; some of which have been resolved since, and some which have not. The article states that, at the time, EARP was confronting its most serious crisis, as Native organizations and public interest groups were abandoning the process due to its severe flaws.[83] These flaws existed from the beginning of EARP, and assumptions that it would develop to meet the public's expectations were abandoned by this time.[84] Despite the noted flaws in the EARP, Canada's model was being examined and acted as a model process for countries around the world. What the author fails to mention is that this is likely due to the simple fact that Canada's was one of the first, rather than the best, processes that could stand as a model. Observing and analyzing how the EA process has evolved over time supports this notion.

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[83] William E. Rees, "EARP at the Crossroads: Environmental Assessment in Canada" (Environmental Impact Assessment Review, vol 1 (4), 1980), 355.
[84] Rees, 356.

EARP functioned in two relatively independent phases: initial environmental screening and formal review of major projects. There were no formal consultation phases included in the framework and, as it was 1980 and the *Constitution Act 1982* did not yet exist, there was no legal duty to consult affected Indigenous peoples. There were, however, measures for public participation involved in the process. Under EARP, the panel's formal review was strictly advisory, and final decisions were made by the minister of the environment in consultation with the minister of the initiating department.

The article states that, "while EARP has enjoyed notable successes, the process is fundamentally flawed."[85] The following recurrent flaws, as discussed by various authors, are listed:[86] the intended scope of EARPs was unclear; there was no obvious rationale for the exclusion of federal regulatory agencies or Crown Corporations from routine participation in EARP; review panels were selected on "the basis of their knowledge and expertise of the project under review (FEARO 1980a)," which undermines public confidence in panel objectivity; the failure or inability of FEARO to develop or enforce consistent rules for the conduct of public reviews; the lack of legal mandate and procedures threatened the depth and rigour of EARP reviews; EARP reviews had a tendency to appear as an afterthought, seeming to be rushed in order to meet deadlines, and environmental matters were not routinely integrated in project planning; EIS guidelines sometimes seemed to "preclude the 'no go' option; and there was almost a

[85] Rees, 360.
[86] CEAC 1979, Emond 1978, Harvison 1979, Rees 1979.

complete absence of follow-up studies to determine the degree to which the recommendations of EARP panels are implemented.[87]

With the establishment of the duty of fairness in 1978, there were notable improvements in the conduct of public meetings. Despite this, it is noted that intervenors were not receiving critical materials in advance of meetings. The author also notes that several key public interest groups and native organizations made the decision to boycott the process. One of the most startling elements of the process is that it relied entirely on self-assessment by the proponent, and thus the only accountability measure involved at the time was the "spirit of good will among reasonable men."[88] Under the self-assessment model that was used, each federal department or agency was responsible for screening its own projects, as well as private sector projects for which it is the initiator. Beyond an advisory role, FEARO was not a part of departmental screening activities. As of January 1981, only 31 referrals were made to FEARO, of which only 15 had cleared the panel review. The author questioned whether there were mechanisms in place within the planning process that would effectively integrate environmental concerns at the screening stage.

The article also includes a short analysis of eight cases of screening across the four government departments that were most active in EARP.[89] This analysis was based on "normative criteria relating to procedural and systematic rigour, representation of

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[87] Rees, "EARP at the Crossroads," 355.
[88] Rees, 357.
[89] Rees, 363.

interests, adequacy of information, and apparent effectiveness."[90] According to this analysis, none of the screening procedures examined could be considered rigorous, with poor documentation primarily limited to descriptive data or checklists.[91] There were, after all, no explicit guidelines regarding a "significant environmental impact." There were no records of rationale for dismissing identified environmental concerns, and, ultimately, final recommendations showed "unsubstantiated judgement" on the part of the responsible officials. In addition, of the eight cases, the public was consulted in only two, and underrepresented even in those. They also found that, of all the cases, none showed evidence that the screening decision was truly informed. Overall, there was little to show that existing screening procedures were effective in their ability to achieve stated or assumed objectives.[92]

The article goes on to discuss the case of exploratory activity in the Beaufort Sea where DINA involved a procedure that allowed for a major regional interest group and two levels of government to meet under existing mechanisms, therefore inciting no new "twists" in the process. Although the author used this situation as an example to show that hope for improved EA processes is not yet dead, he also recognized that the effort ultimately failed, with little political support coming from Ottawa. Despite severe environmental concerns, no follow up studies were ordered. DINA and the DOE issued approvals in principle and final permits against the recommendations of the joint committee, and it was believed that these were ignored due to strong lobbying efforts on

[90] Rees, 364.
[91] Rees, 364.
[92] Rees, 364.

the part of the company. It is no surprise that, as a result of this and other similar cases, public interest groups and Native organizations lost motivation to take part in the EARP process. In spite of these discouraging cases, Rees maintained that there were mechanisms available that have genuine potential for use and adaptation.

There is a section in this publication that discusses the issue of self-assessment and lack of accountability in the EARP system. As a consequence of the government's commitment to self-assessment, as well as the lack of legal force in EARP, there was a lack of clarity regarding departmental responsibility, with no requirements for any specific departments to act in any way.[93] To make matters worse, there were no real consequences for those involved when they did not do that which they were meant to do. On these grounds, Canadian officials claimed that EARP was superior to NEPA because of its flexibility and ability to evolve as it accumulated experience. Rees found that, despite this 'flexibility,' there was an evident environmental cost associated with the "excessive discretion" enjoyed by participating agencies under EARP. The issue for Rees, then, was not necessarily that the objectives themselves were impossible, but that Ottawa was not providing the necessary conditions for ordinary "men of good will" to meet those objectives.[94] The change it required most was for FEARO to have a stronger mandate, at the very least to ensure that the government was doing what it claimed to be doing under EARP.

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[93] Rees, 366.
[94] Rees, 367.

Rees recommended that the following elements be included in environmental assessment legislation: FEARO be established as an independent legal entity; the scope of EARP should be clearly defined to include relevant socioeconomic factors; federal regulatory agencies and Crown Corporations should be included under the EARP mandate; FEARO should have power to set and enforce regulations for panel review, hold rigorous technical hearings, and devise decision criteria to guide proponents at the screening level; representatives of initiating agencies should be prohibited from serving on EARP panels; regulatory agencies should be required to participate in appropriate phases of screening and panel reviews of projects relevant to their mandate; initiating agencies should be required to formulate, document, and publish systematic screening procedures, and to designate those officials responsible for administering screening procedures, consult with all relevant regulatory agencies during screening and before a decision is made, and to publish periodically a register of projects that have been screened; a provision for public participation in screening decisions on demonstration of significant public interest should be included; and a mechanism to provide reasonable funding for public interest groups to facilitate their effective participation in EARP reviews should be provided.[95] Rees stated that these would create a more systematic and rigorous framework for EARP, and they would limit the hesitancy of public interest groups and Native organizations towards actively participating in EARPs. Rees goes on to discuss the notion that environmental concerns were generally not taken into account

[95] Rees, 367-368.

when policy was created, and that there was no cohesive statement of national environmental policy.[96] He then states that the problem was not with EARP, but rather that it had become a "*de facto* policy generator and catalyst for additional government action in producing better integrated environmental and development policies.[97]

There is a section pertaining to regional development and EARP, where the point is made that EARP emphasizes both ecological and socioeconomic implications: what, then, occurs in cases with regional scale projects that have national significance? This becomes particularly poignant in cases where the local population will suffer the majority of the negative consequences of the project while the benefits flow elsewhere. This is especially relevant in cases involving Indigenous communities. After all, why would a community oppose a project that would provide them with beneficial outcomes that outweigh the negative implications? More often than not, projects that affect Indigenous communities will cause harm to their land, resources, culture, or way of life while the financial rewards are reaped by someone with no connection and therefore no emotional investment in that community. The idea of EARP being a "one shot" effort with only short-term provisions is also mentioned. Projects may go on for many years, and their effects much longer, while EARPs last a small fraction of that time and exist only during the birth of the project with no requirements for follow-up or longevity measures.

Rees concludes that EARP was a largely reactive mechanism with a questionable record even in the assessment of environmental effects of specific projects and actions.

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[96] Rees, 369.
[97] Rees, 371.

As a result, it cannot "realistically be expected to assume successfully the lead role in what should be regional development planning."[98] He goes on to say that EIA was simply one essential component of a broader development framework that was yet undiscovered. Rees states that the ultimate goal is to integrate environmental assessment and broader planning procedures in Canada, and to move away from "assessment-as-afterthought to true environmental management."[99]

"An Ecological Framework for Environmental Impact Assessment in Canada" by Gordon E. Beanlands and Peter N. Duinker

In "An Ecological Framework for Environmental Impact Assessment in Canada," Beanlands and Duinker present results from a project that was designed to address concerns that scientific requirements and implications of the EA process do not receive sufficient attention. The authors claim that the environmental assessment process in Canada has evolved into a "fairly complicated sociopolitical phenomenon involving extensive administrative support systems."[100] According to the authors, there is widespread concern that there is a significant gap between basic concepts as they relate to scientific studies. This report presents the results of a two-year study that was intended to address this concern within the Canadian context. The project allowed numerous people involved in impact assessments the opportunity to review their experience and recommend ways of incorporating a more rigorous scientific approach into future

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[98] Rees, 373.
[99] Rees, 373.
[100] Beanlands and Duinker, "An Ecological Framework for Environmental Assessment in Canada," (Halifax: Dalhousie Institute for Resource and Environmental Studies, 1983), 1.

assessments. Its goal was to determine the extent to which ecology could contribute to assessment studies, as well as to recommend how this may be achieved. The project did, however, recognize that ecology is only one of many factors in EIA.

According to Beanlands and Duinker, the lack of attention paid to the scientific elements of EIAs has created a divergence between the two major groups involved: on the one side stand the administrators and their scientific advisors responsible for establishing the reference terms for assessments and judging whether the resulting studies are adequate; on the other side stand the project proponents and their environmental consultants who translate the reference terms, typically without understanding the scientific standards that will be implemented by the project's reviewers. Thus, a serious disconnect is created, and this often results in a muddled, frustrating review process that occurs within a relatively well-defined administrative process.[101] This confusion results in dissatisfaction among those directly involved. The findings of this study lend themselves to many of the issues pointed out in the previous article, *EARP at the Crossroads*; should the scientific rigour suggested in this article have been applied at the time of the EARP, the issues raised in the previous article may not have been so plentiful or severe. As the EA process evolved, its scientific rigour should have been increased. It is apparent, however, that this has not yet been the case.

When asked, some participants involved in the project were not convinced that scientific rigour is an important element of the EA process, while others stated that

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[101] Beanlands and Duinker, 1.

scientific rigour needed to be improved lest the concept of EAs become an "exercise in public relations and government lobbying."[102] This project is considered by the authors to be the first attempt to regard the technical requirements of EA policies and procedures in Canada from the perspective of the applied scientist. If this is, in fact, the case, this publication has significance in the examination of literature written on EAs in Canada as the scientific elements of the EA process are of great importance. Without the application of science, an EA exists simply as a political process designed to satisfy those too ignorant to understand it, and its only purpose becomes the creation of the illusion that there is some level of environmental management occurring.

Generally speaking, the lack of scientific rigour in the environmental assessment process undermines its validity. How, then, could the EA process serve as a sufficient platform for the duty to consult as it currently exists? The process itself is flawed if it does not provide proper scientific information regarding the potential effects of the proposed project, and it cannot accurately represent a thorough evaluation of how that project will affect the environment. The same may be said for the duty to consult; if that duty is not sufficiently carried out, the potential effects of the proposed project cannot be properly assessed or represented. In addition, a lack of scientific rigour and the associated unreliable results this produces is disadvantageous to affected Indigenous groups who rely upon the results of an environmental assessment to understand the environmental

[102] Beanlands and Duinker, 2.

effects of the project at hand. In order to truly understand what is threatening them, they are entitled to a reliable, valid assessment of the effects that may be had.

"Public participation and environmental impact assessment: Purposes, implications, and lessons for public policy making" by Ciaran O'Faircheallaigh

This paper observes general models of public participation in EIA and discusses the notion that EIA literature is lacking in analysis of the implications of different forms and degrees of public participation, as well as how public participation relates to debates about participation in policy making in general.[103] The issues surrounding public participation in EIA are a focus for scholars and practitioners and, according to O'Faircheallaigh, the general consensus is that public participation is highly desirable, and that scholars should be concerned with finding ways to make public participation more effective. Although this consensus exists, there are disagreements regarding how it should be approached. According to this source, the benefits of public participation are taken for granted, and, as a result, the reasoning for increasing and improving public participation may be clouded, making it more difficult to improve the process. The reasons for the pursuit of public participation are diverse and may not be mutually consistent. "The key goal of this article is to identify and explore the full range of ways in which members of the public relate to EIA processes."[104] The author claims that public participation may be the only manner in which all potential issues associated with

[103] Ciaran O'Faircheallaigh, "Public participation and environmental impact assessment," (Environmental Imapct Assessment Review, vol. 30, iss. 1, 2010), 19.
[104] O'Faircheallaigh, "Public Participation and EIA," 19.

proposed actions can be properly identified and the concomitant fears and emotions inflicted by these potential issues can be mitigated.

This article provides a broad definition of what public participation means: "any form of interaction between government and corporate actors and the public that occurs as part of EIA processes."[105] Under said definition, Indigenous consultation may be included. The article does not, however, include discussion of Indigenous consultation, save for one passing mention in service of a related point. The self-proclaimed purpose of this publication is to distinguish various purposes for public participation in EIA, and to discuss the implications those purposes have on decision making. General models of public participation in public policy are examined and used to evaluate different approaches to EIA, and ask what is revealed about these models when they are observed in the assessment process. O'Faircheallaigh argues that, despite the existing analyses of public participation in EIA, there is insufficient attention paid to how different forms of public participation interact with one another. He also points out that public participation raises issues regarding which actors possess control over decision making, stating that these are not resolvable issues but are, rather, issues that must be managed through negotiation.

O'Faircheallaigh claims that there are 3 categories within which purposes for public participation may fall: as an aid to decision making which remains separate from the participating public; as a mechanism for achieving a role for the public as joint

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[105] O'Faircheallaigh, 20.

decision makers; and as a mechanism for reconstituting decision-making structures.[106] Despite the evidence that public participation in EAs is highly desirable, decision makers are likely to seek only the degree of participation which is required to extract the information needed. They do not seek supplementary information, likely because it typically does not serve them to do so. After all, what interest would government or industry decision makers have in information that may negate or contradict their objectives? This exposes one of many weaknesses in the EA process, as there is little motivation to consider or pursue a variety of options aside from precisely that which is required under law. This automatically bars the process from being exposed to potential effects that would not otherwise be found. Insufficient public participation allows proponents to safeguard their projects from scrutiny from the very people who will have to live with its effects, and the failure to incite the duty to consult follows the very same vein, albeit with more complex and, in many cases, directly severe consequences than those experienced by the general public. There is, after all, a much more complicated and unhealthier dynamic between the Canadian state and Indigenous peoples, and there is often much more at stake -such as traditional ways of life and culturally significant places and practices- where Aboriginal communities are concerned.

Sharing information with the public is a very different matter than allowing a community or group to influence government decisions, as the latter empowers individuals and communities while the former is a simple provision of details of a project

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[106] O'Faircheallaigh, 20.

with no exchange of ideas or opinions.[107] This particular idea has significant relevance to the duty to consult and its application to environmental assessments. The duty to consult requires only the provision of information to affected Indigenous groups, and provides no opportunity for those groups to influence government decisions; therefore, there is no empowerment provided to affected or involved Indigenous groups. This is at the heart of many issues in the relationship between the Canadian state and Indigenous peoples. The Canadian government, not unlike most, is not quick to give away power; especially not to its marginalized groups. The result is the maintenance of the severe imbalance of power that created the need for the duty to consult in the first place. This speaks to the broader conversation referred to by the author regarding public participation in public policy in general: the allowance for participation in a government process represents more than a simple administrative process, particularly in such a case where the results have the potential to severely affect those whose participation is restricted.

According to O'Faircheallaigh, the issue of public participation in public policy decisions is contested and highly political. It is rather easy to draw similarities between these notions regarding public participation and the issues involved with the duty to consult in EAs. Politically, the weight of public participation in EAs has more pull because there are significantly more members of the general public than there are affected Indigenous groups. That said, Indigenous groups tend to have a stronger connection to the potential effects of projects; yet, in most cases, they do not have the

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[107] O'Faircheallaigh, 20.

political influence that public exposure and action may have because, politically, they are relatively weak. Their heightened interest alone should make concerned Indigenous groups more valuable as subjects of consultation and members of participatory actions, and yet, due to this political weakness, the main avenue through which Indigenous groups have been able to achieve the level of participation which they are currently allowed has been through the courts. Aside from this heightened interest, Indigenous groups also hold the traditional ecological knowledge that their peoples have acquired over the thousands of years they have spent in direct contact with the very land and resources that are being assessed. Public participation, on the other hand, may be strengthened through public pressure and demand from large groups.

Because proponents desire and intend for their projects to be approved, they are likely to downplay or ignore negative impacts, as well as to exaggerate the benefits: particularly the economic benefits that are used to justify large industrial projects, no matter their environmental risks.[108] This is perhaps the most pertinent point from this publication that may be relayed to the duty to consult in EAs. Not unlike the general relationship between Indigenous peoples and the Canadian state, Indigenous rights as well as their socioeconomic, environmental, and cultural concerns are a very distant second to government and industry priorities. If the concerns of an Indigenous group, no matter how valid they may be, do not align with or allow for the intended actions of the proposed project, they are dismissed. This is the most evident and pressing issue with the

[108] O'Faircheallaigh, 21.

EA process: as it currently stands, the process allows projects to move forward despite the potentially devastating effects they may have. This is of major concern for relatively disempowered Indigenous communities. Wherein an impassioned public may have the ability to affect change- provided the effects are widespread enough to involve a significant number of people- Indigenous groups tend not to share in this luxury.

This article sets out to contribute to the broader debate surrounding public participation in EIA in three ways: by distinguishing between different purposes for public participation; by considering how these purposes can be interpreted and valued; and by considering how public participation can assist in assessing the utility of various models of public participation in policy making in general.[109] Public participation presents the opportunity to assist in problem solving by providing suggestions that can help address complex environmental and social issues. The example provided concerns a proposed project that will result in the death of a certain number of turtles each year. Varying groups (for example, environmentalists, economists, and Indigenous elders) will regard these effects in different ways: an economist would concern themselves with the market value of an equivalent quantity of meat; an Indigenous elder, in this example, believes that people are spiritually linked to turtles and live in a relationship of mutual dependency;[110] an environmentalist would be concerned with the effect these deaths will have on the turtle population, the affected ecosystem, and future of the species. The author states that decision makers may wish to ensure that one single perspective is able

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[109] O'Faircheallaigh, 20.
[110] O'Faircheallaigh, 20.

to dominate.[111] The use of a variety of forms of public participation, which would include Indigenous consultation, would account for this, allowing the government to learn of different possibilities and how those factors may affect different segments of the population, as well as how the scientific findings of a project will be experienced by each affected group.

"Environmental impact assessment: the state of the art" by Richard K. Morgan

"Environmental impact assessment: the state of the art" provides an overview of the progress that has been made in environmental impact assessments over the past forty years with particular focus on the past 15-20 years. The paper concentrates primarily on EIA as it emerged from the National Environmental Policy Act 1970 (NEPA) in the United States. The article does, however, offer important insight into the international context of environmental impact assessments/environmental assessments and how they have developed over time. After all, domestic processes that deal with transnational effects such as environmental change can and often do develop along international trends. In this case, the global trend that is recognizing that environmental management strategies such as EA/EIA are entirely necessary has influence over the way state governments create policies. Morgan examines whether the EIA process is prepared to encounter future challenges. This is done through an examination of how EIA has expanded internationally, recent increasing trends of EIA implementation, and the continued emergence of variants of impact assessment. This paper also focuses on current

[111] O'Faircheallaigh, 20.

issues in EIA through theory, practice issues, and EIA effectiveness. Environmental impact assessment has developed as a key component of environmental management over the past 40 years and has occurred in conjunction with the increasing understanding of harmful effects on the environment and associated environmental change. Because it is now more important than ever to consider impacts on the environment, it is important to assess the progress that has been made in EIAs and to reflect on the current and future challenges that persist.

Countries such as Australia, Canada, Sweden, and New Zealand set the early example in adopting EA processes, and many others have since followed by incorporating some form of impact assessment process into formal procedures or legislation. EIA or EA is recognized in many international conventions, protocols and agreements including the Convention on Transboundary Environmental Impact Assessment; the Convention on Wetlands of International Importance; the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; the United Nations Framework Convention on Climate Change; the United Nations Convention on the Law of the Sea; and the Protocol on Environmental Protection to the Antarctic Treaty.[112]

Morgan briefly discusses the types of environmental assessments that have emerged since 1970, including social impact assessment (SIA), health impact assessment (HIA), strategic environmental assessment (SEA), regulatory impact assessment (RIA),

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[112] Richard K. Morgan, "Environmental impact assessment: the state of the art," (30:1, 2012), 6.

human rights impact assessment, cultural impact assessment, post-disaster impact assessment, and climate change impact assessment. Morgan states that the main challenge for the EIA community will be to ensure that all forms of impact assessment will "contribute to the effective assessment of proposals, based on well-understood principles shared across the field of impact assessment, and conducted in an integrated and complementary way."[113] Thus, this publication discusses EIA in its most recent theoretical context and considers how those views are influencing impact assessment practices as well as the broader effectiveness of those practices.

Morgan divides the issues involved in environmental assessments into three broad categories: theoretical grounding- is there a clear sense of the purpose of EA and what it comprises? quality- what is good practice, how can quality be judged, and what guidance should be provided? and effectiveness- what is being achieved through this process?[114] Morgan explains that the theoretical basis of EIA may be viewed through the various theories and models of planning and decision-making. Morgan discusses five planning theories: rationalism, pragmatism, socio-ecological idealism, political-economic mobilization, and communications and collaboration.[115] Morgan also referenced a simpler categorization of decision-making approaches: rational, new institutionalist, and negotiation perspectives.[116] Several other decision-making approaches are outlined, from which Morgan determines that the common theme is the critique of the rationalist model

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[113] Morgan, 7.
[114] Morgan, 7, from Retief (2010).
[115] Morgan, 7, from Lawrence (2000).
[116] Morgan, 7, from Leknes (2001).

of planning and decision-making. The basis of the rationalist model was "the adoption of a rational process to guide the choice, from a range of alternatives, of the best solution for a defined problem or need, based on an analysis of all the relevant information necessary to make that choice."[117]

The basis of rationalism in EIA is an interesting concept in the context of this paper. Does the proposed emphasis placed on rationalism threaten the value placed on Indigenous concerns and traditional ecological knowledge? The seemingly obvious answer is yes, an emphasis on rationalism does, in fact, erode the value placed on implementation of TEK. This can serve as a simplified explanation as to why TEK is so undervalued and underused in the current EA system, and why it is not a part of the process in general. "From its inception, environmental assessment (EA) has been associated with the rationalistic idea of planning."[118] As a result, planning processes begin with the identification of the objectives of the assessment, and the results of this set the requirements for policy makers. These objectives and their potential alternatives are analyzed, and this analysis contributes to the implementation of the planning process.[119] Therefore, a rationalist approach is ideally a matter of finding the most effective way to achieve the objectives found during the planning process.[120] As will be discussed in the review of "A Place for Traditional Ecological Knowledge in Resource Management," this is where co-management approaches come into play. A strictly rationalist approach

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[117] Morgan, 8.
[118] Bo Elling, "Rationality and effectiveness: does EIA/SEA treat them as synonyms?" (27:2, 2009), 121.
[119] Elling, 121.
[120] Elling, 121.

simply cannot provide for a truly holistic process, nor an appropriate solution. The same can be said for an approach based entirely on TEK. A co-management approach provides the benefits from both, allowing both the generalized theoretical understanding that is provided through rationalism, as well as the generational, local, and culturally relevant knowledge that accompanies a TEK approach.

The form of EIA that emerged in the 1970s and remains the dominant form of institutionalized EIA in many countries is strongly influenced by the rationalist model, which is characterized as having a strong technical emphasis with planners processing information from a neutral stance and producing independent evaluations of alternatives, which are then provided to decision-makers.[121] After NEPA was enacted, the EIA process came to be seen as one of the most important ways to inform decisions regarding project proposals. This rationalist model has been the subject of significant criticism, and one of the most important elements of the criticism has been the impossibility of recognizing all possible alternative solutions.[122] As a result, more constrained and "practice-informed" models of the rationalist approach emerged. These approaches do, however, bear significant similarities to the traditional rationalist model. They, too, have been criticized for their "failure to recognize the political and value-based nature of decision-making."[123] This has encouraged collaborative approaches to planning and decision-making processes, including EIA. This involves "bringing stakeholders and communities into the

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[121] Morgan, "EIA State of the Art," 12.
[122] Morgan, 8, see Holden (1998).
[123] Morgan, 8, from Wilkins (2003) and Richardson (2005).

processes, emphasizing the importance of communication as a means of negotiating consensus solutions that capture the values of those participants, and moving the professional technocrats from a controlling role to a facilitating role in the decision-making process."[124]

In the current context, there is a significant literary and practical basis showing that EIA is still firmly rooted in rationalism. Recent theoretical debates, however, are showing the need to move towards a more collaborative and participatory approach. According to a 2007 report released by the US Council on Environmental Quality, the value dimension of the EIA process must be reflected in the way it is designed and carried out.[125] Thus, when significant decisions are being made, the process must include measures to accommodate those who may be affected by the proposed activity. Morgan says this must, at a minimum, include the scoping phase and the impact evaluation phase.[126] He also states that EIA practitioners should be more aware of and more sensitive to the inherent power relations that exist within rationalist decision-making processes, as these relations can hinder effective participation and exacerbate environmental injustice.[127] Morgan recommends that practitioners should exercise caution in pursuing theories or models that may not exist, and should instead use theoretical debates to develop their actions.[128]

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[124] Morgan, 8, from Wilkins (2003) and Elling (2009).
[125] Morgan, 8.
[126] Morgan, 9.
[127] Morgan, 9.
[128] Morgan, 8, from Richardson (2005).

Practical issues in impact assessments are the focus of most EIA literature, and this trend will likely continue. There is, however, a need for development of the concept of cumulative effects assessment (CEA) in EIA literature. Despite the general consensus that cumulative effects are of significance and need to be considered, they are frequently ignored or inadequately executed in practice. According to Morgan, cumulative effects are central to impact assessments and the improvement of CEA in the EIA process is desirable. To conclude, Morgan uses the SWOT (strengths, weaknesses, opportunities, threats) framework to summarize the current state of EIAs. The strengths listed include the fact that EIA is well established around the world, both in domestic laws in various states and in international law. Its growing significance in different levels of decision-making and the variance of decision types for which it is used is also mentioned. Another strength mentioned is the support infrastructure that is considered to be well-developed, as well as the community of researchers committed to learning about the process. Discussed weaknesses begin with concern regarding the poor quality of impact assessment information, which might reflect problems with institutional arrangements, low levels of commitment by proponents, issues with the nature, extent and quality of training and capacity building in the impact assessment, or elements of all of these factors. Significant practical improvements to EIA quality often require overcoming entrenched bureaucratic and professional perspectives; something that is difficult to do without a procedural overhaul. Noted threats include the notion that governments are stimulating economic growth in response to the financial crisis and seek to quicken decision-making. As a result, environmental assessment should be more important, yet these hastened decision-making tactics weaken the provisions for environmental

protection. This could be argued for the changes made under *CEAA 2012,* which, as admitted by the government at the time, included measures to reduce the number of EAs and to hasten those that would occur. The associated fear is that the increased prioritization of financial viability of projects will continue to reduce the influence of EIA on project decisions, with and without the application of the duty to consult.[129]

The article concludes with the 'opportunities' section, which states that comfort should be taken in the fact that EA has become widely accepted by governments, the international legal community, funding agencies, and other key players.[130] The author states that the EIA profile will increase as concerns regarding environmental issues grow and communities and governments "recognize the importance of true anticipatory mechanisms in their decision-making processes."[131] Accordingly, the impact assessment community is facing an opportunity to build on this foundation and shift thinking from the licensing stage to more critical decision-making processes. Not unlike Rees stated during the EARP era, EIA should become an integral part of development processes rather than being left to the final legal step before projects begin, as this would allow those involved in impact assessments to act in ways that are consistent with community needs and desires rather than partaking in what is referred to as "compliance-oriented EIA."[132]

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[129] Morgan, 11.
[130] Morgan, 12.
[131] Morgan, 12.
[132] Morgan, 12.

"Quality and effectiveness of environmental impact assessments: lessons and insights from ten assessments in Canada" by David P. Lawrence

This article describes a study that reviewed the quality and effectiveness of EIAs through systematic review of a cross section of ten EIA reports. The author, David P. Lawrence, first provides an overview of the framework for assessing EIA quality and effectiveness. The study methodology is described before explaining the ten EIAs under a screening and performance analysis. The listed recurring problem areas include overall study design, generation and evaluation of alternatives, consideration of impact significance, uncertainty, cumulative effects potential and sustainability, and impact management integration and implementation.[133]

Lawrence chose ten EIA reports and reviewed them systematically in an attempt to address the shortcomings of other evaluation systems, which leave considerable discretion for implicit judgement. This analysis is meant to be instructive towards EIA regulators and practitioners. The ten EIAs encompass seven project types within eight different jurisdictions. It is noted that, despite the fact that ten EIAs do not provide a basis for broad generalizations, they offer a useful cross section of experiences that can allow for identification of insights that may have a broader application.[134]

The distinction between 'quality' and 'effectiveness' is established, where quality analysis is a tool for assessing EIA institutional arrangements, documents, processes and methods; and EIA effectiveness analysis is a tool for assessing the direct and indirect

[133] David P. Lawrence, "Quality and effectiveness of environmental impact assessments: lessons and insights from ten assessments in Canada" (Project Appraisal, 12:4, 2012), 219.
[134] Lawrence, 224.

consequences stemming from the EIA regulatory regime and from EIA procedures, documents and methods undertaken within the EIA regulatory regime. An assessment of EIA institutional arrangements can encompass such concerns as organizational structure and interactions; organizational capacity; and policies, legislation, regulations and guidelines. Process assessment includes evaluating the planning process, the political process, and the administrative procedures used to review the application. Various methods are used in EIA to identify alternatives, characterize the proposal and potentially affected environment, measure and predict impacts, interpret impact significance, mitigate and monitor impacts and involve stakeholders. EIA methods should be "well-defined, unambiguous, capable of reasonably consistent and objective application, directed toward a distinct purpose and sufficiently important to influence the assessment of EIA quality/effectiveness."[135]

In his analysis, Lawrence notes that only two of the screening criteria, the consideration of potential cumulative environmental effects and the consideration of potential sustainability and biodiversity implications, contributed to a screening decision.[136] Of the ten EIAs, five failed to address cumulative environmental effects and six failed to address sustainability implications.[137] Although all ten passed the remaining screening criteria, six of the EIAs are borderline because of "cursory and largely *ad hoc* treatment of alternatives, impact significance interpretations and uncertainty."[138]

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[135] Lawrence, 221.
[136] Lawrence, 222.
[137] Lawrence, 226.
[138] Lawrence, 228.

According to the study, the most significant shortcoming is an evident lack of scientific rigour.[139] "An Ecological Framework for Environmental Impact Assessment in Canada," discussed earlier in this chapter, addresses this same issue: that, in order for EIAs to improve in quality and effectiveness, they must involve more scientific rigour. How, after all, might an environmental assessment truly consider a project's effects on the environment if that assessment is not scientifically sound? Although there are other important elements that must be considered in impact assessments, the scientific study of how the project will affect the environment is the pillar upon which the assessment must stand.

The most common limitations that were found regarding lack of scientific rigour included the failure to treat EIA as an experiment, no consideration of comparable projects, a vague study design, no indication of qualifications for those who conducted the study, limited justification of methods used, no peer review, and limited acknowledgement of constraints and uncertainties.[140] Across the ten EIAs, the following aggregate criteria ratings were found to be generally successful: document style and format, proposal description, major document elements, public involvement, and planning process description. The most common weaknesses found when applying the analysis and synthesis criteria and indicators involved the following: treatment of sustainability concerns, the determination of cumulative environmental effects, the analysis of impact reversibility potential, the assessment of patterns of fluctuation, and

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[139] Lawrence, 228.
[140] Lawrence, 228.

the consideration of probability, risks, and uncertainties. In addition, there is a need for improvement in systemic interpretation of impact significance. Other areas in need of improvement include the *ad hoc* procedures used for generating alternatives, the blurring of alternative screening and comparison, the cursory treatment of non-structural alternatives, the limited consideration of mitigation potential, and the general failure to screen unsustainable alternatives.[141] After identifying the weaknesses and relative strengths of the ten EIAs that were studied, Lawrence lists the primary ways in which the weaknesses and shortcomings could be improved, which include the following: a more rigorous impact prediction approach; the explicit and systematic consideration of cumulative environmental effects and sustainability implications; the analysis and documentation of agency concerns and priorities at least up to the level currently devoted to public concerns and preferences; the more systematic, explicit and consistent treatment of impact significance [as distinct from impact magnitude], risk, reversibility, and uncertainty; an integrated impact management approach.[142]

In his conclusion, Lawrence states that there is an evident need for improvement in the EIA process, and that a greater level of consistency can be achieved without affecting the potential for improvement and innovation within the process. The significant variability in the EIAs that were studied cannot be simply explained in variance of jurisdictions and projects, and this variability reinforces the need for more *post hoc* EIA evaluation and for more communication and networking amongst

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[141] Lawrence, 228.
[142] Lawrence, 229.

professionals involved in EIAs. The analysis of this study shows a need for a more formal and systematic approach to overall study design, generation and evaluation of alternatives, documentation of agency concerns and priorities, treatment of risk and uncertainty, evaluation of significance, consideration of cumulative environmental effects and sustainability, and to the integration and implementation of impact management resources.[143] These priorities need to be shared by administration and design of EIA legislation, as well as in application of that legislation. In the context of this paper, it is important to note that, although scientific rigour is important in assessments of environmental impacts, reconciliation and, by extension, the purpose of the duty to consult is not a question of science. This will be discussed further in a later section.

Traditional Ecological Knowledge Literature

The literature concerning Traditional Ecological Knowledge (TEK) covers a broad range of perspectives and analysis regarding the collection and use of TEK. The selection of literature for the purposes of this paper provides an overview of the uses and applications of TEK in order to understand the value it may bring to the environmental assessment process, as well as how consideration of TEK can and should be involved in the implementation of the duty to consult.

What is TEK?

Traditional Ecological Knowledge is defined as "the local understandings of plant, animal, and habitat relations held by Indigenous peoples," and it is emerging as "an

[143] Lawrence, 229.

important focus of applied social research."[144] TEK may be further defined as "a cumulative body of knowledge, practice and belief evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and their environment."[145] TEK is both cumulative and dynamic, as it builds on experiences as well as adapting to change as the definition of "tradition" changes over time.[146] The potential that TEK has to contribute to the proper treatment and use of resources is both vast and untapped. Knowledge that has been held and adapted by Indigenous groups for many generations have proven that TEK holds answers for sustainable practices; answers that scientific knowledge alone simply cannot provide. In the broad sense, TEK itself epitomizes the utility and practicality of consulting with Indigenous groups, particularly in the local context. It allows for transmission and use of generations-old information that scientific experiments cannot access, and can provide guidance to decision makers and practitioners of EA processes as well as serve as a bolstering addition to the implementation of the duty to consult. TEK is demonstrative of the fact that Indigenous groups have more to offer than protests and complaints regarding resource development and extraction; they possess knowledge based on generations of data collection, observation, and experiences. In cases where TEK is contradictory to industry intentions,

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[144] C.R. Menzies, *Traditional Ecological Knowledge and Natural Resource Management*, (Lincoln: University of Nebraska Press, Ebscohost, 2006) 87.
[145] Fikret Berkes, "Traditional Ecological Knowledge," Winnipeg: University of Manitoba, 1.
[146] Berkes, 1.

it is often ignored, and this is not only disrespectful to aboriginal culture, but also leads to damage caused to ecosystems that use of TEK may have preserved for many years.

"TEK is said to offer the promise of ancient, culturally relevant, and environmentally friendly ways and means of reintegrating alienated industrial women and men with our natural world."[147] The literature shows that ecological crises and the failure of scientist-led solutions have encouraged widespread interest in Indigenous knowledge systems.[148] It is mentioned in nearly all sources discussed in the following section that TEK has become more prominent in recent years, although it would seem this is true only in a marginal sense, as this increased interest seems to be widely academic in nature and does not tend to be reflected in any practical application. It is important to note that Indigenous knowledge is locally developed, and this may be considered both a strength and a weakness;[149] TEK can provide specific and detailed information that may be crucial for management of ecosystems in the local context, but this locally developed knowledge can be difficult to transfer outside of that local context.[150] TEK is valuable because it is associated with a very long history of resource use and management within a particular area. It is the "cumulative and dynamic product of many generations of experience and practice;"[151] in other words, it is both longstanding and adaptable, having been shaped, altered, and tested over time. According to Bombay (1996), a Mohawk man named Jameson Brant has described Indigenous knowledge as "a body of information about the

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[147] Menzies, 87.
[148] Menzies, 87.
[149] Menzies, 87.
[150] Menzies, 2.
[151] Menzies, 2. See Berkes (1999) and Menzies (2006).

interconnected elements of the natural environment which traditional Indigenous people have been taught, from generation to generation, to respect and give thanks for."[152] Despite growing awareness of TEK in natural resource management, current regulations and practices often do not promote integration of TEK into active resource management, and environmental assessments typically do not include consideration of TEK.

Although most discussion of TEK focus on North American Indigenous peoples, there are ecological knowledge traditions in other Indigenous societies, as well as culturally transmitted, cumulative, multigenerational knowledge held by groups with European backgrounds.[153] Due to its qualitative nature, TEK is considered to be less precise and reliable than scientific ecological knowledge, and thus, the relationship between the two fields is controversial. The fact that TEK is not testable is considered an issue, and this leads to the incorrect notion that science is more valuable than TEK. This normative approach is harmful to the integrity of TEK, which has validity outside the world of rigorous scientific study, particularly in the context of consultation regarding the harm that may be done to Indigenous culture and traditional ways of life.

Despite the evidence that the field of TEK has experienced growth, this has mainly occurred within the realm of interdisciplinary scholarship rather than from ecology and resource management professionals or decision-makers.[154] Therefore, there is a significant disconnect between theory and practice. The practical application of TEK has yet to become widespread despite its praises being sung by many knowledgeable

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[152] Menzies, 6.
[153] Berkes, "Traditional Ecological Knowledge," 1.
[154] Berkes, 2.

scholars, and it has yet to make a significant impact through the duty to consult and the environmental assessment process. The duty to consult through the EA process provides an inimitable opportunity to utilize TEK to inform environmental practices.

"Traditional Ecological Knowledge in Perspective" by Fikret Berkes

"Traditional Ecological Knowledge in Perspective" explains TEK, its roots, how it relates to western science, and its practical significance. According to Berkes, the study of TEK is valued in a number of fields, and the earliest systematic studies of TEK were performed not by ecologists but by anthropologists. In its early iterations, "[a]ncient ways of knowing started to receive currency in several disciplines, including ecology."[155] Growing recognition of the value of ancient agriculturalists, water engineers and architects has allowed for validation of traditional knowledge in a variety of fields.[156] Berkes goes on to discuss the ambiguity of the concept of "traditional ecological knowledge," which has no universal definition despite the breadth of literature that has been written on the subject. Some scholars choose not to use the word "traditional," opting instead to refer to it as "indigenous ecological knowledge," as the term "traditional" cannot properly represent the evolution of indigenous societies over time, nor can it account for the adaptability that is integral to traditional knowledge systems.[157] In this context, the semantics of the term have a significant influence on how TEK is perceived. The connotations associated with tradition tend to include an inability or

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[155] Fikret Berkes, "Traditional Ecological Knowledge in Perspective," (*Traditional Ecological Knowledge: Concepts and Cases*, Canadian Museum of Nature, 1993), 1.
[156] Berkes, 1.
[157] Berkes, 3.

unwillingness to evolve, antiquity, or even obsoletion. Traditional ecological knowledge is not synonymous with these terms, and the belief that this is the case hinders its potential to contribute within contemporary contexts. The validity of TEK has been reduced by those who view traditional cultural knowledge as "pre-logical" or "irrational."[158] These connotations and the associated consequences play a significant role in how TEK is translated from scholarly writing and theoretical bases to assessment and decision-making processes. As discussed in the previous section, particularly when it is compared with western scientific knowledge, TEK is undervalued in the environmental assessment process, despite the fact that TEK has been proven to provide beneficial information that western science simply cannot. There is significant evidence that traditional peoples possess scientific curiosity, and, even in ancient societies, knowledge was acquired not only to resolve immediate practical issues but also through the desire to learn and know more. [159]

Berkes states that TEK differs from scientific ecological knowledge in nine substantive ways: TEK is mainly qualitative; it has intuitive components, and is not purely rational; it is holistic and not reductionist; mind and matter are simultaneously considered; it is rooted in morality; it is spiritual and not mechanistic; TEK is based on empirical observations and accumulation of facts by trial-and-error; it is based on data from resource users, rather than specialized researchers; and it is based on diachronic

[158] Berkes, 4.
[159] Berkes, 4.

(rather than synchronic) data.[160] The author notes that these are generalized, and there are exceptions to them. One of the most significant contrasts between TEK and scientific ecological knowledge is that TEK does not aim to control nature, nor is it concerned with theory.[161] Not unlike western scientific practices, TEK has limitations, including its challenge in verifying predictions and the slow speed at which knowledge is accumulated. TEK does, however, provide a broader social context that western science does not, and this is valuable in its own right. This social context makes TEK an inherently political concern in addition to the political implications its application may have. Recording TEK is politically significant as a tool for social change and is imperative to the preservation of cultural diversity.[162] In this regard, TEK is "not merely a system of knowledge and practice; it is an integrated system of knowledge, practice and beliefs."[163] It is intertwined with indigenous culture as well as social and political factors.

The article notes that, in relation to scientific ecological knowledge, investigations of TEK systems can inform biological and ecological insights.[164] This is certainly relevant in the pursuit of environmental assessments, as TEK can supplement scientific findings as well as guide scientific research. The author goes on to explain that TEK is also valuable in resource management, as it is relevant to contemporary natural resource management, where "'rules of thumb' developed by ancient resource managers and enforced by social and cultural means, are in many ways as good as Western scientific

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[160] Berkes, 4.
[161] Berkes, 4.
[162] Berkes, 6.
[163] Berkes, 4.
[164] Berkes, 5.

prescriptions."[165] TEK is noted as being valuable to the conservation of protected areas, particularly in cases where local communities jointly manage protected areas, as well as for development planning, and for appreciation of the cultures that possess and accumulate this knowledge. Most importantly, TEK is noted as being valuable to assessment, wherein people who depend on local resources are often significantly more capable of assessing costs and benefits of development than evaluators who come from an outside position. Local holders of TEK are also significantly more capable of understanding and evaluating the potential risks to Indigenous communities and culture that may be damaged by development projects.

The article concludes with a brief contemplation regarding the integration of scientific knowledge and TEK: "Rooted in different world views and unequal in political power base, these two systems of knowledge are not easy to combine," and attempts to do so are met with questions of power sharing in decision-making.[166] This points to the fundamental and ever-present imbalance of power between Indigenous peoples and the Crown. The closing thoughts Berkes leaves readers with opens up discussions and questions regarding how integrating TEK into a system already dominated by western science is much more complex than simply inserting TEK information into the process.

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[165] Berkes, 5. See Gadgil and Berkes 1991.
[166] Berkes, 6.

"A Place for Traditional Ecological Knowledge in Resource Management" by Micheline Manseau, Brenda Parlee, and G. Burton Ayles

This chapter describes Northern Canadian initiatives of resource co-management wherein traditional ecological knowledge is used. "Accomplishments achieved by the different northern initiatives suggest that for TEK to be used in management decisions, respect for different knowledge systems must prevail: a respect for the knowledge and the ways of knowing." It is noted that, although this may appear to be a given, it is not, and continual efforts to do so are required.[167] The authors cite several different legislated institutions created in Northern Canada that have the potential to move TEK forward in resource management.[168] The authors aim to document how the commitments made by Indigenous groups, academics, governmental and non-governmental organizations involved in natural resource management have led to an increase in the use of TEK in the decision-making process.[169]

This source is focused primarily on the idea and application of co-management of resources, where opportunities are created for communities, governments, and other stakeholders to work together and communicate regarding resource management. Co-management institutions can be a platform for cooperation, sharing of ideas on natural systems, and mutual learning.[170] The authors discuss the redistribution of the balance of power that can be involved in these co-management institutions; departure from state-

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[167] Manseau, Parlee, and Ayles, "A Place for Traditional Ecological Knowledge in Resource Management," (*Breaking Ice: Renewable Resource and Ocean Management in the Canadian North,* 2005*),* 156.
[168] Ayles et al., 141.
[169] Ayles et al., 142.
[170] Ayles et al., 141.

centred structures for more equal collaborations, and joint decision-making. It is noted that "the change in power dynamics is often critical in the linking of state and especially indigenous knowledge systems."[171] It is ultimately necessary for a shift in the power balance to occur in the case of co-management, particularly where TEK is concerned. TEK is a knowledge system that belongs to Indigenous peoples, and it is developed by and through them and their ways of life; thus, in order for the proper use of TEK and for true cooperation between the two systems of knowledge to become a reality, a shift in the power balance must occur. Aside from legislated changes and decision-making power, there is an inherent shift in the balance of power that occurs simply through weight being given to Indigenous knowledge systems. The allowance of TEK to influence decisions and processes gives power to Indigenous knowledge and to Indigenous peoples themselves. In order for TEK to maintain its integrity, the information it offers must come firsthand from those who possess it.

The chapter explains a case in which the participation of people fluent in the use of both types of knowledge are integral to the study. Under this study, performed by the Alaska Beluga Whale Committee, researchers were community members or individuals with commitments to the community and long-term relationships with its elders; they were required to possess good listening and communication skills, objectivity regarding the issue at hand, and cultural sensitivity. "Over time, networks of people develop and form the necessary basis to facilitate the inclusion of different knowledge systems in

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[171] Manseau et al., 142.

resource management."[172] It is also noted that traditional knowledge holders have a tendency to compare their own observations with the knowledge of elders within their community, which has been accumulated across many generations. This knowledge pertains to the land upon which those generations have lived, and thus provides better local insight than can generalized scientific observations and theories.

"Traditional Ecological Knowledge in Environmental Assessment and Management" by Peter J. Usher

In "Traditional Ecological Knowledge in Environmental Assessment and Management," Usher begins by stating that it has become a policy requirement in Canada that TEK be considered and incorporated into environmental assessment and resource management.[173] This, however, is a misleading statement, as the policy to which he is referring is not a federal policy, nor is it matched across the provinces and territories. He provides the example of the Northwest Territories' Traditional Knowledge Policy, which recognizes that "aboriginal knowledge is a valid and essential source of information about the natural environment and its resources, the use of natural resources, and the relationship of people to the land."[174] This policy initiated the incorporation of TEK into government decisions and actions in the Northwest Territories. In addition to this specific territorial example, Usher cites two recent federal assessment panels (for the BHP diamond mining project in the Northwest Territories and the Voisey's Bay nickel mining

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[172] Manseau et al., 157. See R. Collier, pers. comm. 2003.
[173] Peter J. Usher," Traditional Ecological Knowledge in Environmental Assessment and Management," (Arctic Institute of North America, Vol. 53, No. 2, 2000), 184.
[174] Usher, 184.

project in Labrador) that were instructed to give full and equal consideration to TEK. Accordingly, several developments over the last two decades have contributed to the consideration of TEK in quasi-judicial proceedings and in co-management initiatives. This includes an increasing recognition of the fact that Aboriginal people possess and acquire knowledge that can be useful to these processes, as well as advocacy from groups such as the Royal Commission on Aboriginal Peoples that this is the case, the negotiation of comprehensive claims in the North, and the evolution of formal environmental assessment and review processes.[175]

Although there is a general policy requirement for consideration of TEK, its wording is "neither clear nor consistent," and there is little guidance regarding implementation in public arenas in which knowledge claims must face scrutiny and testing.[176] According to Usher, this suggests that policy makers do not have a complete understanding of what TEK actually is. This is a recurring theme throughout TEK literature, which frequently references the issue that TEK is not a well-defined concept, particularly as it relates to policy and decision-making. TEK is an element of indigenous culture and not a simple system of knowing, and is often not well understood by those outside of that culture, nor is its value properly determined by those who view western science as the only reliable knowledge system. Usher states there is also insufficient attention paid to proper methods of organizing and presenting TEK for the required

[175] Usher, 184.
[176] Usher, 184.

purposes.[177] He states that his objective in this publication is to address the issues surrounding implementation of TEK in environmental assessments and co-management processes. In order for this to be made possible within the current system, it would require changes to common rules and protocols, transparency of procedure, and clarity of outcome for all involved parties.

Of the various policy arenas mentioned in this article, the EA process is the most visible and the most structured. In the EA process, participants are able to contribute information as well as opinions regarding a range of issues.[178] Thus, the EA process is, for all intents and purposes, the most logical arena in which TEK should be utilized, particularly in cases where the duty to consult is triggered and Indigenous groups will be directly involved in the EA process. The current EA structure already provides the opportunity for TEK to be implicated, and public participation in EAs allows members of affected groups and communities to present or expand upon TEK in cases where it is not initially or sufficiently pursued. As was previously mentioned, however, this is more complicated than simply inserting TEK into the EA process, and the careful consideration of this is integral to the success of the use of TEK in EAs.

Usher says environmental assessment and management involve actions with consequences that must be anticipated and understood to ensure the most desirable outcomes are achieved and the least desirable outcomes are avoided.[179] In order to integrate science and TEK in this context, the information from each source must be

[177] Usher, 185.
[178] Usher, 185.
[179] Usher, 185.

collected, organized, and communicated appropriately, and this must be carried out systematically through established protocols. This would serve to avoid overgeneralizing from insufficient information and untested assumptions.[180] Usher states that knowledge claims must be validated rather than asserted, and, as a result, no knowledge claim or information can be undisclosed or kept privileged from examination. Thus, in order to incorporate TEK into the EA process, no significant changes to the process itself are required; it will be a matter of ensuring that the appropriate steps are taken in order to utilize and pursue TEK in a systemic, respectful, and appropriate way, as Usher suggests.

When discussing definitions of TEK for EA and environmental management, Usher claims that, while there are differences between TEK and science, "their essential similarity may be more important for the purposes of this discussion."[181] As discussed by Berkes in the previous section, Usher notes that there are issues with the word "traditional" being associated with Indigenous ecological knowledge, as the term is associated with knowledge that is archaic and nonadaptive. In contrast, TEK is a complex and well-informed system of knowledge that has the ability to adapt, expand, and evolve as time and acquisition of information progresses. The difficulty with defining TEK creates issues with its use in assessment and management practices, particularly in attempting to systemize the process of applying TEK.

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[180] Usher, 185.
[181] Usher, 185.

Usher devotes several paragraphs to the classification of TEK, where information is divided into four categories based on substantive and epistemological grounds.[182] These categories are as follows: factual/rational knowledge about the environment, including statements of fact about matters such as weather, ice, coastal waters, currents, animal behaviour, and traveling conditions; factual knowledge about past and current use of the environment, or other statements about social or historical matters that "[183][184] and finally, a fourth category that encompasses the underlying culturally based foundation of the knowledge system by which information derived from observation, experience, and instruction is organized to provide explanations and guidance. The fourth category is the framework that allows for the construction of knowledge from facts, and[185] With this in mind, Usher focuses on factual knowledge (category 1) as it pertains to EA because it is testable in the same way that scientific knowledge is, and can be used for monitoring and predicting potential effects on the environment. It is noted that TEK does not need to be ancient to be valid or useful; new and evolving ecological knowledge may contribute to environmental assessment as well as knowledge passed down across many generations.

From the perspective of western science, TEK is inclusive of empirical facts or associations based on observation and experience, explanations of fact, a culturally specific way of organizing and understanding information, a set of values, and cultural

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[182] Usher, 186.
[183] Usher, 186.
[184] Usher, 186.
[185] Usher, 137.

norms about how certain things should be done. From an aboriginal perspective, TEK is what people learn from experience, from family and community, and from stories handed down about how to live fully and effectively within their environment. “It is thus both how things work and a guide to action.”[186]

The emphasis in TEK is on observing conditions, trends, and variations rather than the establishment of norms and averages or testing the strength of associations. In lieu of experiments and formal hypothesis testing, conclusions in TEK tend to be verified by trial and error.[187] Despite noted difficulties that can occur when confirming associations and inferences within TEK, Usher states that “even widely used scientific methods of verifying and interpreting data, including statistical tests, do not preclude erroneous conclusions, and are not without controversy and uncertainty.”[188] It is only logical that those who spend the most time on the land that is involved in environmental assessment or management strategy would also be involved in those processes. The observations and hypotheses developed within TEK can complement observations that contemporary scientists are in the appropriate position to make through techniques such as magnification, remote sensing, or chemical or genetic analysis. “Scientists’ observations are instrumented, quantified, and recorded, and are more likely to be guided by a specific hypothesis, but are otherwise in principle similar to those of aboriginal observers.”[189]

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[186] Usher, 186.
[187] Usher, 187.
[188] Usher, 187.
[189] Usher, 187.

Usher describes the integration of TEK in environmental assessment and management through the four phases of a typical public review of a development proposal that would involve TEK. These phases are each briefly explained, and the relevant categories of TEK that are required for each phase are also mentioned. Phase 1 involves the coping, or identification of issues, which leads to the guidelines for the review; this phase requires TEK from Categories 2 and 3. Phase 2 involves the preparation of an Environmental Impact Statement (EIS) by the proponent, in response to the guidelines. It is noted that, although all categories of TEK may be useful for this phase, it may, in some cases, be either impossible or inappropriate for the proponent to fully incorporate TEK into the EIS. Phase 3 involves public review of the EIS, which may include public hearings. The factual and explanatory aspects of TEK (Category 1) can be applied both to baseline description (or profiling) and, in certain respects, to impact prediction.[190] Category 1 TEK can also include prior experience with development impacts, and hence can contribute to understanding cumulative effects. Category 3 TEK is appropriate in community sessions, while Category 1 and Category 2 TEK can be introduced in both types. Phase 4 involves monitoring and follow-up, if the project is approved and proceeds. "Category 1 TEK can and should be used for monitoring impacts on VEC's and for testing impact hypotheses and predictions in a follow-up program."[191] It is noted that the EA process may present a new challenge to

[190] Usher, 187.
[191] Usher, 189.

TEK, just as it does to science, as it attempts to predict the outcome of what is, at least in part, a novel, untested circumstance.

TEK's most viable avenue to be included in environmental assessments is to do so through a study report- a written document that organizes and synthesizes TEK for the specific purpose of the assessment and specifies the basis of the knowledge presented.[192] In the past, these reports have often been presented by trained intermediaries, while the author notes that, although this provides an essential line of communication, they do not replace the significance of direct statements of TEK by those who possess it, nor do the reports take precedence over public hearings.[193] There are established methods for obtaining and organizing Category 2 TEK, and there are emerging norms for TEK research that are specifically directed to environmental assessment and management issues.

According to Usher, when comparing TEK and scientific methods, it is clear that TEK research can be faster and cheaper than a typical biophysical science program.[194] He mentions that, if it is introduced early in the EA process, TEK can be used to guide scientific research on impacts through identification of key locations and processes that may inform hypothesis testing and focus sampling programs.[195] In the use of western science for environmental assessments, specific questions are asked and answered by research programs directed to the problem at hand, while TEK in EAs uses experiences

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[192] Usher, 189.
[193] Usher, 189.
[194] Usher, 189.
[195] Usher, 190.

across time to deal with any problems that may arise.[196] The implementation of TEK in environmental assessments has yet to become an organized or structured process, and thus it does not operate in a straightforward manner. In order for Category 1 TEK to be considered a knowledge claim equal to scientific claims, it must be documented in an equivalent or comparable way. This would have at least two requirements: to compile and assemble TEK in an organized and systematic way, and to distinguish clearly between observations and inferences and to clearly separate conclusions from results (as is done in scientific reports).[197] If scientists and decision-making officials who are not familiar with TEK are not willing to accept inferences or conclusions, "they are liable to discount the observations on which they are based as anecdotal-or worse, as unreliable."[198]

The fact that TEK must operate under community control raises a key question for proponents and regulators in project review. The proposed development may be controversial, and, in addition, its review may occur in the context of larger political concerns, such as unresolved land claims or negotiation of agreements.[199] Under these circumstances, an aboriginal group is not inclined to choose proponent- designated researchers as intermediaries, and, in cases where said group is in opposition to the project in question, the review could be delayed by failure to provide TEK. There is often a reluctance to share TEK even in cases where the project is considered favourable by the affected aboriginal groups, and this is due to a concern that TEK provided will be

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[196] Usher, 189.
[197] Usher, 189.
[198] Usher, 189.
[199] Usher, 190.

misinterpreted, misunderstood, or decontextualized.[200] It is therefore neither reasonable nor appropriate to require a proponent to incorporate TEK directly into its EIS.[201]

Usher provides the example of the Voisey's Bay Environmental Assessment, in which a joint EA panel reviewed the proposal for Voisey's Bay Nickel Company's mine and mill project. Because there were unresolved land claims and benefits involved, the panel gave the proponent two options to ensure that TEK would have full consideration within the review: Voisey's Bay Nickel Company could either "make best efforts, with the cooperation of other parties, to incorporate into its EIS aboriginal knowledge to which it has access or which it may reasonably be expected to acquire through appropriate diligence, in keeping with appropriate ethical standards and without breaching obligations of confidentiality;" or "facilitate the presentation of such knowledge by aboriginal persons and parties themselves to the Panel during the course of the review."[202] Neither the Labrador Inuit Association nor the Innu Nation was willing to provide TEK directly to the proponent.

As they could not acquire Category 1 TEK, VBNC chose the second option. Both Aboriginal parties chose to minimize use of trained intermediaries at the public hearings, with the Labrador Inuit Association choosing to assemble a panel of Inuit experts who presented evidence at the public hearings, and this evidence was questioned and considered in the same way as other expert evidence. The Innu Nation used trained intermediaries to assist in the preparation of a report on Innu TEK as well as the

[200] Usher, 190.
[201] Usher, 190.
[202] Usher, 191.

documentation of Innu circumstances and concerns. These resources did not convey Category 1 TEK, nor did they address the specific project at hand. According to Usher, the Voisey's Bay case shows that the use of professional intermediaries to organize and present TEK can be minimized. The need for professional intermediaries should be assessed on a case-by-case basis, and their primary role should be to organize TEK and make it accessible rather than to verify or improve it.[203]

TEK is regarded by many Aboriginal people as being unique and specific to their culture and locality, and as a "positive and empowering attribute of their aboriginal identity.[204] For them, the use of TEK in environmental assessment and management affirms the validity and relevance of their knowledge, experience, and competence, and helps to reconcile a long history in which those attributes were ignored or discounted.[205] There are concerns that TEK may not be treated with respect, or that appropriation and dispossession of TEK may occur. Although there has been some legal discussion of intellectual property rights and TEK, no firm principles have been established.[206] When questioning who has the right to access and interpret TEK, Usher mentions that ethical treatment of TEK should not include sole control over interpretation of that knowledge.[207] He concludes that his intention is to demonstrate the power of TEK in

[203] Usher, 191.
[204] Usher, 191.
[205] Usher, 191.
[206] Usher, 192.
[207] Usher, 192.

environmental assessment and management arenas and processes that already exist before moving forward and attempting to alter those processes to fit TEK or vice versa.[208]

"Traditional Ecological Knowledge and Wisdom of Aboriginal Peoples in British Columbia" by Nancy J. Turner, Mariane Boelscher Ignace, and Ronald Ignace

"Traditional Ecological Knowledge and Wisdom of Aboriginal Peoples in British Columbia" focuses on traditional ecological knowledge and wisdom (TEKW) in British Columbia through two case studies in the province that demonstrate how TEKW can be useful in preventing and solving ecological dilemmas. The authors begin by stating that TEKW has become a major focus of attention over the past decade (1990-2000). "TEKW is acknowledged as having fundamental importance in the management of local resources, in the husbanding of the world's biodiversity, and in providing locally valid models for sustainable living" as well as "being complementary to, equivalent with, and applicable to scientific knowledge."[209] Recently developed international agreements have recognized the importance of indigenous knowledge. Knowledge about plants and their cultural importance is the particular focus of this publication, and the authors propose a model for analysis of TEKW systems and make recommendations for potential applications of TEKW. The previously noted increased attention being paid to TEK comes with a caveat; that traditional knowledge among younger generations of most Indigenous groups has diminished as assimilation and environmental issues and changes

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[208] Usher, 192.
[209] Turner, Boelscher Ignace, and Ignace, "Traditional Ecological Knowledge and Wisdom of Aboriginal Peoples in British Columbia" (*Ecological Applications,* Vol. 10, No. 5, 2000), 1275.

have increased.[210] Therefore, there seems to be an apparent need for efforts to conserve current TEK, as well as to promote its continuation through future generations. A precedent to this effort is a need for respect of TEK and an understanding of its value not only as a cultural element, but as a beneficial tool for environmental assessment and ecological management. This source maintains that TEKW can enhance resource management practices which are, at present, directed almost entirely by scientific knowledge and westernized views.[211]

Because of their guardianship of the land and their intense connection to not only the land but to all living things, Indigenous peoples are in a unique position in their close and longstanding environmental relationships; and yet, Indigenous cultures are severely threatened by "insensitive economic development, coercive educations systems, by assimilation into the modes of production and inexorable movement toward market economies of the dominant society, and by the escalating ecological destruction of peoples' homelands and resources."[212] As a result, the knowledge base for TEKW is threatened. TEKW is recognized as being holistic and is not easily fragmented, and the themes of TEK discussed in this text are inextricably linked to one another, supporting this notion. This source includes information from ethnobotanical writings, ethnographies, ethnohistorical writings and, most importantly, from accounts of aboriginal writers.[213]

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[210] Turner et al., 1276.
[211] Turner et al., 1276.
[212] Turner et al., 1276.
[213] Turner et al., 1276.

There is a strong connection between aboriginal practices and aboriginal belief systems. Over time, aboriginal peoples have acquired information and developed practices that have been proven effective and sustainable. This is substantiated by the fact that quantities of harvested resources have been consistent over many generations.[214] The authors give several examples of such sustainable harvesting practices, including medicinal plants such as valerian root, medicinal pitch, and adhesives such as western hemlock, several edible mushrooms, root vegetables, green leaves, as well as edible berries, fruits and nuts.[215] Plant resource and use is intertwined with many forms of ecological knowledge and wisdom. Ecological succession is known and understood by aboriginal peoples, and is shown by their practice of landscape burning and the resulting benefits for the species that grows in the aftermath.[216]

Historically, there has been an intimate understanding of the prime habitats for various cultural species, the conditions under which they were most productive, and the best processing and storage methods for optimal use.[217] The authors briefly describe systems used to organize various responsibilities involved in harvesting and monitoring of specific resources, and, accordingly, how knowledge has been passed between different groups within aboriginal communities.[218] In aboriginal traditions and practices, "the environment is seen as a whole; all the parts are interconnected in a seamless web of causes and effects, actions and outcomes, behaviours and consequences." People,

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[214] Turner et al., 1277.
[215] Turner et al., 1278.
[216] Turner et al., 1279.
[217] Turner et al., 1279.
[218] Turner et al., 1279.

animals, plants, natural objects, and supernatural entities are not separate or distinct.[219] There is a spiritual as well as a practical respect for nature and the environment, and it is this respect for all life forms as well as the land and the connections between them that characterizes aboriginal belief systems in North America.[220] Resource management practices that have come to fruition through traditional knowledge have been and continue to be an integral part of those belief systems wherein human beings are respectful of and considerate towards all living things. This respect is connected not only with entire belief systems, but also to sustainable methods that have been successful across many, many generations; the practical and philosophical natures of resource management practices are inextricably linked.

According to the authors, knowledge transfer occurs in many ways, and language is integral to the transmission process. Due to a significant loss of aboriginal languages in the Residential School system, there was a widespread loss of the specific vocabulary and discourse that is needed to describe the relationship between the people, nature, and the land.[221] Despite this and other significant cultural damages (e.g. banning of traditional ceremonies), the authors point out that aboriginal peoples have been able to carry on many of their traditions and ways of life, and those traditions have been and continue to be vital to the maintenance and prosperity of TEKW.[222] Trading and other forms of

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[219] Turner et al., 1279.
[220] Turner et al., 1279.
[221] Turner et al., 1280.
[222] Turner et al., 1280.

communication between different aboriginal groups has created common concepts and details among different language and cultural groups.[223]

The case study used in this article concerns the yellow avalanche lily (Erythronium grandiflorum) and balsamroot (Balsamorhiza sagittata), and the authors note that recent work on these two plants has revealed complex relationships between plant ecology, human health and nutrition, technological innovations, and cultural aspects of plant use.[224] Despite generations of success with the discussed ecologically sustainable practices, contemporary elders have noticed a distinct deterioration in both the quality and productivity of these and other root vegetables.[225] For example, avalanche lily bulbs are no longer as large or plentiful as they once were due to the abandonment of traditional practices such as burning the meadows where they grow, nor are the roots being dug at only a certain size, and these factors stifle the growth of the root.[226]

"Virtually all of the culturally important plants of British Columbia, as well as other areas of North America, are underlain by equally rich and significant traditional knowledge. If ecologists, resource managers, and restorationists are to truly understand these resources and the ecological and cultural systems that support them, they will need to recognize and rely more fully on TEKW of indigenous peoples."[227] In conclusion, the authors reiterate that in searching for solutions to ecological issues, it is important to recognize, respect, and understand TEKW of indigenous peoples, and this must be done

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[223] Turner et al., 1281.
[224] Turner et al., 1281.
[225] Turner et al., 1284.
[226] Turner et al., 1284.
[227] Turner et al., 1285.

with their full participation and collaboration. This final point is particularly significant. The authors provide a few examples of effective and ethical models of ecological decision-making but note that there is more development required. TEKW offers not only detailed observations concerning specific resources and areas, but also philosophies and general methods of acquiring and transferring knowledge that can help achieve a more sustainable relationship between human and environment.[228]

"Integrating Traditional Ecological Knowledge and Management with Environmental Impact Assessment" by R.E. Johannes

"Integrating Traditional Ecological Knowledge and Management with Environmental Impact Assessment" begins by stating that there has been an increase in awareness that Traditional Ecological Knowledge and management systems (TEKMS) may be utilized to improve development planning, and it may be particularly pertinent in environmental impact assessments. According to Johannes, when it comes to TEKMS and environmental impact assessments, research should focus on four essential perspectives or frames of reference: taxonomic, spatial, temporal, and social. Regarding the taxonomic perspective, Johannes says more has been written about Indigenous plant and animal naming systems than any other aspects of TEK. It is important for researchers to become familiar with these names before studying TEK of different species.[229] The

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[228] Turner et al., 1285.
[229] R.E. Johannes, "Integrating Traditional Ecological Knowledge and Management with Environmental Impact Assessment," (*Traditional Ecological Knowledge: Concepts and Cases,* Canadian Museum of Nature, 1993), 34.

spatial perspective involves the recording of spatial distribution of living and non-living resources through mapping. Local knowledge is particularly valuable in this context, as it may make it possible to survey and create maps much more efficiently than it would without this knowledge. Johannes provides the example of the geographical information system (GIS) that is being created by local First Nation peoples for portions of Northern Manitoba. This initiative combines satellite imagery with TEKMS and placing it into a format that is very valuable for environmental impact assessments.[230] The location of rare or endangered species are more likely to be known by local resource users involved in these mapping practices than by researchers doing site inventories.[231] Aggregation sites and migration pathways judged to be important through common criteria may not coincide with those known to local people.[232] Indigenous peoples often monitor changes in aggregation sizes annually, and may reduce their exploitation pressures in periods of low yield. It is also noted that areas that may appear to be unremarkable to an EIA researcher during a site inventory may serve as aggregation sites or migration routes in another period of time which may be known to local peoples.[233] The value that TEK added to assessments in the cited examples is clear, and it would take years for an EIA team to collect the same information using conventional means.

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[230] Johannes, 34.
[231] Johannes, 34.
[232] Johannes, 34.
[233] Johannes, 35.

The social perspective includes the way in which Indigenous peoples perceive, utilize, allocate, transfer, and manage their natural resources.[234] Perhaps the most significant point in this article is the following: TEK cannot be used properly without being situated within the social and political structure in which it is embedded. Johannes mentions that there is a burgeoning literature on this subject, although nothing specific is cited. "Environmental impact assessment should cover not only the direct impacts of a project on the environment, but also the impacts of altered human access to natural resources."[235] In the section that discusses methods, Johannes discusses the notion that Indigenous experts in TEK are typically protective of their knowledge and are not likely to bestow it upon investigators who are not knowledgeable on the associated environmental subjects.[236] When acquiring information, "biologically unsophisticated" researchers are ill-equipped to determine what information is new, important, already well-known, or implausible. They may not know the "appropriate questions to pursue promising biological leads opened up by the local expert."[237] Opportunities to record vast quantities of TEK have been lost because researchers were untrained in the appropriate environmental subjects, and are therefore unaware of the potential significance of this information. As a result, Johannes states that TEK should be recorded and evaluated by people who possess an appropriate background in biology, ecology and resource management, and in the social sciences. The latter is important not only for translating

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[234] Johannes, 35.
[235] Johannes, 35.
[236] Johannes, 36.
[237] Johannes, 36.

cultural information, but also for addressing the aforementioned social perspective. It is important to note that neither natural scientists nor social scientists can do the job well without the expertise of the other.

A significant inadequacy in much of the literature on TEK is the absence of efforts to determine the validity of TEK.[238] Johannes discusses methods for determining the reliability of informants, and the notion that some may exaggerate environmental significance of certain areas, or may even pretend to be TEK experts when, in reality, they are not.[239] In addition, it is important to differentiate between observation and interpretation. This will help prevent the acceptance of incorrect information. Care must be taken, however, not to dismiss false interpretations too quickly, as this may risk a failure to realize the possible value of underlying empirical knowledge.[240] According to Johannes, "many biologists still have an 'attitude problem' when it comes to TEKMS. They dismiss the knowledge gained by indigenous peoples during centuries of practical experience as anecdotal and unsubstantiated."[241] With this being said, Johannes also states that romanticized and uncritical claims of TEKMS are also untoward. For example, locally prescribed methods for "improving fishing or hunting which focus on propitiating spirits or counteracting the effects of sorcery may divert attention from the real and sometimes correctable causes."[242] This is a poignant, albeit somewhat derogatory, statement. TEK should not be romanticized, nor should it be taken as fact simply for the

[238] Johannes, 36.
[239] Johannes, 36.
[240] Johannes, 36.
[241] Johannes, 37.
[242] Johannes, 37.

pursuit of reconciliatory measures. Its less practical elements put TEK at risk of not being taken seriously, and yet, these supernatural theories are a part of TEK and of certain Aboriginal cultures and should be treated with a certain degree of reverence despite the fact that they may not directly contribute to an EA. Respect for TEK and Indigenous cultures does not suggest ignorance of science and a claim that TEK must be honoured in all its forms; it does, on the other hand, require recognition of the value of TEK and consideration of the information it offers in conjunction with scientific forms of knowledge. "Wise and unwise environmental practices and valid and invalid environmental beliefs coexist in many cultures. To assume differently is to assume that with respect to natural resource management indigenous peoples are either inherently superior or inherently inferior to the cultures of the developed world."[243] Both these extremes demonstrate a prejudice that is not of service to development planners.

Johannes mentions that many cultures are not proprietary about their TEK, and some have asked governments to bring in researchers to record their TEK for them. No such cultures are cited, but it is acknowledged that TEK is disappearing quickly as a result. Although the failure to record TEK risks its loss over time, there is a hesitancy for local people to share their traditional knowledge because this sharing relinquishes a degree of status and power.[244] Such reluctance may come from a notion that the disclosure of knowledge does not carry benefits for the aboriginal group, fear that competitors may profit at their expense, or fear that their knowledge may assist in

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[243] Johannes, 37.
[244] Johannes, 37.

development that could damage their resources or restrict their access to those resources.[245] There are some portions of TEK that remain proprietary for good reason: for example, the Chief of the Fox Lake First Nation of Manitoba states that, for his peoples, "maintaining complete Indigenous control of the raw traditional land use information must be a cornerstone of linking TEK and science."[246]

Johannes states that, in order to pave the way for research regarding TEK, development planners will require some incentives, including lease payments, greater legal recognition of local authority over local resources, better protection from uncontrolled outside encroachment, enhanced income from tourism, assistance in dealings with the outside world, and employment in local natural resource management. Accordingly, "social scientists are comfortable with research that involves such tradeoffs; biologists who study TEK must learn to follow suit."[247] Johannes concludes by stating that there will be accelerating growth in the incorporation of TEKMS and impact assessment.

Duty to Consult Literature

The following section contains a brief sample of literature regarding the duty to consult. Although there is a significant presence of literature written about the duty in the academic world, this review will provide an overview of the duty as it relates to the environmental assessment process through a reconciliatory lens.

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[245] Johannes, 37.
[246] Johannes, 37.
[247] Johannes, 138.

"Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" by Alastair Neil Craik

"Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" explores the practical and theoretical dimensions of using EA processes to implement the duty to consult. This source begins by stating that, within the context of government decision making, environmental assessments are becoming the principal vehicle for carrying out the duty to consult Aboriginal peoples. It goes on to say that there is a level of pragmatism involved in the use of EAs to implement the duty to consult in cases that are subject to environmental assessments. According to the author, this is because a significant amount of the information and analysis of environmental effects for an EA are also required to discern the impacts on Aboriginal rights and interests.[248] There is a pragmatic attractiveness to using EA processes to implement the duty to consult where the activity in question is subject to EA, as much of the information and analysis of the environmental effects of a proposed activity will be required to assess the impacts of that same activity on Aboriginal rights and interests. Thus, integration of the two processes is more efficient than doing each individually as it combines what would otherwise be two separate consultation processes; further, the two processes are in some sense inseparable as the consultation in one may affect the other. It is noted that the integration of the duty to consult and EAs is neither simple nor without important implications. "Integrating the duty to consult with environmental assessment requires

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[248] Alastair Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (Osgoode Hall Law Journal, Issue 1, 2015), 632.

careful consideration of the unique obligations owed to Aboriginal people and the constitutional nature of those obligations."[249]

As is evident in the title, this article relates the integration of the EA and duty to consult processes to reconciliation. The author states that the relationship between the duty and environmental assessments is more than a functional connection as each is a process of reconciliation; the duty to consult being a reconciliatory tool between the crown and aboriginal peoples, and EAs being used for reconciliation between the natural environment and development activities.[250] This parallel comparison is truly demonstrative of the purpose of this paper: the EA process itself has been proven to do a poor job of reconciling the natural environment with development activities, having a proclivity towards aiding development at the cost of the environment. The same can be said for the duty to consult, which, particularly when combined with the flawed EA process, does equally as poor a job at reconciling the relationship between the Crown and Aboriginal peoples.

Ultimately, the author does not state whether it is a good policy option to implement the duty to consult, but rather points out that attention must be paid to the constitutional nature of the duty to consult throughout the entire EA process. The constitutional nature of the duty should influence the Crown's discretion in the structuring of the EA process, and this should align with the goal of reconciliation.[251]

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[249] Craik, 633.
[250] Craik, 633.
[251] Craik, 678.

"Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" by Rachel Ariss, Clara McCallum Fraser, and Diba Nazneen Somani

This source analyzes the varying provincial and federal policies concerning the duty to consult and accommodate as they relate and contribute to reconciliation through relationships of mutual benefit and respect between Aboriginal peoples and the Crown. This analysis demonstrates that several policies contain both truly responsive elements promoting relationship building for reconciliation, as well as elements that maintain the status quo in Crown-Aboriginal interactions.[252] The authors summarize the elements found amongst these policies that best create clear opportunities for developing new relationships between the Crown and Aboriginal groups and communities. The authors argue that a "robust norm of transformative reconciliation must enliven consultation policies, while affirming Aboriginal and treaty rights as section 35 has promised." The framework for the analysis revolves around this concept. Provincial policy guidelines are examined in three specific areas: delegation, timelines and financial support, and accommodation. They note that the analysis in this paper can only address the policy frames, while more studies must be done to understand how these policy frames are developed, as well as how consultation, negotiations, and accommodation function through shared decision-making. They conclude that most Crown policies regarding the duty to consult and accommodate are "limited in their abilities to fundamentally change

[252] Ariss et al.,"Towards Reconciliation?" (Montreal: McGill Journal of Sustainable Development Law and Policy, v13 (1), 2017), 50.

the framework of Aboriginal-Crown relations, especially where those policies separate consultation procedures from the substantive accommodation and reconciliatory goals of the duty."[253]

The authors begin by summarizing the duty to consult and stating that the purpose of fulfilling the duty is to work towards reconciliation, as well to respect the constitutional status of Aboriginal rights.[254] There is emphasis placed on the importance of the honour of the Crown, and how this doctrine must lead to good faith consultation. Accommodations are considered proof of good faith consultation, as they are tangible evidence that the Crown understands Aboriginal rights and is addressing Aboriginal concerns.[255] Throughout the article, the authors reiterate that the duty contains both procedural and substantive aspects and, although fair procedures are an important part of protecting Aboriginal rights, they may not be enough in cases where the goal of reconciliation is ignored.[256] The lack of veto, and the imbalance of power it creates in consultation and accommodation in favour of the Crown, remains a serious concern for Aboriginal groups and legal scholars.[257]

In order for consultation to be meaningful, as is required, it must allow for real negotiation and real change in plans made by the Crown. As written in *Mikisew Cree*, the Crown has a "positive obligation...to reasonably ensure that [the Aboriginal group's] representations are seriously considered and, wherever possible, demonstrably integrated

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[253] Ariss et al., 7.
[254] Ariss et al., 7.
[255] Ariss et al., 8.
[256] Ariss et al., 8.
[257] Ariss et al., 11.

into the proposed plan of action."[258] Along this vein, the Crown must engage with Aboriginal groups early in the process, and engagement must continue throughout the consultation process. Within the consultation process, the extent to which the Crown delegates to third parties is proportional to the amount of value the Crown places on relationships with Aboriginal groups. According to the Royal Commission on Aboriginal Peoples (RCAP), if the governments recognized Aboriginal peoples as nations and engaged with them as such, this respect would "pave the way for genuine reconciliation and enable Aboriginal people to embrace with confidence dual citizenship in an Aboriginal nation and in Canada."[259]

According to the Truth and Reconciliation Commission, "Reconciliation not only requires apologies, reparations, the relearning of Canada's national history, and public commemoration, but also needs real social, political and economic change."[260] Reconciliation is a forward-looking concept that involves contrition, acknowledgement, restorative justice, and equity.[261] Despite its rich characterization, the concept of reconciliation has been accused of being a "pacifying discourse" that does not challenge colonialism. This, as discussed in the first chapter of this paper, creates a context wherein reconciliation becomes a token rather than an actionable concept. The label of 'reconciliation' legitimizes and justifies government and industry actions, creating the

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[258] Ariss et al., 11. See *Mikisew Cree*, supra note 3 at para 64, citing Finch J.a. in *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at paras 159-60,178 DLR (4th) 666.
[259] Ibid., 11. See Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment (*Ottawa: Indian and Northern Affairs Canada, 1996) at 5.
[260] Ariss et al., 12.
[261] Ariss et al., 12.

appearance of cooperation and atonement, while there is often no practical or tangible basis to these appearances. True reconciliation is rarely achieved. Hence, a problem arises in the context of the duty to consult, where the notion of reconciliation is used as a piece of token terminology that lacks consequential reconciliatory action. Reconciliation is used to legitimize government actions and to appease Aboriginal groups, creating an appearance of cooperation and resolution even when neither is present. A relationship as severely and deeply damaged as that between Canadian governments and Aboriginal peoples cannot be rectified by a legal obligation that often amounts to little for Aboriginal peoples, while often providing significant gains for Canadian governments, and the use of reconciliation as a concept adds to this problem.

Focusing on reconciliation may also be viewed as "a refusal to question Crown sovereignty, an effort to ignore the contemporary presence of Indigenous nations, and a denial that treaties are nation-to-nation agreements."[262] This is particularly pertinent when reconciliation is considered as a method to balance interests rather than in the context of protecting rights. As a result of this emphasis on "balance," the authors note that, over time, the concept of reconciliation acts as a "burden on section 35, rather than providing guidance for how to recognize and affirm Aboriginal rights."[263] According to Walters, an emphasis on balance and compromise "pushes the court's explanation and uses of reconciliation towards a concept of 'reconciliation as consistency."[264] According to Walters, this reduces the normative power of 'reconciliation,' reducing it to a

[262] Ariss et al., 14. See Ladner, *supra* note 8 at 286.
[263] Ariss et al., 14.
[264] Ariss et al., 14.

"technical exercise in rendering consistency."[265] This emphasis on balance also downplays the resource and power *imbalance* that exists between the Crown and First Nations, and this imbalance has a significant effect on negotiations and consultations within that relationship. Thus, the authors state that reconciliation may be a "risky proposition," and, particularly where it is used to balance interests, Crown sovereignty is left unchallenged with little attempt to make substantial change that is required by what the authors refer to as "reconciliation as relationship."[266] Reconciliatory approaches which serve a relationship rather than pursue a so-called 'balance' can operate within the context of that relationship, where the circumstances of imbalance and inequality are taken into consideration. The social context of inequality and the associated unequal bargaining power in the Crown-Aboriginal relationship shape both the process and the outcomes of consultation and accommodation.[267]

Provincial policies vary in their emphasis on Crown responsibility and the extent to which governments delegate to third parties.[268] British Columbia's policy, for example, indicates that proponents set up the consultation processes, while provincial decision-makers become more involved at the accommodation stage. The authors state that, while it is a necessary tool for government to function efficiently, there are risks involved in "over-delegation."[269] Those risks are as follows: the Crown may become a "neutral arbiter" between a proponent and an Aboriginal group, where balance may be pursued

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[265] Ariss et al., 14. See Walters, *supra* note 8 at 179, 182.
[266] Ariss et al., 14.
[267] Ariss et al., 16.
[268] Ariss et al., 28.
[269] Ariss et al., 28.

rather than the protection of Aboriginal rights, allowing the Crown to "evade its constitutional duty;" delegation allows third parties to shape the discourse surrounding the duty, which creates movement away from principles that are established by the courts; and the scope of consultation is reduced as the duty may be owed by multiple regulatory decision-makers, and, therefore, aspects of the duty are delegated to multiple players.[270] Most notably, engagement with multiple parties results in confusion over who is actually responsible for fulfilling the duty to consult.[271] This particular problem is exacerbated through delegation of the duty within the EA process, as "[t]he tensions between process and substance in the duty to consult escalate when the purpose of the duty is minimized and efficiency of process is maximized."[272] This is how aspects and responsibilities associated with the duty slip through the cracks, often at the benefit of either the proponent or the government, or possibly both, and at the expense of the concerned Aboriginal group.

This article also mentions *Tsilhqot'in* and the notion that this case, along with UNDRIP, are significant in their attachment of consent to the duty to consult and accommodate. Given the high threshold for justifying infringement that was set in *Tsilhqot'in,* negotiating towards consent may be a more viable option for the Crown compared to justifying its impositions on accommodation with a dissenting Aboriginal group.[273] The authors continually reiterate that the duty to consult and accommodate is

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[270] Ariss et al., 18.
[271] Ariss et al, 18.
[272] Ariss et al., 24.
[273] Ariss et al., 22.

fulfilled through good faith negotiation. While good faith that is required of the Crown may "temper its power, 'mere hard bargaining' is acceptable."[274] The bargaining power held by the Crown is significantly disproportionate to that held by Aboriginal groups, and this imbalance is increased as proponents become a part of the process and are delegated certain responsibilities by the Crown. The Crown and proponents have better access to financial, technical and legal resources, as well as other types of support and information.[275] In addition, industry actors are likely to have had more experience with consultation processes than are many Aboriginal groups, particularly those communities in more remote areas where projects that will impact Aboriginal rights are often proposed.

"In analyzing the extent to which duty to consult and accommodate policies contribute to a vision of 'mutual recognition, mutual respect, sharing and mutual responsibility' [the authors] recognize the serious constraint of the current no-veto interpretation."[276] This reinforces the inequality of negotiating power in Crown-Aboriginal relations. According to the authors, removing this constraint would be a clear contribution to building equal nation-to-nation relationships.[277] It is worth noting that provincial and federal duty to consult policies were initially developed in reaction to SCC jurisprudence. They were often hastily crafted, without the consent of Aboriginal groups, and were designed only to meet what was legally required. Generally speaking, the

[274] Ariss et al., 23.
[275] Ariss et al., 23.
[276] Ariss et al., 23.
[277] Ariss et al., 24-25.

federal guidelines focus on coordinating inter-departmental federal consultation and determining the situations in which the Crown can lean on provincial or proponent consultation and records management. Aboriginal communities and scholars have shown concern that "meaningful change will not be able to sustain itself without...[i]mprovements to policy at the strategic level."[278] The development of policy is needed to protect Aboriginal rights. The duty to consult and accommodate will develop, at least in part, through its expression in both application and policy.

The bulk of the article explains different elements of provincial policies on the duty to consult and accommodate, categorized by the following elements: delegation, process (which includes timeframes), and financial and capacity support. In summary, Alberta focuses on proponents and provides oversight of the consultation process through the Aboriginal Consultation Office (ACO).[279] Manitoba, Nova Scotia, and the Federal Guidelines have also created specific bodies for supervision of the consultation process. The federal government has two bodies that oversee regulatory aspects of project development (Major Projects Management Office for projects in all provinces, and Northern Project Management Office for projects in the territories), and this includes fulfillment of the duty. In Saskatchewan, the province makes a pre-consultation assessment of the level of consultation that is required. In Quebec, the relevant department conducts a "preliminary analysis" to determine whether a potential action may have an impact on Aboriginal and treaty rights. New Brunswick's policy maintains

[278] Ariss et al., 27.
[279] Ariss et al., 29.

that the duty lies with the Crown, and the Aboriginal Affairs Secretariat "will take the lead establishing consistent policies, procedures, and practices across the provincial government."[280] Most provincial policies stipulate that reasonable time frames must be enforced. In Quebec and Nova Scotia, parties must agree on time constraints while providing themselves with a reasonable time period to allow for adequate consultation. Nova Scotia, Alberta, and Saskatchewan provide specific time frames, with the latter two providing the most detail with varying response times depending upon the depth of consultation required.[281] Alberta determines the level or depth of consultation based on the expected impact of a project as well as the sensitivity of the treaty right or traditional land use that is being affected. All provincial policies except New Brunswick's mention funding. The policy in PEI is rather vague. Some provinces focus on proponents as funding providers (Alberta, NS, Newfoundland, and Ontario).[282]

Regarding accommodation and the protection of Aboriginal rights, all provinces except Manitoba, NB, and PEI mention options for accommodation. New Brunswick and Alberta's policies focus on consultation, with little mention of accommodation. Most provincial policies include plans to 'mitigate,' minimize,' or 'avoid' impacts, and this would serve as accommodation. The Federal Guidelines state that "the proponent is often in the best position to modify the project to avoid, eliminate, or minimize the adverse impacts."[283] Several provinces permit financial provisions, but only in cases where there

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[280] Ariss et al., 31. See NB Consultation Policy, *supre* note 135 at (1).
[281] Ariss et al., 31.
[282] Ariss et al., 31.
[283] Ariss et al., 37.

is no possibility for mitigation of impacts. Only Saskatchewan and the Federal Guidelines include the possibility that it may be necessary to cancel a project in order to fulfill the duty. Despite these being the only policies that consider cancellation of a project, there are others that suggest limits to potential projects. Nova Scotia, for example, includes a list of potential "avoidance" options for accommodation measures, one of which is to "abandon project components."[284] BC is vague, suggesting that "accommodations may include measures aimed at promoting the broader interests of First Nations."[285] The level of commitment to upholding Aboriginal and treaty rights is, according to the authors, reflected in the ways in which accommodation and its purposes are discussed in provincial policy. Provincial policies vary in the extent to which they require collaboration between parties.

According to the authors, "reconciliation as relationship cannot be built on distance."[286] Accordingly, delegation to proponents imperils the Crown to further distance itself from consultation and accommodation processes. For example, Nova Scotia's policy runs this risk as it relies heavily on proponent-led consultation, as well as lack of oversight mechanisms, and minimal attention to accommodation. Extensive delegation to proponents creates distance between the Crown and its constitutional duty, as it creates distance between both the action of carrying out the duty and the responsibility for ensuring that the action is executed sufficiently. Federal guidelines directly support consultation as relationship where it advises officials that "for good

[284] Ariss et al., 37. See NS Consultation Guidelines, *supra* note 129 at (26).
[285] Ariss et al., 37. See BC Updated Procedures, *supra* note 135 at (17).
[286] Ariss et al., 40.

governance and other policy reasons, your department or agency may decide to consult regardless of whether there is a duty."[287]

Regarding timelines and funding, tight timelines and lack of funding are likely to put limits on community engagement, and to restrict Indigenous groups' participation in the process. NS, BC, Manitoba, and Quebec policies have open timeframes that provide less certainty regarding the timing of decision-making while still allowing for flexibility in studying potential impacts and consideration of accommodation. Flexibility allows for the depth of consultation that is required and the potential impacts of a project to contribute to the creation of timeframes. This can allow for more thoughtful decisions that are more reactive to the constitutional aspect of Aboriginal rights, and these decisions will likely be better received by Aboriginal communities that are involved. PEI and Newfoundland's consultation policies combine access to funding with "relaxed yet reasonable timeframes."[288]

Regarding collaboration in general, the Federal Guidelines are vague, and the extent of collaboration varies among provincial policies. "Community input into the design of the consultation process is one avenue towards more equal bargaining power,"[289] and, when including Indigenous groups, that avenue extends to a more reconciliatory approach. Collaboration and negotiation are most clearly represented in the policies of Nova Scotia and Quebec. The Federal Guidelines have a strong discourse of collaboration with industry and Aboriginal groups. The authors point out that this makes

[287] Ariss et al., 41.
[288] Ariss et al., 43.
[289] Ariss et al., 44.

the extent to which "collaboration" is about nation-to-nation relationship building less clear. Manitoba's policy is noted as being 'very collaborative,' while Alberta and BC's policies do not refer to collaboration directly. Newfoundland and Ontario policies encourage proponents to work with Aboriginal groups to make plans for collaboration. The authors warn that this may result in eroding Aboriginal rights over time. [290]

Regarding accommodation, neither Saskatchewan nor the Federal Guidelines include "possible outcomes of consultation by envisioning a range of potential accommodation measures, including specifically stopping a project."[291] BC, Saskatchewan, Ontario, and the Federal Guidelines require some degree of discussion with Aboriginal communities on proposed accommodations.[292] Nova Scotia and BC's policies show that Aboriginal rights are easily substituted for interests.[293] New Brunswick has an overarching use of "balancing" language which "suggests a stance that is less interested in upholding Aboriginal rights and more focused on ensuring 'certainty for government, industry and First Nations.'"[294] Ontario and Nova Scotia implicitly endorse this "balance" in consultation, with both insisting that First Nations are not to "deliberately hamper good faith attempts at consultation undertaken by the Crown, nor are they to assume 'unreasonable positions' that prevent the proposed projects from moving forward."[295] Saskatchewan's policy, on the other hand, is thoroughly framed by

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[290] Ariss et al., 47.
[291] Ariss et al., 48.
[292] Ariss et al., 50.
[293] Ariss et al., 49.
[294] Ariss et al., 49.
[295] Ariss et al., 49.

the language of rights. “Emphasizing a ‘balancing’ approach to Aboriginal and broader societal ‘interests’ undermines the respect for the constitutional rights which give rise to the duty.”[296] Economic and other interests do not amount to rights, which are a constitutive element of Canada.

In conclusion, the authors communicate that those policies that involved some element of collaboration in their policy development were often those that also had flexibility in procedures such as timelines. Rebuilding relationships requires open-mindedness, especially to the results of consultation. The most open-minded approach involves recognition that it is, in some cases, necessary to require the refusal of a proposed project, as this demonstrates a prioritization of Aboriginal rights and the recognition of and support for the purposes of section 35.[297] There are other elements of policy that have a tendency to shape the duty into a technical exercise, which minimizes rights protection, “thus circumscribing opportunities to build new relationships between Aboriginal peoples and the Crown.”[298] These elements include inflexible or tight timeframes, allowances for projects to proceed without response from Aboriginal communities, minimization or ignorance of financial support for Aboriginal communities in the consultation process, and extensive delegation to proponents. The failure to create a direct connection between the protection of Aboriginal rights and the duty to consult and accommodate is disrespectful to the constitutional nature of those rights. Policies with little or no reference to accommodation or to Aboriginal rights, or the overemphasis

[296] Ariss et al., 50.
[297] Ariss et al., 51.
[298] Ariss et al., 51.

of ‘balance’ and ‘interests,’ are preventive of relationship building. Respect for Aboriginal rights and their constitutional nature is integral to reconciliation, and “policies that attempt to separate the procedural aspects of the duty to consult from its substance cannot support the spirit of reconciliation in ‘real social, political, and economic change’ as expressed by the TRC, nor fulfil the court’s preference for good faith negotiation towards reconciliation.”[299]

Conclusion

Generally speaking, the literature on the duty to consult shares many of the same concepts and are typically critical of the current iteration of the implementation of the duty to consult for the same reasons. These may be summarized as a general failure to progress reconciliation, disregard for the Aboriginal rights and their constitutional nature, and a focus on ‘balancing interests’ that does little to advance the interests of Aboriginal groups. The same may be said for the literature regarding the environmental process in Canada, with the main themes present throughout that literature being a general lack of scientific rigour in the assessment and analysis of environmental effects; EA measures being carried out only to the extent that is legally necessary, which is often a minimal standard; they often fail to account for the long-term effects of projects; they are reliant on proponent assessment, with a tendency for the process to favour the interests of the proponent with insufficient regard for environmental impact; and, most importantly for the purposes of this paper, they do not offer sufficient requirements or a suitable

[299] Ariss et al., 53.

framework for carrying out the duty to consult. In addition, traditional ecological knowledge was included in this literature review, and several sources were discussed which support the notion that TEK is both valuable and valid in its potential to contribute to environmental assessments. These notions will be discussed throughout the forthcoming chapters of this paper.

CHAPTER 3

CASE STUDY#1: GITXAALA NATION V. CANADA

The first case presented here is *Gitxaala Nation v. Canada,* one of many cases that involved the Enbridge Northern Gateway Pipeline Project, which was announced in 2006 and has not since been constructed. *Gitxaala* was heard in October 2015, and a judgment was delivered at the Federal Court of Appeal in June of 2016, which reversed the Governor in Council's decision to approve the project. The case concerned several First Nations communities as well as several third-party appellants that stood in opposition to the construction of the Northern Gateway Pipeline. *Gitxaala Nation v. Canada* is exemplary of the duty to consult operating in dysfunction through the environmental assessment process for a number of reasons. This is evident in Canada's failure to execute Phase IV of the consultation process, the lack of meaningful consultation that took place, Canada's refusal to share information regarding Aboriginal rights and title, and the delegation of the process to the Joint Review Panel (JRP).

The proposed project would include two pipelines: one export pipeline for diluted bitumen or synthetic oil, and one import pipeline for condensate. The Project would also include the associated infrastructure for the pipeline, a tank terminal, and a marine terminal. The route would span 1175 kilometers between Bruderheim, Alberta, and the Kitimat Terminal, which would be built near Kitimat, British Columbia. The First Nations appellants in *Gitxaala* were the Gitxaala Nation, the Gitga'at First Nation, the Haisla Nation, the Council of the Haida Nation (as well as Peter Lantin on his own behalf and on behalf of all citizens of the Haida Nation), the Kitasoo Xais'Xais Band Council (on behalf of all members of the Kitasoo Xais'Xais Nation), the Heiltsuk Tribal Council

(on behalf of all members of the Heiltsuk Nation), Martin Louie on his own behalf as well as the behalf of the Nadleh Whut'en and the Nadleh Whut'en Band, and Fred Sam, on his own behalf and on behalf of all Nakazdli Whut'en and the Nakazdlih Band. Gitxaala involved nine applications for judicial review of Order in Council P.C.-2014-809 (which required the National Energy Board to issue two Certificates of Public Convenience and Necessity), five applications for judicial review of a Report by the Joint Review Panel, and four appeals of the certificates issued by the National Energy Board (NEB). These proceedings were consolidated, and the focus of the Federal Court of Appeal was the legal challenge of the Order in Council. The FCA found that, although the Order in Council was acceptable and defensible, it could only be made if the Duty to Consult Aboriginal Peoples had been fulfilled. It was noted that perfection in this fulfillment was not expected and that only "reasonable satisfaction" of the duty to consult was required. With that in mind, the Court ultimately found that Canada had not fulfilled its duty to consult in this instance. The Court stated that, although Canada exercised 'good faith' and designed a proper framework for consultation, the execution of said framework "fell well short of the mark."[300] Thus, the Order in Council and all associated Certificates were quashed and remitted back to the Governor in Council for redetermination. In January of 2016, Prime Minister Justin Trudeau and his Liberal government announced that they would not be further pursuing the Project. The assessment that 'good faith' was exercised will be called into question in an impending

[300] *Gitxaala*, para. 8.

section of this analysis, as the ambiguity of the statement and the term itself allows this claim to be made with little justification, and the variety of elements involved in the Court's decision will be discussed with regard to the duty and the EA process.

The Court's listed reasons for quelling the Order in Council may be summarized as follows: Firstly, the Governor in Council prejudged the approval of the project. The First Nations also believed that the framework of the consultation process was unilaterally imposed upon them. They felt that inadequate funding was provided to them for participation in the Joint Review Panel and consultation processes. The First Nations groups also felt that the consultation process was over-delegated, and that Canada either failed to conduct or failed to share its legal assessment of the strength of the First Nations' claims to Aboriginal rights or title. They also claimed that Crown consultation did not reflect the terms, spirit and intent of the Haida Agreements, and that the Joint Review Panel Report left too many issues affecting First Nations to be decided after the Project was approved. In addition, the consultation process was evaluated as being too generic. After Report of the JRP was finalized, the affected First Nations stated that Canada failed to consult adequately with them about their concerns, in addition to the failure to provide adequate reasons. Lastly, the First Nations claimed that Canada did not assess or discuss title or governance rights and the impact on those rights.

Equity Partners

It is important to note that, at the time *Gitxaala* was being heard, Northern Gateway's Project was supported by 26 Aboriginal equity partners representing nearly 60 percent of the Aboriginal communities along the route of the pipeline, 60 percent of the area's First Nations population, and 80 percent of the area's combined First Nations and

Métis population.[301] It was expected that the number of equity partners would increase, and this did, in fact, occur, with 31 First Nations equity partners ultimately becoming involved.[302] This is demonstrative of the forthcoming discussion that not all Indigenous communities share the same views, nor should they be treated as a single, simplistic entity. Individual consultation with a variety of communities is vital as their opinions and interests are often very different from one another. This may also signal that proper consultation may not necessarily lead to the arrest of the Project, as there is a potential willingness on the part of the Indigenous groups to concede to the Project in the event that it serves their interests. Were the proponent and the JRP willing to honour the consultation process they may have found this to be the case, provided they were willing to concede certain aspects as well. The protection of Indigenous resources, culture, ancestral sites, and rights and title does not have to be synonymous with anti-industrialism; to treat Indigenous groups as an enemy to progress is not only a mistake but also an injustice. It was those communities whose resources and culture were at risk that were not willing to allow the Project to go ahead, while those who became equity partners either did not risk loss or damage to these elements, or those risks or damage were outweighed by economic benefit or job growth. In addition, it is worth noting that not all members of Aboriginal Equity Partners stood united in their views on the project. For example, Chief Eugene Horseman made a statement claiming his community of Horselake First Nation in northern Alberta signed on as an equity partner despite the fact

[301] *Gitxaala*, para 16.
[302] Reid Southwick, "Enbridge's Indigenous partners in failed pipeline were not a united front," (Calgary Herald, 2016).

that Enbridge offered a small stake that was presented as a "take-it-or-leave-it" offer. Horseman stated, because he has no power to stop projects in their traditional territory, they must join forces so that they can continue to take care of their youth and elders."[303]

The Appellants

Although several of the appellants in this case were not Indigenous groups (ForestEthics Advocacy Association, the Living Oceans Society, the Raincoast Conservation Foundation, BC Nature, and Unifor), the focus of this analysis will be the affected Indigenous groups rather than those interested parties. The effects on the appellants are listed in *Gitxaala*, and may be summarized as follows: for the Gitxaala, portions of the oil and condensate tanker routes were located within their asserted traditional territory. The Gitxaala asserted that this tanker traffic would affect its Aboriginal rights, including title and self-governance rights. Fifteen Gitxaala reserves, as well as several harvesting areas, traditional village sites, and spiritual sites, are near the routes, and the Gitxaala's main community is roughly 10 kilometers from the routes. Tanker routes would also cross a portion of the Haisla Nation's territory, as would the pipeline itself. The entire Kitimat terminal would also be in the territory claimed by the Haisla, upon which they assert rights to hunting, fishing, trapping, gathering, timber use, and the right to self-governance. All ships coming and going from the Kitimat terminal would pass through the asserted territory of the Gitga'at First Nation. The route is two kilometers from the main Gitga'at community, and there are 14 Gitga'at reserves along

[303] Southwick 2016.

the shipping route. The Kitasoo Xai'Xais Band Council is the governing body of the Kitasoo Xai'Xais Nation, and the tanker routes would cross their asserted territory, which includes several coastal islands and surrounding waters as well as mainland territory next to inlets and fjords. The Heiltsuk Tribal Council, which governs the Heiltsuk Nation, asserts a claim to 16658 square kilometers, and tankers approaching Kitimat from the south would cross a portion of this asserted territory. The Nadleh Whut'en and Nak'azdli Whut'en are members of the Carrier Sekani Tribal Council, whose comprehensive claim has been accepted by Canada for negotiation. The pipelines would cross approximately 50 kilometers of the Nadleh's asserted territory, and cross 86 watercourses, 21 of which contain fish-bearing waters. The pipelines would also cross approximately 110 kilometers of Nak'azdli asserted territory, as well as 167 watercourses, 60 of which contain fish-bearing waters. A pumping station would also be located on Nak'azdli's asserted territory. Lastly, the Haida Nation, the Indigenous Peoples of Haida Gwaii, has asserted territory that was a part of all proposed tanker routes. A portion of the Haida territory, known as Gwaii Haanas, is a Haida protected area and national park reserve that contains a UNESCO World Heritage Site called "sGan gwaay" or "Nan Sdins." Northern Gateway identified nine ecosections and twelve oceanographic areas of significance for the Project and several of these surrounded Haida Gwaii.

Approval Process for the Project

In late 2005, Northern Gateway submitted a preliminary information package regarding the Project to the NEB and CEAA. In early 2006, the NEB recommended that the Minister of the Environment refer the project to a review panel, which would be conducted jointly under the *National Energy Board Act* and the *Canadian Environmental*

Assessment Act. This Joint Review Panel (JRP) had two tasks: to prepare a report under section 52 of the *National Energy Board Act*, which would be considered by the Governor in Council; and to conduct an environmental assessment of the Project as a "designated project" under the *CEAA*, and make recommendations to the Governor in Council under section 30 of the *CEAA.* In February 2009, the CEAA released the Government of Canada's framework for Aboriginal consultation regarding the Northern Gateway project. This involved a five-phase consultation process, which consisted of a preliminary phase, a pre-hearing phase, a hearing phase, a post-report phase, and a regulatory/permitting phase. According to the Court, with the exception of Canada's execution of the duty to consult, "the assessment and approval process was set up well and operated well. Given the challenges, this was no small achievement."[304] The court established that, throughout the review process, there were opportunities for both the public and Aboriginal groups to provide their views.

Appellants' Concerns

In short, the most arresting concerns asserted by the appellant First Nations regarding the nature and execution of consultation were as follows: the Governor in Council prejudged the approval of the project; Canada's consultation framework was unilaterally imposed upon those involved First Nations, with no consultation having occurred in its formation; Canada failed to provide adequate funding to facilitate First Nations' participation in the JRP and other aspects of the consultation process; the

[304] Gitxaala, para. 20.

consultation process itself was over-delegated, and the JRP was not a legitimate forum for consultation; Canada either failed to conduct or failed to share its assessment of the strength of the First Nations' claims to Aboriginal rights or title; Crown consultation did not reflect the terms, spirit, or intent of certain agreements between Canada and the Haida; the JRP report left too many issues affecting First Nations to be decided after the approval of the project; the consultation process was too generic, as Canada and the JRP looked at First Nations as a whole and did not address the specific concerns of individual First Nations; Canada failed to consult adequately with First Nations about their concerns following the finalization of the JRP report, and it also failed to show that Canada considered and factored them in when the Governor in Council made the decision to approve the project; Canada did not assess or discuss First Nations title or governance rights, nor was the impact on those rights factored into the Governor in Council's decision to approve the project.[305]

First concern: The Governor prejudged the approval of the Project

The first of the appellants concerns, that the Governor in Council prejudged the approval of the project, was argued by the Gitxaala and adopted by the Haida. This concern was in reference to statements made by the then Minister of Natural Resources that were reported in the *Globe and Mail* in July 2011.[306] This concern also referred to the fact that the process was adopted without real consideration of title and governance rights, as well as the legislative change in 2012 that modified the powers of the NEB,

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[305] *Gitxaala*, para 191.
[306] Nathan Vanderklippe, "How Enbridge's Northern Gateway pipeline lost its way," August 10, 2013, *Globe and Mail*,

giving the Governor in Council the final decision-making power. The Court found that the two former concerns were not supportive of the submission that the approval of the project was prejudged. The Court did, however, find that, although they were not sufficient to establish bias, the remarks made by the Minister of Natural Resources were concerning. The court stated that, in order to show that the Governor prejudged the approval of the project, the allegations had to show that the bias was demonstrative of a final opinion on the issue, and it must be proven that the mind of the decision-maker was made up beyond the ability to persuade it.

Although there was an inability to show that these comments represent a bias in the decision, the comments, as mentioned by the Court, are concerning, and are not to be overlooked. They demonstrate a penchant for pushing through a project that had already been determined as "in the national interest" before there was any real justification for doing so. The fact that a bias could not be proven does not mean that one did not exist, and, although this did not amount to anything in the court's decision, it is still worth considering when analyzing this case. According to the Court, "...the decision-maker is the Governor in Council and the decision whether to approve the Project is politically charged, involving an appreciation of many, sometimes conflicting, considerations of policy and the public interest. The decision is not judicial or quasi-judicial."[307] The constitutional duty to consult should not be affected by political processes, nor should it

[307] *Gitxaala*, para. 197.

be subject to the changes that are made to legislation such as the CEAA and the NEB Act.

Second concern: Framework was unilaterally imposed

The second concern was that the framework of the consultation process was unilaterally imposed upon the involved First Nations. The Haisla argued that, although it was able to provide feedback on the draft of the Joint Review Panel Agreement, it was not consulted on the Crown consultation process itself. The Haisla stated that Canada unilaterally decided to integrate the consultation process into the JRP process. This submission was adopted by the Haida. The Kitasoo and the Heiltsuk argued that they were not consulted regarding the five-phase review process, the impact of using a hearing process to engage in consultation, or the timing or scope of Canada's consultation in Phase IV.

The Court found that Phase I consultation was neither flawed nor unreasonable, as the Crown "has discretion as to how it structures the consultation process and how the duty to consult is met."[308] In addition, what is required is a reasonable process and not "perfect" consultation.[309] The court discusses the steps involved in Phase I wherein involved First Nations had the opportunity to comment on the process. In September 2006, when the Minister referred the project to the review panel, the draft Joint Review Panel Agreement was released for a 60-day comment period, which was public and therefore accessible to Aboriginal groups. According to the court, Northern Gateway put

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[308] *Gitxaala*, para 203.
[309] *Gitxaala*, para 203.

the project on hold after a number of comments were received from Aboriginal groups during this period. Although it is not stated specifically by the Court, the implication is that these comments were the reason the project was put on hold. This, however, is misleading; according to the Impact Assessment Agency of Canada website, the delay to the project was announced in favour of expanding and accelerating other new lines to carry oil sands products to United States markets. The draft comment period and the EA were put on hold for these reasons, not for consideration of Aboriginal concerns found through the comment period as was implied by the Court. In addition, public consultation cannot replace Aboriginal consultation.

On June 18, 2008, Northern Gateway Pipelines informed the NEB and the CEAA that it had resumed environmental, regulatory, Aboriginal, and stakeholder engagement activities, requesting that the NEB and the Agency proceed with finalization of the proposed JRP agreement. At this stage, Canada contacted over 80 Aboriginal groups to advise them of the project, as well as opportunities to participate in the JRP process and the Crown consultation process. According to the Court, "the Agency provided information to groups for whom Canada had a duty."[310] Other Aboriginal groups subsequently contacted the Agency and were, as a result, provided with information on the project. It is noted by the court that some Aboriginal communities that were contacted chose not to participate.

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[310] *Gitxaala*, para 204.

The Court stated that the JRP process was significantly modified in response to concerns expressed by affected Aboriginal groups: Canada changed the scope of its review to include the marine transportation of oil and condensate; Canada modified the JRP selection process to ensure that the panel could obtain expert consultants or special advisors if needed; the JRP agreement was modified to include provisions that required the JRP to conduct its review in such a way that facilitated the participation of Aboriginal peoples, as well as the provision of evidence from Northern Gateway that established the concerns of Aboriginal peoples. The final JRP agreement required the JRP to consider and address all project-related Aboriginal issues and concerns with its mandate; conduct its review in a manner that facilitated that participation of Aboriginal peoples; receive evidence from Northern Gateway regarding the concerns of Aboriginal groups; receive information from Aboriginal peoples related to the nature and scope of potentially affected Aboriginal and treaty rights; and include recommendations in its report for appropriate measures to avoid or mitigate potential adverse impacts or infringements on Aboriginal and treaty rights and interests."[311] In the opinion of the court, the evidence established that Canada had acknowledged its duty of deep consultation with all affected First Nations from the outset of the process. The court was "satisfied that there was consultation about Canada's framework for consultation. It was not unilaterally imposed. It was reasonable."[312] This certainly calls into question the standard of reasonableness in

[311] *Gitxaala*, para 204.
[312] *Gitxaala*, para 208.

this case, as the Court established that Canada had recognized its duty of deep consultation with the affected First Nations.

Third Concern: The funding provided for participation in the JRP consultation process was inadequate

The court found that, without doubt, the level of funding that was provided to First Nations was a constraint to participation in the JRP process. However, it was established that the affidavits that were provided by the appellants did not sufficiently explain the amounts that were sought, nor how they were calculated, and, as a result, the evidence failed to show that the funding provided by Canada was so inadequate that it rendered the consultation process unreasonable. It is not explained how the court came to the conclusion that the level of funding was a hindrance to the consultation process in light of this decision that the evidence was insufficient. It is important to note that the onus of consultation is on the Crown, not on the affected Aboriginal groups. Therefore, the expectation that a First Nation should be capable of compiling or have knowledge of required documentation for proof of required funds is unreasonable. The issue of under-funding a First Nations involvement in the consultation process, had it been carried out reasonably, logically, and fairly, should have been resolved at the beginning of the framework rather than after the fact in court.

The Kitasoo and Heiltsuk argued that the process required significant legal assistance, as well as significant travel expenses to attend hearings. Both the Kitasoo and the Heiltsuk stated that they could not afford to provide expert reports or to hire experts to review the expanse of data provided by the proponent. The Heiltsuk sought $421877 in funding for all phases of the process, while they received only $96000. The Kitasoo

sought $110410 in funding for Phase IV of the process but received a mere $14000, which was roughly the amount that all other appellants were given to fund their Phase IV efforts.[313] The Court reviewed the affidavits that were submitted and found that the funding provided was certainly a constraint on participation in the JRP process.

Fourth Concern: The consultation process was over-delegated:

The fourth concern was that the consultation process was over-delegated. The Haisla submitted that meaningful consultation requires two-way dialogue, and the JRP was a quasi-judicial process which did not consist of any direct engagement between the Haisla and the Crown. They also submitted that the JRP did not assess the nature and strength of the Aboriginal rights claimed by each First Nation, and it did not assess the potential infringement the project may have on those rights. The Court did not agree that the consultation process was over-delegated, nor that it was unreasonable for the JRP process to be integrated with the Crown consultation process. The court cited *Rio Tinto* at paragraph 56, where the Supreme Court confirmed that participation by First Nations in a forum that was created for purposes other than consultation, such as environmental assessments, can fulfill the Crown's duty to consult. According to the Court, "The issues to be decided in every case is whether an appropriate level of consultation is provided through the totality of measures the Crown brings to bear on its duty of consultation."[314] The Court was satisfied that the existence of Phase IV demonstrated that delegation of the duty to the JRP was not inappropriate. Despite this finding, the verdict on the case was

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[313] *Gitxaala*, para 209.
[314] *Gitxaala*, para 214.

based almost entirely on the fact that Phase IV consultation was found to have fallen far short of what was required. It's mere existence, however, was used to justify the rejection of a significant submission that, had it been proven true, would have created an important precedent.

Fifth Concern: Canada either failed to conduct or failed to share with affected First Nations its legal assessment of the strength of their claims to Aboriginal rights or title.

The fifth concern was that Canada either failed to conduct or failed to share with affected First Nations its legal assessment of the strength of their claims to Aboriginal rights or title. This section dealt with the assertion that Canada was "obliged to disclose the analysis that led to its assessment of the strength of each First Nation's claim."[315] The Gitxaala, Gitga'at, and the Haisla stated that, despite their repeated requests, government officials responsible for consultation did not assess the strength of their claims to governance and title rights. They never received Canada's assessment of the strength of these claims. According to the Gitxaala, Gitga'at, and the Haisla, this was an error of law that "wholly undermined the consultation process."[316]

The court stated that the Minister made no commitment to provide an actual legal analysis to the Haisla, as they committed only to providing a description of the analysis, which the Court construed to be an "informational

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[315] *Gitxaala*, para 218.
[316] *Gitxaala*, para 219.

component."[317] The Court rejected this assertion that Canada failed to assess the strength of the First Nations' claims, as it was unsupported by the evidence. The Court also decided that Canada was not obliged to share its legal assessment of the strength of claim. *Halalt First Nation v. British Columbia* established that a legal assessment of the strength of a claim is inherently subject to solicitor-client privilege.[318] As stated by the court, "It is to be remembered that the strength of claim plays an important role in the nature and content of the duty to consult. Canada must disclose information on this and discuss it with affected First Nations. On this, Canada fell short."[319]

Sixth Concern: The Crown consultation did not reflect the terms, spirit and intent of the Haida Agreements

At the time of *Gitxaala*, the Haida had concluded several agreements with both the federal government and the BC government in order to establish collaborative management of land and marine areas in Haida Gwaii. These agreements are as follows: the 1993 Gwaii Haanas Agreement; the 2010 Gwaii Haanas Marine Agreement; the 2007 Strategic Land Use Plan Agreement; the Kunst'aa Guu Kunst'aayah Reconciliation Protocol; the Memoranda of Understanding with Canada for cooperative management and planning of the sGaan Kinghlas (Bowie Seamount).[320] The Haida argued that these agreements "reinforce and individualize" Canada's obligations to engage in a deep and

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[317] *Gitxaala*, para 222.
[318] *Halalt First Nation v. British Columbia*, 2012, BCCA 472, para. 123.
[319] *Gitxaala*, para. 226.
[320] *Gitxaala*, para 226.

specific level of consultation and associated accommodation. They submit that Canada followed only a 'generic' consultation process, with the result being the Governor in Council's decision to approve the Project failed to respect the Haida Agreements.[321]

Four Interrelated concerns

There were four additional appellant concerns that the court considered overlapping and interrelated, as they were focused primarily on the execution of Phase IV. Those concerns were as follows:

The JRP Report left too many issues affecting First Nations to be decided after the Project had already been approved

According to the Court, for a project such as the Northern Gateway Pipeline, the duty to consult must be fulfilled before the Governor in Council gives its approval for the issuance of a certificate by the NEB. It is at this point in the case that the Court pointed to the importance of consultation at the beginning of Phase IV: "Phase IV was a very important part of the overall consultation framework. It began as soon as the Joint Review Panel released its Report."[322] According to the Court, "The Report of the Joint Review Panel covers only some of the subjects on which consultation was required. Its terms of reference were narrower than the scope of Canada's duty to consult. One example of this is the fact that Aboriginal subjects that, by virtue of section 5 of the *Canadian Environmental Assessment Act, 2012*, must be considered in an environmental

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[321] *Gitxaala*, 227.
[322] *Gitxaala*, para 239.

assessment are a small subset of the subjects that make up Canada's duty to consult."[323] In addition, in the JRP process: Northern Gateway made no assessment of the Project's impact on Aboriginal title;[324] the JRP made no determination regarding Aboriginal rights or the strength of an Aboriginal group's claim to an Aboriginal right or title; Northern Gateway confined its assessment of the Project's impact on Aboriginal and treaty rights to an assessment of the potential impacts upon the rights to harvest and use land and resources; Northern Gateway did not look specifically at a single community's right. Rather it looked at rights "generally speaking;" the JRP accepted this approach and relied upon it to conclude that the Project would not significantly adversely affect the interests of Aboriginal groups that use lands, waters, or resources in the Project area. Phase IV was Canada's first opportunity to engage in direct dialogue with affected First Nations regarding matters of substance rather than procedure. It was also the last opportunity to do so before the Governor in Council's decision.[325]

The consultation process was too generic, as Canada looked at First Nations as a whole and failed to address adequately the specific concerns of particular First Nations

The court refers specifically to two letters that were sent to each affected First Nation on June 9 (about a week before the Project was approved) and July 14 (after the Project had already been approved) of 2014. These letters were heavily relied upon by Canada but were deemed insufficient in discharging Canada's obligation to engage in

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[323] *Gitxaala*, para 240.
[324] *Connections: Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 1*, (National Energy Board, 2013), 47.
[325] *Gitxaala*, para 242.

meaningful dialogue. "The content of these letters can at best be characterized as summarizing at a high level of generality the nature of some of the concerns expressed by the affected First Nations."[326] This blanket approach to consultation is, in many ways, concomitant with the EA process which is, by its very nature, generic.

After the JRP Report was finalized, Canada failed to adequately consult with First Nations about their concerns and failed to give adequate reasons

As stated by the Court, "Canada was not willing to provide even a general summary of the sorts of recommendations and information provided to the Governor in Council."[327] In *Mikisew Cree First Nation* at paragraph 55, the court iterated that while acting under the duty to consult, Canada must communicate the potential impacts a project may have on the affected First Nations, and their findings on the matter must also be communicated. The Order in Council mentioned the duty to consult only once in its entirety, stating simply that consultation had been executed by the Crown. Canada failed to give sufficient reasons regarding the adequacy of consultation, the assessment of which was required before the approval of the project. The Order in Council included no justification of the consultation process and no evaluation or demonstration of whether First Nation's concerns were considered.

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[326] *Gitxaala*, para 281.
[327] *Gitxaala*, para 319.

Canada did not assess or discuss title or governance rights and the impact on those rights

As discussed in section 317 of *Gitxaala*, the JRP report did not establish anything regarding Aboriginal rights or title, nor did it provide an explanation on how or if those non-assessed rights affected the JRP's decision that the Project would not have a significant effect on Aboriginal groups. As a result, the JRP report, which is referred to as "nothing more than a guidance document," cannot elucidate Canada's assessment of the Project's impact on rights and title. It was at this point that the court recognized that "Canada's execution of the Phase IV consultation process was unacceptably flawed and fell well short of the mark. Canada's execution of Phase IV failed to maintain the honour of the Crown."[328] The court cites *Haida Nation*, stating that 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."[329]

Environmental Assessment Report

The Joint Review Panel's Report *Connections* contained the environmental assessment for the Northern Gateway Pipeline Project, and the report outlined what was done on the part of Northern Gateway to assess the effects of the Project as well as the JRP's assessment. The report contained the 209 conditions put forth by the JRP that would need to occur for the approval of the Project—less than 15 of which mention

[328] *Gitxaala*, para 230.
[329] *Gitxaala*, 232.

Aboriginal groups. There is a significant volume of information in this report, the totality of which supports the notion that environmental assessments are not an appropriate host for the duty to consult, and that information will be discussed in a forthcoming section.

Northern Gateway mentioned that "substantial baseline information"[330] was acquired through Aboriginal Traditional Knowledge Studies. This information included importance and use of land, wildlife, and natural resources. There were several species that would be put at risk by the Project, and the effects on some of these species were assessed, while others were not. According to the report, selected key indicator species were chosen by the proponent, and those species were used to assess all species, as Northern Gateway claimed that the assessment of selected key indicator species would properly represent all species because those species not chosen bore enough similarities to those that were chosen. According to the JRP report, "For marine and freshwater portions of the project, should the project cause losses to fishery resources, one option would be compensation."[331]

Analysis

Consultation does not involve specific requirements, but is, rather, governed by operation through 'good faith.' As discussed by the authors of "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" in order for consultation to be meaningful and executed in good faith, it must occur early in the process, long

[330] *Connections,* 24.
[331] *Connections,* 24.

before the decision is made, and must continue throughout the process.[332] It is important that the Honour of the Crown leads to good faith consultation, involving meaningful dialogue and mutual respect. "Accommodations are considered proof of good faith consultation, as they are tangible evidence that the Crown understands Aboriginal rights and is addressing Aboriginal concerns."[333] Failure to create a direct connection between the duty to consult and the protection of Aboriginal rights is ignorant of the constitutional foundation of those rights. As a result, policies with minimal or no reference to either accommodation nor Aboriginal rights are preventive of relationship-building.[334] The same may be said for frameworks that overemphasize 'balance' and 'interests,' particularly concerning accommodation.[335] The basis for reconciliation lies in respect for Aboriginal rights and their constitutional nature. "Policies that attempt to separate the procedural aspects of the duty to consult from its substance cannot support the spirit of reconciliation in 'real social, political, and economic change' as expressed by the TRC, nor fulfil the court's preference for good faith negotiation towards reconciliation."[336]

According to the Court, the decision-maker regarding the project is the Governor in Council, and the decision to approve the project is politically charged. This involves an appreciation of "any, sometimes conflicting, considerations of policy and the public interest."[337] Accordingly, the decision is neither judicial nor quasi-judicial. In respect to

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[332] Ariss et al., "Reconciliation?" 10. Citing *Mikisew Cree First Nation v. Canada*, note 3, para. 67.
[333] Ariss et al., 50.
[334] Ariss et al., 52.
[335] Ariss et al., 52.
[336] Ariss et al., 53.
[337] *Gitxaala*, para 197.

this assertion, the constitutional duty to consult should not be affected by political processes, nor should it be subject to the changes that are made to legislation such as the CEAA and the NEB Act. When important decisions regarding a constitutional imperative such as the duty to consult are made by a political actor, there is great potential for injustice in that decision. This refers back to the issues of 'balance' and 'interests' that were previously mentioned: when decisions are made regarding Aboriginal rights, they are balanced against the interests of the broader population. This, however, becomes a tangled web when political motives are involved.

Regarding the second concern, the Court implied that the project was put on hold due to comments received by concerned Aboriginal groups. This, however, is misleading; according to the Impact Assessment Agency of Canada website, the delay to the project was announced in favour of expanding and accelerating other new lines to carry oil sands products to United States markets. The draft comment period and the EA were put on hold for these reasons, not for consideration of Aboriginal concerns found through the comment period as was insinuated by the Court. In addition, public consultation cannot replace Aboriginal consultation; therefore, the 60 day comment period within which these comments were received should not have been considered to be a part of the implementation of the duty to consult. This was nothing more than an invitation for public comments, with no Aboriginal engagement or meaningful two-way dialogue involved. The court was "satisfied that there was consultation about Canada's framework

for consultation. It was not unilaterally imposed. It was reasonable."[338] This certainly calls into question the standard of reasonableness in this case, as the Court established that Canada had recognized its duty of deep consultation with the affected First Nations. By extension, the Supreme Court of Canada has established that the Crown should not be held to a standard of perfection regarding consultation. As stated in *Haida Nation* at paragraph 62, "What is required is not perfection, but reasonableness." Only a reasonable effort to inform and consult is required in order to sufficiently discharge the duty. It was this imperative that led the FCA to the conclusion that, in Phase IV of the consultation process, a reasonable effort was not made to inform and consult.

The third concern, that inadequate funding was provided to First Nations for their participation in consultation, was under evaluated by the court. It is not explained how the court came to the conclusion that the level of funding was a hindrance to the consultation process in light of this decision that the evidence was insufficient. It is important to note that the onus of consultation is on the Crown, not on the affected Aboriginal groups. Therefore, the expectation that a First Nation should be capable of compiling or having knowledge of required documentation for proof of required funds is unreasonable. The issue of under-funding a First Nations involvement in the consultation process, had it been carried out reasonably, logically, and fairly, should have been resolved at the beginning of the framework rather than after the fact in court. It is also worth noting that any constraint to the participation in the consultation process should be

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[338] *Gitxaala*, para 208.

considered unacceptable. This is not an equivalent to “perfect consultation,” but is, rather, fundamental to meaningful, good faith consultation. The severe imbalance of power that exists in the relationship between the Canadian state and Aboriginal peoples is evident when funding is concerned; Aboriginal groups are, by default, at a disadvantage in any conflict or litigation with the Crown. Receiving inadequate funding only exacerbates this issue.

The fourth concern, that consultation was over-delegated, is telling of a broader issue with the duty to consult itself; one that is a central theme in this paper. The issue here lies within the fact that the delegation of the duty and the degree to which delegation is acceptable is, not unlike many other aspects of the duty, ambiguous and ill-defined. There is no indication of what would be considered 'over-delegation.' The integration of the duty to consult and the environmental assessment process creates the opportunity for delegation, which, in the case of *Gitxaala,* occurred not only through the delegation to the JRP, but also through the delegation of assessment responsibilities to the proponent. This further removes the Crown from its responsibilities, and, as highlighted by the Haisla's assertion that they had no direct engagement with the Crown due to the use of a quasi-judicial process that did not allow for meaningful two-way dialogue.

The four interrelated concerns focus primarily on Canada’s execution of Phase IV of the consultation framework. The generic nature of the consultation process is evident throughout *Gitxaala,* and is exemplified in the June 9, 2014 letter sent to Kitasoo, the Heiltsuk, the Nadleh and the Nak’azdli. According to the court, the letter responded to concerns to a limited extent and in a generic fashion. There were several First Nations involved in this case, each of which has its own unique traditions, linguistics, cultural

practices, and interests. The variance amongst First Nations' concerns is demonstrated by the Aboriginal Equity Partnership, which supports the notion that different Nations can have vastly different interests. Each First Nation has a different population, governs a different area with vastly different ecological characteristics, has its own unique history and traditions, and has different economic situations and interests. Therefore, to view the affected Aboriginal Groups as a single entity is negligible and leads to a failure to meaningfully consult.

The FCA agreed that there were too many issues affecting First Nations that were left to be decided after the project was approved. As was profoundly stated by the court, "meaningful consultation is not intended to simply allow Aboriginal peoples 'to blow off steam "before the Crown proceeds to do what it always intended to do."[43] Where the duty arises in a project such as this, the duty must be fulfilled before the Governor in Council provides approval to the NEB. This is due to the Governor in Council's decision being a strategic high-level decision that "sets into motion risks to the applicant/appellant First Nations' Aboriginal rights: *Haida*, at paragraph 76."[339] Further, future consultation, as contemplated by the Joint Review Panel conditions, would not involve the Crown and future decision-making lies with the National Energy Board. Canada advised in the consultation process that the National Energy Board does not consult with First Nations at the leave to open stage.

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[339] *Gitxaala*, para 233.

In *Mikisew Cree First Nation* at paragraph 55, the court iterated that, while acting under the duty to consult, Canada must communicate the potential impacts a project may have on the affected First Nations, and their findings on the matter must also be communicated. In the case of the Northern Gateway project, Canada repeatedly told the affected First Nations that it would not share information concerning the strength of these First Nations' claims to Aboriginal rights and title -a matter which is fundamental to determining the relevant impacts of the project. Canada stated its acceptance of the obligation it possessed to engage in deep consultation, and yet, as determined by the spectrum of consultation established in *Haida,* a process of deep consultation should have involved performance and disclosure of claim assessments, and in this regard, Canada failed. In Court, the majority held that it was not in keeping with deep consultation to simply assert that the impacts of the Project would be mitigated while neglecting to engage in dialogue regarding the nature and extent to which those rights may be impacted. In this case, 'deep' consultation consisted of little more than the base level of consultation required at the low end of the spectrum. In the 2012 decision *'Doré v. Barreau de Quebec*' the Supreme Court held that reasonableness, rather than the justificatory measures found in the *Canadian Charter of Rights and Freedoms,* should apply to determining whether an administrative decision-maker exercising delegated authority has breached its constitutional duties.

The environmental assessment report stated that the JRP required Northern Gateway to pursue exploration of alternatives for the Project, and it is mentioned that one such alternative would simply be to not proceed with the Project. A number of criteria for the initial process of choosing location options for the pipeline route are listed, but this

list does not include First Nations communities, reserves, ancestral cites, traditional rights, or land claims. After the location options were narrowed down, the effects on Aboriginal groups were added to the list of selection criteria in deciding which of the potential locations were to be used for the terminals and the pipeline route. This should have been included in the initial selection process, as adding it into the second phase makes it a relative concept; one location option may have had relatively less effect on Aboriginal groups, but this has little meaning when it is compared to only one other potential option. Effects on Aboriginal groups should have been taken into account from the beginning of the process and should have been taken more seriously in order to prepare for the consultation process, which may have been much less complex with a lower risk to Aboriginal groups (and therefore a lower threshold for consultation) had Northern Gateway chosen a location and route that did not intersect such a large number of Aboriginal communities.

According to Gitga'at First Nation and Coastal First Nations, the selected key indicator species identified in the Aboriginal Traditional Knowledge Study did not adequately represent all relevant species that were at risk of being affected by the Project. They argued that Northern Gateway used a subset of the species to generalize across the entire species, despite the fact that there were clear differences between subsets that would have affected their assessment. The example given is baleen and toothed whales, who may respond very differently to project effects generally, across different species, and even across sub-species. For example, according to Coastal First Nations, northern resident killer whales, which were assessed, offshore and Bigg's transient killer whales could be affected by the Project, and the latter two have different behaviours, habitats,

and prey than the latter. Coastal First Nations also said that in addition to humpback whales, which were assessed, fin whales should have been assessed. Fisheries and Oceans Canada requested that Northern Gateway determine the potential effects of noise on fin whales and provide a list of proposed mitigation measures for identified effects. Northern Gateway responded that, based on available information, the humpback whale is an appropriate proxy to assess the effects of noise on fin whales' hearing and that its proposed mitigation measures for humpback whales would also apply to fin whales.

As is continually reiterated in the JRP report, compensation appears to be the primary option should losses or damages occur.[340] The option of compensation in the instance of Aboriginal concerns is inappropriate and, no matter the amount, would be incommensurate to the effect that losses of fishery resources or damage to fish habitats may have on the culture of the Aboriginal group. Affected Aboriginal groups described their spiritual connections with the land and waters. The Haida described the foundation of the culture as based on the spiritual, mental and physical relationship with the lands and water, and they iterated that this spiritual connection relies on continuity, and it is passed down from generation to generation. According to the Gitxaala, coastal waters are "their place in the world," and they emphasized the importance of their relationships with the environment.[341] The Haisla said that family and community livelihood is dependent upon natural resources. The Haisla expressed concern that a spill would destroy the relationship between the land, Haisla families, and the community. Gitga'at First Nation

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[340] See *Connections,* 12, 13, 110-113, etc.
[341] *Connections,* 268.

and the Kitasoo Xai'xais said the Kermode bear, which can be found only within the Great Bear Rainforest, is of significant cultural and spiritual significance to them. They also stated that the Great Bear Rainforest was a part of their ecotourism plans and that the protection of the rainforest is an important part of their stewardship responsibilities.

According to an affidavit submitted by the Fisheries Manager of the Haisla Fisheries Commission, the Kitimat River ecosystem has many characteristics that make it "particularly vulnerable" to an oil spill. The proposed route through the Kitimat River Valley would pass through remote areas that would be difficult to access in the event of a spill. The Fisheries Manager noted that "Healthy fish habitat and healthy fish are paramount to the survival of the culture and the historic way of life for the Haisla."[342] Needless to say, no level of compensation could amend the cultural damage that may have been done by a spill from the pipeline. This is yet another demonstration that the EA process does not allow for a sufficient consultation process. Environmental impacts as they are assessed in an environmental assessment (i.e. the number of fish that could be lost) and the subsequent economic impacts can be appropriately mitigated through compensation, as they can be given a monetary value and therefore can be remedied through financial means. Cultural significance and the preservation of historical ways of life cannot be replaced with compensation, nor can the effects that the destruction of such facets of an Aboriginal group be remedied through financial means. The JRP concluded that Northern Gateway's selection of valued ecosystem components and key indicator

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[342] "Affidavit of Michael E. Jacobs," (Written Evidence of the Haisla Nation, 2010), para 38.

species met the regulatory guidance provided for the environmental assessment. They also found that focusing on species at risk had "resulted in a precautionary assessment that fully consider[ed] potential projects' pathways of effects."[343] Evidently, this is not the case, as the chosen method of assessment for species at risk did not account for the effects on Aboriginal culture. Although this method satisfied the requirements of the CEAA, and was, therefore, sufficient for environmental assessments, it failed to account for the requirements of the duty to consult.

According to Northern Gateway and the JRP report, the Kitimat site did not contain any culturally modified trees. This was discovered to have been entirely incorrect, as discussed in section 273 of *Gitxaala,* during consultation meetings when Canada's representatives agreed that hundreds of culturally modified trees exist at the proposed terminal site. They agreed that many of these culturally modified trees would be destroyed by the project, and that this would have an impact on the Haisla, who brought forth the error from the report. As noted by the Court, Canada offered no suggestion as to how the impacts to the Haisla's culturally modified trees could be avoided or even accommodated.

Delegation of the Duty and the JRP

The Court found that the integration of consultation into the Panel process was, in fact, reasonable.[344] "As a matter of law, the Crown has discretion as to how it structures

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[343] *Considerations,* 185.
[344] *Gitxaala,* para 213.

the consultation process and how the duty to consult is met."[345] This, however, is not an unfettered process. No matter the circumstances, the Crown is always bound by its obligation to act honourably, which extends to all facets of the consultation process and the execution of the duty to consult, both theoretically and in practice. Canada repeatedly refused to engage in dialogue and provide information regarding the strength of the affected First Nations' claims to Aboriginal rights and title. This was defended under the premise of Cabinet confidence, and that it was protected by solicitor-client privilege because the information was prepared by the Department of Justice. The Heiltsuk poignantly observed that, although legal advice could not be disclosed, the result of the assessment itself could be shared. The Court did not accept that privileges prevented the disclosure of factual information that was relevant to the consultation process.

Dissenting Reasons (Ryer J.A.)

Ryer claimed that the Crown had no obligation to make a request to the Governor in Council for an extension on Phase IV consultation. On the contrary, the obligation of the Crown to act honourably and engage in good-faith consultation certainly presents a challenge to this assertion. Although there was no specific instruction or requirement of an extension being permitted, the tenets of the honour of the Crown mandate a relationship of respect, which would certainly involve the allowance of a reasonably requested timeline extension in a case such as this. Particularly given the other circumstances of this case, asking for an extended timeline was hardly an unreasonable

[345] *Gitxaala*, para 203.

request. Meaningful consultation cannot be achieved under circumstances wherein the timeline is too condensed for an involved party. The maintenance of an unreasonably terse timeline served none other than the Joint Review Panel and the proponent, with the involved Indigenous groups experiencing further and unnecessary inconvenience.

There was a lack of meaningful consultation: Canada sent representatives to consultation meetings who did not have decision-making authority and were there only to gather information. "In order to comply with the law, Canada's officials needed to be empowered to dialogue on all subjects of genuine interest to affected First Nation, to exchange information freely and candidly, to provide explanations, and to complete their task to the level of reasonable fulfillment."[346] The adequacy of the Crown's efforts in this regard must be determined prior to project approval.

Canada failed to share information that it had regarding rights and title. The Court stressed that this is vital to meaningful consultation as it defines the subjects that must be discussed between the Crown and First Nations as well as the level of dialogue that must occur without this information a First Nation cannot assist the Crown in determining the potential impact of a project so that those impacts can be properly mitigated and accommodated. By repeatedly failing to share information with affected First Nations, many effects of the Project on the First Nation's rights and title were "left undisclosed, undiscussed, and unconsidered."[347]

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[346] *Gitxaala*, para 327.
[347] *Gitxaala*, para 325.

Conclusion

According to the *Canadian Environmental Assessment Act,* a Review Panel must, in accordance with its terms of reference, conduct an environmental assessment of the designated project. The section of the CEAA that lists the duties of a review panel, however, does not mention the duty to consult or consultation in any way. The justification for integrating the consultation process into the Panel process (phases I, II, and III of the Framework) was based upon the existence of Phase IV, in which direct consultation was meant to occur. In consonance with the aboriginal Consultation Framework for the Northern Gateway Pipeline Project, the EA report and the record from the JRP process will be "the primary source of information to support the federal government's assessment of the project's potential impacts on potential or established Aboriginal and treaty rights."[348] In accordance with this, it was deemed essential that Aboriginal groups provide all relevant information in phases II and III of the consultation process.[349] Criteria that satisfy Environmental Assessment requirements simply do not suffice to thoroughly and properly fulfilling the duty to consult. There are significant flaws in the EA process supported by literature (reference to literature review chapter). It is unreasonable and illogical to utilize a flawed process to implicate a constitutional duty.

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[348] "Aboriginal Consultation Framework for Northern Gateway Pipeline Project," (*Canadian Environmental Assessment Agency* Archives), 8.
[349] "Aboriginal Consultation Framework," 8.

CHAPTER 4

CASE STUDY #2: CLYDE RIVER V. PETROLEUM GEO-SERVICES INC. AND CHIPPEWAS OF THE THAMES FIRST NATION V. ENBRIDGE PIPELINES INC.

This chapter will discuss the companion cases *Clyde River v. Petroleum Geo-Services Inc.* and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* These cases will be analyzed in order to better understand the use of environmental assessments to carry out the duty to consult in Canada. Although *Clyde River* and *Chippewas* resulted in different outcomes, the analysis of the two cases reveals issues with the application of the duty to consult through the EA process, as well as through administrative avenues more generally. In *Clyde River*, the appeal was allowed and the authorization from the NEB was quashed, while in *Chippewas,* the appeal was dismissed. In the context of this analysis, it is important to note that *Chippewas* itself did not include an environmental assessment. Nonetheless, the duty to consult was carried out through the administrative NEB process, which also carries out environmental assessments. The significance of this will be discussed in a forthcoming section. The companion cases *Clyde River v. Petroleum Geo-Services Inc.* and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* demonstrate the dysfunctionality of the duty to consult, particularly as it operates through an administrative process and, by extension, the environmental assessment process. This points to both practical and procedural issues with the duty to consult, with the application of the duty through the NEB being highlighted here as demonstrative of those issues, with and without the use of an environmental assessment.

Clyde River v. Petroleum Geo-Services Inc.

Clyde River was heard by the Supreme Court of Canada in July of 2017. In May 2011, the proponents, Petroleum Geo-Services Inc., applied to the NEB for permission to conduct offshore seismic testing for oil and gas. The proposed testing would take place in Baffin Bay and Davis Strait off the coast of Nunavut, adjacent to an area in which the Inuit have treaty rights to harvest marine mammals. The testing would use air guns that produce underwater sound waves intended to locate and measure geological resources, such as petroleum, and it would occur from July to November each year for five consecutive years. The NEB began an environmental assessment of the project, initially required under the *Canadian Environmental Assessment Act 1992*, and later under the *Canadian Environmental Assessment Act 2012.*

Clyde River First Nation opposed the testing from the outset, filing a petition against it with the NEB in May of 2011. Petroleum Geo-Services Inc. held meetings in communities that would be affected by the testing, and Clyde River was included in these meetings. Before the appeal went to the Supreme Court, the FCA considered the COGOA's requirement for ministerial approval of a benefits plan for the testing to be the trigger for the duty, but the majority of the FCA concluded that it was unnecessary to decide whether the duty was triggered as the Crown was not a party before the NEB. In both *Chippewas* and *Clyde River*, the FCA stated that only ministerial action (or action by a Crown corporation) can constitute Crown conduct that would trigger the duty to consult. The Supreme Court of Canada discussed whether the NEB approval process can trigger the duty to consult, which resulted in resounding agreement that in this case, the duty was triggered, and this was widely discussed throughout the case. What remained up

for question, however, was what specific Crown conduct served as the trigger; a question that would remain unanswered. Despite these wavering opinions on the details of the trigger, the Court communicated a consensus was reached that the duty was undoubtedly triggered.

Clyde River, or ‘Kangiqtugaapik’ in Inuktitut, is an Inuit hamlet located in the Baffin Mountains along the northeastern coast of Baffin Island, located in the Patricia Bay. The region is home to wildlife such as polar bears, seals, narwhals, bowhead whales, caribou, arctic hare, arctic fox, and many species of migratory birds. Clyde River’s population is roughly 850, and its main language is Inuktitut. The first Europeans to visit the area were Norse Vikings around 1000 A.D., calling the place “Helluland” (Norse for “land of flat stones”).

The Consultation Process

When the NEB process began, proponents' representatives attended Inuit community meetings, and when basic questions were asked by concerned citizens, these representatives were unable to provide answers. In Pond Inlet, for example, a community member asked the representatives which marine mammals would be affected by the proposed testing, to which the representatives responded, "that's a very difficult question to answer because we're not the core experts." In Clyde River, a community member asked how the testing would affect marine mammals, to which the proponents responded as follows:

> "...a lot of work has been done with seismic surveys in other places and a lot of that information is used in doing the environmental assessment, the document that has been submitted by the companies to the National Energy Board for the approval process. It has a section on, you know, marine mammals and the effects on marine mammals."[350]

This utter failure to answer basic questions regarding the proposed testing led to the suspension of the environmental assessment by the NEB in May of 2013.

In August of 2013, the proponents filed a 3926-page document with the NEB, which was drafted with the supposed intention of answering the aforementioned questions. The vast majority of this enormous document was not translated to Inuktitut, and, beyond it being delivered to the hamlet offices, no further effort was made to determine whether this document was accessible to the communities, nor were measures taken to ensure that their questions were sufficiently answered. After the filing of the document, the NEB resumed their assessment without consulting the Inuit groups. Clyde River, along with various other Inuit organizations, filed letters of comment with the NEB throughout the assessment process, in which they discussed the inadequacies within the consultation process, and continually expressed their concerns about the proposed testing. In April 2014, representatives of the appellants and Inuit in other communities wrote to the Minister of Aboriginal Affairs and Northern Development as well as the NEB to express their belief that the duty to consult was not fulfilled regarding the testing. These appellants and concerned parties believed this could be resolved through a strategic environmental assessment before allowing for any testing to take place. Under the

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[350] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069, para 10.

circumstances, however, it was deemed that a strategic environmental assessment report was not required.[351] It becomes clear that the Inuit were making continued attempts to reach out to government officials as well as the proponent in attempts to have their concerns acknowledged, while these communications continually went unanswered or were handled unacceptably.

The Inuit right of concern in *Clyde River* was the right to harvest marine mammals, a practice upon which many Inuit in Nunavut rely for the majority of their diet. Food costs are very high in Nunavut, and many would be unable to replace the country food that may be lost if the risks of the project were to come to fruition. Country food is also recognized as being of higher nutritional value than purchased food, which is not insignificant for a remote community with very limited access to fresh produce and pharmaceuticals. In addition, the cultural tradition of sharing country food amongst community members would be lost, and the ability to make traditional garments would be impacted. The cultural practice of carving whalebones, traditional cultural practice for which Clyde River is known, would also be impacted. The practice of the hunt itself is also of great cultural significance to being Inuk, and this would be in peril as well. It is evident that those Inuit rights at stake are of high significance.

The NEB determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including bowhead whales and narwhals, which are both identified as

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[351] *Clyde* River, para 17.

being of “special concern” by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that would be implemented by the proponents. The FCA characterized the degree of consultation owed in the circumstances as deep, according to what was established in *Haida Nation v. British Columbia.*

In *Clyde River,* the court found that consultation fell well short of the mark in several respects: the inquiry was misdirected; the significance of the process was not adequately explained to the Inuit; and, most importantly, the NEB process did not fulfill the Crown's duty to conduct deep consultation. The court cited the following four issues that arose within the appeal: Can the NEB process trigger the duty to consult? Can the Crown rely upon the NEB process to fulfill the duty? What is the NEB's role in considering Crown consultation before approval? Was the Crown consultation adequate in this case? Regarding the second issue, the appellants argued that a regulatory process is not sufficient in fulfilling the duty, as at least some direct engagement between themselves and the Crown is required. As reiterated in this case by the Court, the responsibility for ensuring adequate consultation takes place always rests on the Crown. As originally stated in *Ross River Dena Council v. Yukon* in 2012, where the regulatory process being used does not adequately fulfill consultation or accommodation, the Crown is required to take further action to fulfill its duty. This may entail filling gaps within specific cases or may take shape through legislative or regulatory amendments.

The Inuit were well within their rights as a party to a modern treaty to request direct engagement in a timely manner, as they did here, and such action should be taken

in cases in which the process is perceived as insufficient from the view of the affected Indigenous group. This originates from *Beckman v. Little Salmon/Carmacks First Nation*, as parties to treaties are obliged to act diligently to advance their respective interests. Because of the implication of meaningful, good faith consultation required through the honour of the Crown, it must be clearly communicated to affected Indigenous groups that the processes of a regulatory body are being used to carry out the duty to consult. The Court also notes that guidance regarding the form of the consultation process should be provided to affected Indigenous groups. This would be intended to allow those groups to participate effectively and to raise concerns they may have with the proposed form of consultations, and to do so in a timely manner. This idea, however, lacks expansion, and does not include specific guidelines, nor does it include any requirements for guidance. As a result, there is very little potential for pursuing this guidance to any useful extent, and it serves as a mere suggestion that is easily ignored.

The Court also iterates the notion that adequate Crown consultation *before* project approval is always preferable to judicial remonstration after an adversarial process has already been completed. Judicial review is not a substitute for adequate consultation, and true reconciliation is rarely, if ever, achieved in courtrooms. Considering this, it is logical to infer that, in consultation instances that are ultimately sent to court, the broader process of consultation and, in fact, the duty to consult process in general, has been a failure. As a result, the constitutional duty itself is undermined, potentially even more so in cases where the appeal is unjustly denied and precedent is set. If the duty to consult is, as claimed, a reconciliatory process, its proper function should take place within a suitable process outside the courtroom, with meaningful consultation occurring between the

Crown and the affected Indigenous group from the outset of the process. Should a duty to consult case be sent to court, as it often is, the integrity of the duty to consult process has been thwarted. As stated by the court in *Haida,* "Negotiation is a preferable way of reconciling state and Aboriginal interests" (Haida para. 14). In order for this to be done properly and in good faith, direct, meaningful consultation must take place. This is important in the maintenance of the constitutional imperative, the advancement of reconciliation, and the practical application of the duty, both through the specific case at hand and through precedent.

It is noted by the court that neither the project proponent, nor the affected Indigenous groups, nor non-Indigenous community members benefit when projects are approved prematurely and are later subjected to litigation. This statement, however, fails to recognize the notion that Indigenous peoples are much less likely to benefit from such situations, wherein a proponent may benefit if said litigation rules in their favour. Indigenous groups typically find themselves in positions wherein they are, due to a number of constraints, ill-equipped to participate in litigation to begin with, whereas project proponents have access to resources that allow them to partake in litigation much more easily. In addition, the risk taken by an Indigenous group when choosing to pursue litigation is extreme when considering the potential loss they would suffer from being required to pay costs in the event of their appeal being dismissed (such as in the case of *Chippewas*).

In addition to the involved procedural issues, the case of *Clyde River* continually demonstrates the issues with the definitions involved in the duty to consult. For example, the term "adequate," which appears several times throughout the case, and is particularly

problematic. There is, after all, no definition of the word stated at any point in the case and, as a result, the term leaves much to be desired. The interpretation of the concept of adequacy can lead to a variety of consequences, depending on several factors including the following: to whom is it considered adequate? and, more fundamentally, what is the scale upon which adequacy is evaluated? and, finally, to what do these evaluations of adequacy amount? These issues of ambiguity are rampant within procedural and substantive elements of the duty, and are significantly consequential as the duty is further developed. The free interpretation of terms such as “adequate” can, and often does, lead to outcomes that benefit government and industry to the detriment of reconciliation and the protection of Aboriginal rights.

In its environmental assessment, the NEB determined that the testing could, in fact, alter the migration patterns of marine mammals and increase their risk of mortality, which would affect traditional harvesting of mammals such as bowhead whales and narwhals. Both of these species were identified as being of "special concern" by the Committee on the Status of Endangered Wildlife (COSEWIC). Despite this, the NEB came to the conclusion that the testing was unlikely to cause significant adverse environmental effects in light of the measures that would be implemented by the proponent. As determined by the FCA, the degree of consultation required in these circumstances was deep, according to the framework created by *Haida.* The court decided that the conditions upon which the authorization for the project had been granted demonstrated that the interests of the Inuit had been sufficiently considered and that further consultation would be expected to occur were the proposed testing to be followed by further developed activities.

It does not matter whether the final decision maker on a resource project is Cabinet or the NEB: in either case, the decision constitutes Crown action that may trigger the duty to consult. And yet, the NEB is not the Crown—nor is it, strictly speaking, an agent of the Crown. Although its actions can and indeed should trigger the duty, and it has been deemed sufficient to carry out the duty to consult and capable of assessing whether that has been the case, the NEB cannot *be* the Crown. The NEB is not bound by the honour of the crown, nor by the Royal Prerogative, and the ultimate responsibility for consultation does not lie with it. "Any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative." This statement addresses a fundamental element of this and other duty to consult cases; it is inherently ambiguous in its use of a scale of adequacy. Foundational issues such as this create significant issues within the duty to consult both conceptually and practically.

The Court stated that neither project proponents nor Indigenous peoples nor non-Indigenous community members benefit when projects are approved prematurely and are subjected to litigation as a result. This however, is ignorant of the fact that, generally speaking, Indigenous groups are at a significant disadvantage in cases such as these, both financially and regarding experience. A single First Nations group is likely to have had little or no experience with litigation pertaining to consultation, while proponents and their representatives have likely dealt with such issues on other occasions. Proponents are, at the very least, significantly more likely to have access to experts and experienced lawyers than are Indigenous groups. This is ramified from financial issues as well as issues of access. There is also a likelihood that affected First Nations groups—

particularly those who have never been involved in consultation or litigation of any kind—are unaware of what exactly needs to be done in order to serve themselves in the process. What kind of experts should they seek? What exactly needs to be examined? And, more broadly, how does a group go about the process as a whole? An Indigenous group is left to its own devices with little or no guidance.

In the opinion of the Court, where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project's potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.[352] This sentiment, however, does little more than substantiate the idea that the NEB is capable of carrying out environmental assessments. It does not corroborate the notion that EA's themselves nor the NEB in general are capable of carrying out the duty to consult to the extent that is necessary. The court stated that, despite the opinions of some commentators (who those commentators are is not specified), they do not believe that the public interest and the duty to consult function in conflict.[353] As this Court explained in *Carrier Sekani*, the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest.[354] A project authorization that breaches

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[352] *Clyde River*, para 34.
[353] *Clyde River*, para 40.
[354] *Clyde River*, para 70.

the constitutionally protected rights of Indigenous peoples cannot serve the public interest.[355]

Although this is true theoretically, its application has proven that this is often not the case. The 'public interest,' after all, is not defined. As a result, what may be considered "in the public interest" can take whatever shape the NEB or the Crown ultimately decides. Should a project, for example, have particularly positive financial potential for a certain sector (i.e. oil and gas) that may well serve a particular province's economic interests, that could and often will be considered to be 'in the public interest.' Because public interest concerns the interests and well-being of the general public, it will, by its very nature, benefit some, have no effect on some, and negatively affect others. Generally speaking, it is considered to be of public interest if the latter effects can either be minimized, or if the group subjected to these affects can be kept as small as possible. Although *Carrier Sekani* found that projects that breach Indigenous rights cannot serve the public interest, this has been proven to be disregarded in many cases wherein consultation was challenged and ultimately found to have been sufficient.

In Clyde River, the court asserts that the NEB is not always required to "review the adequacy of Crown consultation by applying a formulaic '*Haida* analysis,' as the appellants suggest."[356] Explicit reasons are not required in every case, and the degree of appropriate consideration is dependent on the specific circumstances of each case. "But where deep consultation is required and the affected Indigenous peoples have made their

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[355] *Clyde River*, para 70.
[356] *Clyde River*, para 42.

concerns known, the honour of the Crown will usually oblige the NEB, where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns."[357] Despite this assertion, the court remarked in the prior paragraph that written reasons foster reconciliation by showing affected First Nations that their rights were considered and addressed. Reasons are also noted as being a sign of respect from the Sovereign toward "a prior occupying nation."[358] In this context, it seems entirely unreasonable to state that reasons are not required in every case, particularly in light of the connection made between reasons, reconciliation, and the honour of the crown.

One of the most significant points made by the court was as follows:

> "While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se.* Rather, it inquires into the impact on the *right.* No consideration was given in the NEB's environmental assessment to the source- in a treaty- of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights."[359]

Here the issue with incorporating the duty and the EA process is clearly stated: consultative issues may involve environmental effects, but the focus should be on how those and other associated effects impact Aboriginal rights. This epitomizes one of the central issues with the integration of the duty to consult and the environmental assessment process: environmental harm is not equivalent to harm to Aboriginal rights. The environmental assessment process was designed to assess and determine mitigation

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[357] *Clyde River*, para 42.
[358] *Clyde River*, para 41.
[359] *Clyde River*, para 45.

strategies for environmental harm, which does not account for how this and other effects of the concerned project may affect Aboriginal rights.

The Court also noted that the significance of the process was not adequately explained to the Inuit, and this was a problem. The process itself was found not to have fulfilled the Crown's duty to deep consultation. Deep consultation "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".[360] Despite the fact that the NEB possessed the power to provide these elements, there were a limited number of opportunities made available to the appellants in this case. Unlike many proceedings, including, as the court points out, in *Chippewas,* there were no oral hearings. In *Clyde River,* appellants submitted scientific evidence to the NEB without the provision of participant funding. In a case which required deep consultation such as *Clyde River*, participant funding should have been provided in order to create a sufficient opportunity for the affected Indigenous group to participate in the process. In *Taku River,* for example, participant funding was provided to the appellants, who fully participated in the assessment process as a member of the project committee, despite consultation falling in the middle range of the consultation spectrum and only a moderate level of consultation being required.

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[360] *Clyde River*, para 47.

Regarding the proponent's inability to answer appellants' questions, it is noted that the proponents did eventually respond to the First Nations' questions in a 3926 page document that was submitted to the NEB. The document was posted on the NEB website, but with the bandwidth being expensive and the internet slow in Nunavut, the mayor of Clyde River said he was not able to download the document. In addition to these access issues, the vast majority of the document was not translated to Inuktitut. According to the court, "furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation."[361]

Chippewas of the Thames First Nation v. Enbridge

Chippewas of the Thames First Nation v. Enbridge, the companion case to *Clyde River,* began when the proponent (Enbridge) filed an application with the NEB to modify a 639-kilometer segment of an existing pipeline, known as Line 9. The pipeline would undergo modifications that would enable it to carry heavy crude in addition to alterations that would reverse the flow in specific sections. Modifications would also be made to increase the capacity of the pipeline from approximately 240000 to 300000 barrels per day. Unlike in *Clyde River, Chippewas* resulted in the SCC denying the First Nation's appeal, and the NEB's approval of the Line 9 expansion was upheld. In addition, *Clyde River* involved an environmental assessment, while *Chippewas* did not.

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[361] *Clyde River*, para 49.

Clyde River and *Chippewas* demonstrate two sides of the same coin; a situation wherein the NEB was the final decision-maker, with the latter involving the triggering of deep consultation that was found to have been inadequate, and the former involving the court concluding that consultation was adequate despite a failure to assess or acknowledge the level of consultation that was required. This was one of several shortcomings in *Chippewas,* along with the failure to inform the Chippewas that the NEB process would be the sole carrier of consultation, the failure to recognize and assess the Indigenous rights and interests that were at risk, and an assessment of those risks. These issues contribute to the broader matter of contention at hand, as they further demonstrate the issues involved in the current execution of the duty to consult. How, then, does this support the issue of focus in this paper? It helps to examine the duty as it operates generally, particularly in a failed context such as in *Chippewas,* to show its deficiencies. More specifically, the administrative process itself and the problems created by a reliance on administrative processes to carry out the duty is highlighted in *Chippewas.* This is valuable in an analysis of the duty to consult as it operates through the EA process, which is carried out by an administrative body, and this will be made clear in the analysis of this case.

The Chippewas of the Thames, also known as the Deshkaan Ziibing Anishinaabeg (or Deshkaan Ziibiing edbendaagzijig, meaning "those that belong to Antler River") in the Algonquin language, are an Ojibway or Anishinabek people who originally migrated to the Great Lakes area of Southern Ontario from the northeastern region of North America. They are politically allied with the Odawa (Ottawa) and the Bodaywadami (Pottawatomi) —together forming the Three Fires Confederacy. The Chippewas consider

the majority of Southwestern Ontario to be their modern traditional territory. They are located on the north bank of the Thames River, situated approximately 20 kilometers southwest of London, Ontario. They claim title to the Thames waterbed, and their land base consists of 3331 hectares of unceded land in Southwestern Ontario. The CTFN are one of the traditional Anishinaabe nations governing the territory of Waawayaatanong, now collectively known as the Waawayaatanong Anishnaabeg Southwest Treaty Council, of which they are the governing body. Traditional Anishinaabe territory includes 2.78 million acres of territory marked on treaty maps from the Longwoods Treaty (1822) and the Huron Tract Treaty (1827). In addition, the Chippewas' traditional territory includes the lands addressed in the McKee treaty (1790), the London Township Treaty (1796), and the Sombra Township Treaty (1796). The Chippewas of the Thames First Nation is a signatory with other Anishinaabe nations in several of these treaties, while they are the sole Anishinaabe signatory to the Longwoods Treaty.

In 2012, Enbridge filed an application with the NEB under s.58 of the *National Energy Board Act* to modify a portion of the existing Line 9 pipeline. As mentioned, the proposed modifications would change the direction of the pipeline flow, increase the pipeline's carrying capacity, and would allow the pipeline to carry heavy crude (whereas it had previously only been fit to transport diluted bitumen). Due to a legal loophole in s. 58, the project was not required to undergo an environmental assessment as its modifications were considered to be minor under the parameters of the act. The portion of Line 9 that was involved in the proposed modification project ran directly through the Chippewas' territory, an area over which they possess Aboriginal and treaty rights. The NEB was the final decision-maker regarding the project, as well as the vehicle through

which the Crown carried out consultation. Despite the Chippewas' requests, the Crown refused to partake in direct consultation. Ultimately, the NEB approved the project with some conditions, concluding that the potential impacts on the rights of the Chippewas would be minimal and appropriately mitigated. The Supreme Court of Canada dismissed the Chippewas' appeal, establishing that consultation had been 'manifestly adequate.'

The Chippewas received funding and were able to participate in the NEB hearing process as an intervenor. They filed evidence and delivered oral arguments at the NEB hearings, presenting their concerns about the effects the project may have on their traditional use of the land and the Thames River. The Federal Court of Appeal was split 2-1 in its decision in the case of *Chippewas*. The majority of the FCA concluded that tribunals are not required to determine the adequacy of Crown consultation where the Crown is not the proponent or a party to the proceedings before the tribunal. The dissent, on the other hand, found that tribunals should consider adequacy of consultation, regardless of whether the Crown is a proponent or a party to the tribunal proceedings. The FCA thus denied COTFN’s appeal. In denying the appeal, the FCA not only has diminished the role of tribunals in Crown-Aboriginal consultation, but has also set a dangerous precedent that allows for the approval of projects which may adversely affect Aboriginal and treaty rights without the Crown ever consulting with the Aboriginal groups in question. This decision will have serious practical implications for Aboriginal groups seeking to be consulted on projects which may adversely affect their rights.

As previously established in *Clyde River*, the Crown is entitled to rely on an administrative body's process to fulfill its duty to consult, provided the agency possesses the proper statutory powers that allow it to carry out the duty under the circumstances.

According to the Supreme Court, it also must be made clear to affected Indigenous groups that the Crown intends to rely on the administrative process to carry out consultation. If the agency cannot or does not provide adequate consultation and sufficiently carry out the duty, the Crown must involve itself in the consultation process to ensure that the duty is fulfilled. If regulatory decisions are made on the basis of inadequate consultation, they will not satisfy constitutional requirements and should be quashed.[362] In cases where the NEB is the final decision-maker, it is obligated to assess whether Crown consultation was adequate if that is a presented concern. The Crown is, however, always responsible for upholding the honour of the Crown: something it failed to do in this case. Administrative decision-makers have both the obligation to decide necessary questions of law and an obligation to make decisions beneath the umbrella of constitutional requirements.[363]

As mentioned, the NEB may carry out consultation, but if this process is not sufficient in fulfilling out the duty, the Crown must fulfill the consultation requirements that remain. Upon examination and analysis, it becomes clear that this would have been a reasonable requirement in the case of Line 9. In order for meaningful consultation to take place, the Crown would have been required to partake in direct consultation with the Chippewas, as the Chippewas requested in the letter they sent to federal ministers prior to the hearing process. According to the SCC, the NEB provided the Chippewas with an adequate opportunity to participate in the decision-making process. The court also stated

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[362] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, [2017] 1 S.C.R. 1099, page 1101.
[363] *Chippewas,* 1101.

that the NEB sufficiently assessed the possible impacts that may be had on the rights of Indigenous peoples, concluding that the risks were minimal and could be mitigated through the imposition of conditions on Enbridge.[364] This, however, does not stand to reason in light of the Court's inattention to addressing the specific Aboriginal and treaty rights that were actually at stake. In *Chippewas*, the court said the NEB's written reasons sufficed to fulfill the obligation of the crown.[365] It becomes evident, however, upon reading the published reasons that this is an illogical conclusion. The written reasons did not explicitly identify the Aboriginal or treaty rights at stake, nor did they specifically address the concerns raised by the Chippewas, assess the level of consultation required, discuss accommodation measures, or address the NEB's role in ensuring the Crown's duty to consult was fulfilled.

Changes made in the 2012 federal omnibus bill entitled Bill C-38 allowed Line 9 to receive approval from the NEB without being required to undergo a federal environmental assessment. Despite public outcry in Ontario regarding the oversight of an EA in the case of Line 9, the Ontario government maintained that it would not subject the project to a provincial EA because the pipeline crossed provincial borders and was therefore under federal jurisdiction. Although Line 9 does not cross any Aboriginal reserve land, the court does note that the CTFN possess a treaty right which guarantees their exclusive use and enjoyment of their reserve lands. More importantly, they go on to state that the CTFN assert Aboriginal harvesting rights as well as the right to preserve

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[364] *Chippewas*, 1102.
[365] *Chippewas*, 1106.

sacred sites in their traditional territory. They also recognize that the CTFN claim Aboriginal title to the bed of the Thames River, its airspace, and "other lands throughout their territory."[366]

According to the NEB, "virtually all" of the required construction would occur on previously disturbed lands owned by Enbridge and on Enbridge's right of way.[367] This, however, is a moot point when considering the potential effects the modifications could have on the Chippewas' Aboriginal rights and traditional territory. The potential effects of a spill would not be contained to Enbridge's right of way, nor to the private property along which sections of the pipeline run.

In September 2013, the Chiefs of the CTFN and the Aamjiwnaang First Nation wrote a joint letter to the Prime Minister, the Minister of Natural Resources, and the Minister of Aboriginal Affairs and Northern Development. The letter described the asserted Aboriginal and treaty rights of both groups and the Project's potential impact on them. The Chiefs noted that no Crown consultation with any affected Indigenous groups had taken place with respect to the project's approval, and called on the Ministers to initiate Crown consultation. No response arrived until after the conclusion of the NEB hearing. In this correspondence, the Minister of Natural Resources indicated that he would rely solely on the NEB's process to fulfill the Crown's duty to consult, Indigenous peoples on the project, and the Court points to this in its defense of the NEB's consultation process. It is not mentioned, however, that the remarks conveying this

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[366] *Chippewas*, para 7.
[367] *Chippewas*, para 13.

message were not made until the NEB hearing process had concluded, at which time the sole consultation process had come to an end. The Chippewas requested Crown consultation before the NEB's approval, but the Crown “signaled” that it was relying on the NEB's public hearing process to address its duty to consult.[368] This simplified remark ignores the fact that the Crown did not notify the Chippewas of this until after the NEB process had concluded, and it is difficult to ignore the court's use of the ambiguous term "signaled" to describe the behaviour of the NEB.

According to the court, the potentially affected Indigenous groups were given early notice of the NEB's hearing and they were included in the process. In addition, the court stated that the Indigenous groups were aware that the NEB was the final decision maker, which became evident, but their following statement was particularly problematic: "Moreover, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. Notwithstanding the Crown's failure to provide timely notice that it intended to rely on the NEB's process to fulfill its duty to consult, its consultation obligation was met."[369] This is a crux of the analysis of the case; it puts the onus on the Indigenous group to comprehend the consultation process when it was not made clear to them until after that process had concluded. To assert that it was "understood" by Clyde River that no other Crown entity was involved in consultation was presumptuous and unfounded. The Chippewas' argument was based in part on the fact that they did not understand that the NEB was taking on the role of consultation in its

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[368] *Chippewas*, para 4.
[369] *Chippewas*, 1101-1102.

entirety. They did, after all, specifically request direct consultation with the Crown, a response which received no reply until after the NEB hearing process was finished. Here the court claims that the affected Indigenous groups understood that there was no Crown entity aside from the NEB involved in carrying out the duty, but it specifically points to "the process" in this statement, failing to acknowledge whether other Crown entities or representatives would be involved in consultation outside of the NEB process. In the context of the court's decision, it is important to note that, prior to the NEB hearing process, it was not communicated to the affected Indigenous groups that no other consultation process would take place, and that, as a result, the NEB would be relied upon as the only method for implementing consultation.

The court notes that the duty to consult is "not the vehicle to address historical grievances," and "the subject of the consultation is the impact on the claimed rights of the current decision under consideration."[370] This points to yet another issue with the case, particularly through the lens of reconciliation, which was broadly ignored in this case. Line 9 was built in 1976 with no Indigenous consultation whatsoever, which is, a point of contention for the Chippewas, and this is the 'historical grievance' to which the court is referring. *Chippewas* consistently asserts that the duty to consult requires addressing only the issues with the specific project at hand. "The duty to consult is rooted in the need to avoid the impairment of asserted or recognized rights that flows from the implementation of the specific project at issue; it is not about resolving broader claims that transcend the

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[370] *Chippewas*, 1101.

scope of the proposed project."[371] This is inherently untrue. The duty itself is a reconciliatory measure, and this statement, which is a recurring theme in the case, is reductionistic in its attempt to downplay the seriousness of the issue at hand: the duty to consult is a reconciliatory measure. This is discussed in other Supreme Court cases such as *Rio Tinto*, which, at para. 34, states that "the duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown." This statement alone points to the most fundamental issues with *Chippewas*: the failure not only to protect Aboriginal and treaty rights, but also to properly assess them in the first place, as well as the utter neglect of a reconciliatory approach. In *Chippewas*, the court is heavily reliant upon precedent throughout its explanation, yet it is selective of its which elements of precedent it chooses to include, seemingly ignoring those that support reconciliatory approaches (such as *Rio Tinto*) and the consideration of Aboriginal rights and title.

The SCC stated that, even if they were considering the strength of the Chippewas' claim and the severity of the potential impact on their claimed rights at the highest end of the spectrum, the consultation carried out by the NEB was "manifestly adequate."[372] This is a lofty claim on the part of the court, particularly considering the reference to the strength of the Chippewas' claim and the potential impact on their claimed rights. As will be discussed in a forthcoming section, the NEB did not assess the strength of the Chippewas' claim, nor the potential impact on their rights.

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[371] *Chippewas*, para 2.
[372] *Chippewas*, para 43.

This is particularly problematic for a number of reasons, chief among them being the neglectful approach that was taken in assessing the level of consultation required. The NEB process was already complete when the affected Indigenous groups were informed that the Crown planned to rely entirely upon the NEB process to carry out the duty to consult. According to the Supreme Court, this was acceptable in this case as the circumstances indicated that the Crown intended to rely on the NEB to carry out the duty.[373] This, however, was never explicitly communicated to the Chippewas until the NEB process had concluded. How, then, were the Chippewas able to understand that the NEB process itself was their only opportunity to partake in the consultation process? The funding that is touted by the court as being a defining factor between *Chippewas* and *Clyde River* is, in reality, much less advantageous than is implied by the Court. It is worth considering that the Chippewas were not informed that their funding could—and in fact should—be used in its entirety for the NEB process, as there would be no other consultation opportunities. Herein also lies the issue of lacking meaningful consultation and dialogue, in which the communication of information of such significance and consequence should have been clearly conveyed. To make an assumption is to make an error under these circumstances.

This lack of meaningful dialogue also points to issues in the very foundation of the duty to consult, which is rooted in reconciliation. The good faith that must be exercised within the relationship between the Crown and Indigenous peoples in

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[373] *Chippewas*, para 46.

Canada seems to have evaporated in this case, with little regard on the part of the Crown for upholding the honour with which they are required to act. Despite this disregard for reconciliatory action, the concept is far from absent in *Chippewas.* As stated by the Court, "The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process."[374] This statement in and of itself demonstrates the very issue at hand; although it is intended to point to the errors on the part of the Chippewas, in reality it points to the lapses on the part of the Crown wherein they pursued a one-sided process themselves. This is fairly evident throughout the NEB process, which did not include implementation of meaningful dialogue with affected Indigenous groups.

Conclusion

In many ways, *Chippewas* points to issues with the NEB process, or an administrative process in general being responsible for the duty to consult. *Clyde River* serves the same purpose, taking the opportunity for analysis one step further by including an environmental assessment that was host to a lackluster attempt at carrying out the duty to consult. These companion cases provide insight on the root of the issue with the ability of an environmental assessment to properly and thoroughly apply the duty to consult. Although *Chippewas* may seem to be an unlikely contender for such an analysis as it did not involve an EA, it points to issues with the duty being intertwined with the EA process and the ensuing issues with triggering as well as carrying out consultation without the

[374] *Haida Nation v. British Columbia (Minister of Forests,* 2004, SCC 73, para 50.

structure of the process that is typically used to do so. In addition, there was a general lack of clarity and neglect for communication between the NEB and the Chippewas that is present in many EA cases. Most importantly, *Chippewas* demonstrates a concept that is fundamental to this analysis: environmental effects are neither synonymous nor synchronized with effects on Aboriginal rights.

The administrative process, in this case the NEB hearing process, is the foundation upon which the EA itself rests. If the administrative process itself is inadequate in carrying out the duty then the addition of an EA will not remedy these issues and may, in fact, exacerbate those issues. There are fractures in the foundation of the duty to consult, and they are magnified by the administrative processes that are so callously used to carry out this constitutional imperative. *Clyde River* does so through the utter lack of meaningful consultation, magnified through the inability to answer appellants' basic questions and the subsequent publication of a nearly inaccessible document to remedy the issue. *Chippewas*, on the other hand, does so through a general neglect of good faith, particularly evident in the disregard on the part of the NEB to inform the Chippewas that the hearing process would be the sole carrier of the duty to consult. Perhaps even more significant was the NEB's pretermitting of an evaluation of the level of consultation required in the case, as well as their omission of assessment of the treaty and Aboriginal rights at stake and how exactly they may be affected by the project; issues that were greatly exacerbated by the court's undying support for the NEB process, the denial of the Chippewas appeal, and the associated precedent that was set.

CHAPTER 5

CASE STUDY #3: FORT NELSON FIRST NATION V. BRITISH COLUMBIA (ENVIRONMENTAL ASSESSMENT OFFICE)

Fort Nelson First Nation v. British Columbia was a British Columbia Court of Appeal case heard in 2016 that concerned the Komie North Mine Project, a sand and gravel mine proposed by Canadian Silica Industries (CSI). The location of the mine fell within the traditional territory of Fort Nelson First Nation in an area about 80 kilometers northeast of the City of Fort Nelson, British Columbia. In addition to the Komie North Mine, CSI had shown intentions of potentially seeking to develop five other new sand and gravel mines, each of which would be located within Fort Nelson's traditional territory. The BC Court of Appeal allowed the British Columbia Environmental Assessment Office's appeal, dismissing Fort Nelson First Nations' assertion that the *Regulation* that applied to the project was wrongly interpreted, as well as Fort Nelson's allegation that the duty to consult was triggered but not fulfilled. *Fort Nelson* is demonstrative of significant issues with the integration of the duty to consult and the environmental assessment process: in particular, the pivotal issue of setting trigger thresholds and deciding whether those thresholds have been met; a process which gives the crown control over the scope of the duty to consult. The complex nature of the statutory interpretation involved in the environmental assessment application phase of this project and the implications it had on this case shows the irrationality of integrating the duty to consult with the EA process. The immense differences in both the findings and reasoning of the British Columbia Supreme Court and the British Columbia Court of Appeal show the issues with the EA process as an avenue for the duty to consult.

Fort Nelson First Nation's traditional territory is located in northeast British Columbia. It touches both the Yukon Territory and Northwest Territory borders as well as the Alberta border. Fort Nelson is a band that was (at the time of the court case) home to 800 members governed by an elected chief and council. Fort Nelson First Nation is a Slavey/Cree linguistic group, and is one of six nations that were signatories to Treaty 8. Members of Fort Nelson First Nation continue to practice traditions that include the following: gathering plants for food and medicine; building and maintaining cabins; catching fish; hunting animals such as moose, bear, rabbits, and caribou; and trapping fur bearing animals such as beaver and lynx. Fort Nelson First Nation asserts their aboriginal rights to ownership of their territory, which are included in Treaty 8.[375]

The EAO and Reviewable Project Regulations

According to the British Columbia Environmental Assessment Office (EAO), major projects are first assessed for potentially significant adverse environmental, social, economic, health and heritage effects, as is required in the *Environmental Assessment Act.*[376] The proponent then provides the EAO with details on what they believe are potential adverse effects of the project, as well as their plans to mitigate those effects. The EAO would then seek input from scientific professionals, Indigenous groups, the public, local governments, and federal and provincial agencies "to help ensure that no adverse environmental effects are missed."[377] It would seem that this intention was not upheld in the case of the Komie North Mine project, wherein the focus appeared to be on

[375] "About FNFN," Fort Nelson First Nation.
[376] *Canadian Environmental Assessment Act 2012*, S.C. 2012, s. 5(1).
[377] "Environmental Assessments," (British Columbia Environmental Assessment Office).

avoiding an environmental assessment rather than mitigating environmental effects. This will be discussed in further detail in a forthcoming section.

Under the *Reviewable Project Regulations,* the portion that concerned the Komie North Mine project was Table 6, which defines the reviewability thresholds for the different categories of mine projects (including sand and gravel mines). Table 6 stated that a new sand or gravel pit would be reviewable if its production capacity was: greater than or equal to 500000 tonnes per year of excavated sand or gravel or both during at least one year of its operation, or, over a period of less than four years of operation, more than 1 million tonnes of excavated sand or gravel or both. Whether the project was required to undergo an EA as a reviewable project was entirely decided upon using these criteria, and therefore was subject to the application and interpretation of Table 6.

In this case, the EAO and CSI relied upon the findings of the BC Court of Appeal in *Friends of Davie Bay v. Province of British Columbia (EAO),* a 2012 case which dealt with the *Reviewable Projects Regulation* and the meaning of 'production capacity.' According to *Davie Bay,* it is well-established that the criteria in the *Regulation* are intended to provide a "clear and unambiguous bright line for determining if a project is reviewable or not."[378]

According to the *Environmental Assessment Act,* a project may be designated as a reviewable project through three possible avenues: it may be reviewable under the *Regulation* (s. 5), it may be designated as reviewable by the Minister (s. 6), or it may be

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[378] *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office),* 2016 BCCA 500, para 40.

designated as such by the Executive Director (s.7). According to the BCCA, the preliminary issue comes to light under the circumstances at hand because in the *Regulation* there is no obvious decision by a statutory delegate involved in designating a project as reviewable. As is iterated by the EAO, this regulatory scheme is proponent-driven: there is no application process, no need for statutory approval, no licence, and no express statutory authority in the *EAA* or the *Regulation* which provides power to the EAO to decide whether a certain project is reviewable under the *Regulation.*

The Komie North Mine Project

The Komie North Mine, as well as the aforementioned five proposed mines, would be used to extract silica (or 'frac' sand) used in the hydraulic fracturing process of natural gas extraction. According to CSI, the Komie North Mine would extract 960 000 tonnes of sand and gravel over a four-year period — 40000 tonnes less than the *Regulation* allowed for with no environmental assessment. Despite evidence to the contrary, CSI claimed that they did not have plans to develop other mines on the FNFN's traditional territory. This was, however, addressed in court, with each judicial level presenting a different perspective regarding the five other potential projects. From the very beginning of the case, the BC Supreme Court established that the other potential frac sand mining projects on the FNFN's traditional territory are relevant to the decision at hand.

Under the current *Regulations*, put in place several years after the case was heard, production capacity is defined as "capacity to generate product for marketing or testing,

not including waste materials."[379] At the time of the Komie North Mine review, however, the term 'production capacity' was used in Table 6 but not defined. The definition of production capacity as well as the interpretation of "excavated sand or gravel or both" were significant points of contention in the case. Whether or not the project would be considered reviewable under these *Regulations* had implications not only for the assessment of environmental effects, but also for the triggering and carrying out of the duty to consult, and therefore for Fort Nelson's treaty and aboriginal rights. The chambers judge concluded that the interpretation of 'production capacity' was not reasonable.

The FNFN asserted that through a plain and simple reading in its grammatical sense, "the Sand and Gravel threshold is concerned with the amount of material that is excavated or removed from the ground and is not concerned with the purpose for which it is removed." The FNFN also referred to the application CSI submitted, which included a Development Plan that referred to an "Annual estimate of production," which read as follows:

> "Based upon the current market conditions, 240000 tonnes of resource will be mined yielding about a 46-year mine life. This translates into an annual amount of 134000 tonnes of marketable proppant sand. This may be expanded on a yearly throughout as market conditions require. If expansion occurs beyond 250000 tonnes for more than 4 years the proponents are prepared to enter the BCEAA review process."[380]

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[379] *Reviewable Projects Regulation*, 2019, BC Reg. 243/2019, s. 9.
[380] *Fort Nelson*, para 111.

According to the FNFN, this estimated production capacity of 240000 tonnes of sand and gravel per year, 134000 tonnes of which is marketable proppant sand, supports the aforementioned notion of a plain and simple reading of the statement. FNFN asserted that this indicated CSI's "first impression" of the meaning of table 6, and this was significant in establishing the reviewability of the project.[381]

Case Analysis

Both the EAO and CSI argued that the FNFN's emphasis on the magnitude of sand, gravel, or both that would be excavated failed to "recognize the import and meaning of the phrase 'production capacity.'"[382] CSI and the EAO's arguments utilized dictionary definitions of "production" and "production capacity," which were described as being "determined in reference to the rest of the provision," i.e. the amount of excavated sand or gravel or both sand and gravel. The provision allows for "option in the amount to consider in determining the production capacity" because many sand or gravel pits do not produce both sand and gravel for sale.[383] In the context of this phrasing, a mine would be required to include in its production capacity only the sand that it produces for sale. CSI also utilized the term "excavate" to describe only the material that would be removed for sale as a part of the production capacity, whereas Oxford Dictionary defines "excavate" as "to make a hole, etc. in the ground by digging."[384] CSI does not concern itself with the disruption of the land in its provision, as the BCSC says

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[381] *Fort Nelson*, para 113.
[382] *Fort Nelson*, para 114.
[383] *Fort* Nelson, para 107.
[384] Oxford Dictionary Online.

is evident in the Sand and Gravel Threshold deal with the threshold for modifications to sand and gravel pits, which includes "modification will result in the disturbance of an area of land that was not previously permitted for disturbance."[385] as well as the production capacity. The Lieutenant Governor in Council could have included land disturbance in the then new iteration of the Sand and Gravel Threshold, but chose not to do so. The EAO stated that the terms used to define the threshold criteria for new Sand and Gravel Pits did not consider "production capacity" in isolation from "excavation of sand and gravel or both" without referring to the use of the extracted product—more specifically, whether it is for sale or waste.[386]

The definition of 'production capacity,' however, generally refers to the output of products that can be produced by an enterprise within a certain timeframe. The word "product" is, in this instance, more relevant to the case than "capacity." "Product," however, has two very different meanings (according to the Oxford Dictionary): “an article or substance that is manufactured or refined for sale;” or “a thing or person that is the result of an action or process.” The latter would include any and all materials excavated from the site, while the former refers to only that which would be used for sale. Thus, the 'plain' and 'ordinary' meaning of "production capacity" is not only less clear than is insinuated by the appellants and the Court of Appeal, but may, in fact, be consistent with the FNFN's interpretation depending on lexical semantics. This is significantly problematic in the context of the duty to consult. Its constitutional nature

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[385] *Fort* Nelson, para 117.
[386] *Fort Nelson*, para 70.

and reconciliatory significance should not be reduced to the interpretation of semantics, particularly concerning an unclear regulation which was designed to be interpreted by project proponents for projects which are in their own interest. This supports the FNFN's assertion that the economic benefits of development are being prioritized over environmental protection and, by extension, over the protection of Aboriginal rights and interests as well as Aboriginal consultation.

The BC Court of Appeal and the BC Supreme Court arrived at two entirely different outcomes. This is hugely important regarding the duty to consult and EAs, particularly in the context of litigation. The issues of ambiguity and the room that exists to interpret different aspects of both the duty itself and the environmental assessment process allow for potentially very different outcomes depending on who analyzes the cases, and how they choose to do so. This is evident in the case of *Fort Nelson.* The two court cases provide some of the same information, but view and analyze it differently and this brings the potential outcomes in different directions. The significant variance in the findings of the two courts shows that the avenue of judicial review is not, as *Gitxaala* discussed, a proper method for rectifying the consultation process. *Fort Nelson* provides two entirely different outcomes preempted by two vastly different analyses of both the reviewability of the project itself, of Fort Nelson First Nation's involvement, and the triggering and satisfaction of the duty to consult. As has been previously discussed, the duty to consult is balanced atop a process that is not, by any means, perfect. It is flawed and has much room for interpretation, much of which can be in favour of the proponent or developer. This is clearly demonstrated in the case of *Fort Nelson.*

Fort Nelson First Nation expressed concern regarding CSI's approach to the five other proposed projects. FNFN felt that the applications were intentionally designed and submitted in such a manner that would avoid triggering an EA through 'project splitting.' This refers to the act of ensuring that the estimated production capacity for each application was split away from the cumulation of the applications as a whole, keeping it just short of the EA threshold for projects under the *Regulations.* The FNFN believed that the projects should have been designated as one reviewable project, and reasonably so; three of the projects' boundaries were contiguous, with a fourth being only 1.9 kilometres away, all sites were being used to the same activity by the same proponent, and all of the extracted product would be processed at the same facility. In response, the province stated that it was premature to determine whether the projects were reviewable, and the Minister refused the FNFN's requests to designate the proposed projects as reviewable. Despite this, soon after these statements were made, CSI began the process to start the development of the Komie North project as its own project.

It was a serious oversight on the part of the Court of Appeal to neglect consideration of the other proposed projects in the FNFN's traditional territory. This, as discussed by the BCSC, would set the stage for the development of other frac and sand mines in that territory, allowing them to proceed with the same proponent-driven analysis that could take place with no environmental assessment and no consultation of the FNFN.[387] Particularly through the reconciliatory lens, the allowance of project splitting-

[387] *Fort Nelson*, 227.

or, at the very least, the failure to take a critical look at the possibility that project splitting occurred-and the failure to take the other potential projects into account in the consideration of the Komie North Mine project was a constitutional failure.

The BC Supreme Court identified several inconsistencies, misinterpretations, and glaring omissions regarding the duty to consult and the EA process in the *Fort Nelson* case. They may be summarized as follows: The BC Supreme Court found that there was a duty to consult in the making of the decision, which, despite the Court of Appeal's later assessment that consultation was at the low end of the spectrum, more closely resembled a strategic high-level decision.[388] It was also determined that the potential effects of the decision were not minimal. At the Supreme Court, this was not isolated to the Komie North Mine project, as the other potential new sand and gravel pits in the FNFN's traditional territory were considered to be relevant.[389] On these facts alone, the BCSC ascertained that the duty to consult was not fulfilled by "giving notice, disclosing information and discussing any issues raised in response to the notice".[390] The exchange of correspondence between the EAO and the FNFN was deemed to have been insufficient in supporting the Province's assertion that the duty to consult was adequately discharged. Further, the correspondence upon which the Province relied led the BCSC to the conclusion that no meaningful consultation occurred regarding the subject matter of the decision. They then concluded that, in reality, the FNFN sought to engage in meaningful consultation and the EAO either failed to respond in a timely manner, or deflected the

[388] *Fort Nelson*, para 271.
[389] *Fort Nelson*, para 271.
[390] *Fort Nelson*, para 259.

FNFN's concerns, and went on to make the decision with no input from the FNFN. From that time on the EAO insisted that the process was not subject to consultation as the interpretation of Table 6 was proponent-driven, and, as a result, application of the threshold is not discretionary.[391] More specifically, the BCSC noted that the correspondence that was heavily relied upon by the Province did not include the June 13 letter from the FNFN to the Minister requesting designation of all CSI's proposed projects as reviewable projects.

Within this letter, the FNFN specifically raised the issue of project splitting. This concept refers to the division of a single project into several smaller projects in order to keep the production capacity below the threshold. The EAO did not respond to this letter until February 13, 2013, at which time the Minister had already decided not to designate the Komie North Mine project as a reviewable project. The response letter also stated that the CSI projects “may when further advanced in terms of design constitute a single project that requires environmental assessment," although it concluded that the EAO had requested that CSI contact them before the development stage of any of the six Licenses of Occupation "in order to determine whether an EA will be required." And yet, as noted by the BC Supreme Court, at this time CSI had already submitted a Notice of Work application to the Mines Ministry for a permit to develop the Komie North Mine; a fact of which the FNFN was not informed until May 2, 2013—five months after the application was filed. Upon being informed of this application, the FNFN complained to the Ministry

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[391] *Fort Nelson*, para 271(6).

of Forests, Land, and Natural Resources Operations (on June 3, 2013) regarding the inadequate review period as well as incomplete, inadequate, and inaccurate materials provided to them by CSI. The FNFN also raised environmental assessment concerns yet again; specifically, what it suggested was an attempt by CSI to "circumvent the threshold" by including only sand in the production estimate while the gravel was characterized as waste.

The FNFN sent the EAO another letter on June 18, 2013 in which similar concerns were raised. In the EAO's response, it stated that the EAO was aware of CSI's application to move on to the development stage of the Komie North Mine project. It stated that the Project Assessment Manager would respond to Fort Nelson once he had the required information regarding the application. Despite this, the letter sent from CSI to the Project Assessment Manager on July 19, 2013 requested confirmation that the project was not reviewable, and no copy or information about the letter was given to Fort Nelson. The EAO then made the decision on August 8. They neither notified the FNFN of this, nor did they seek any input from them. According to the BCSC, the Mines Ministry and the Ministry of FLNRO were informed of the decision to approve the project without the requirement of an environmental assessment, while the FNFN were not told until September 30, 2013. At this time, the FNFN had still not received a response to their June 19 letter. The FNFN sent an email to the Ministry of FLNRO informing them that their June 19 letter remained unanswered. In this email, the FNFN stated that the Ministry of FLNRO should not “process further or approve the [Komie North Mine Project] until full responses to its outstanding correspondence had been given by both the Ministry of FLNRO and the EAO (concerning the FNFN’s June 18 letter)”

and “a full consultation with the FNFN has been conducted and concluded by the crown on this application.”[392] Fort Nelson also sent a letter to the EAO on September 26, 2013 apprising them that the FNFN was looking forward to further discussions of the project applications in regards to the effects they may have on FNFN rights and interests.[393]

The chambers judge applied a standard of correctness in its examination of whether the duty to consult was breached, which raised an issue with the Court of Appeal regarding the standard of review. The chambers judge characterized the EAO's interpretation as a "strategic high-level decision" that could have adverse impacts on the FNFN's treaty rights. As a result, he felt that the FNFN should have been consulted before the correspondence on August 8th, 2013. He also concluded that any consultation that may have taken place was insufficient in fulfilling the duty to consult. According to CSI and the EAO, this analysis was incorrect, as they felt that the judge erred in utilizing a standard of correctness rather than a standard of reasonableness. The appellants believed that the judge had simply substituted the EAO's interpretation of the threshold with his own without consideration of the EAO's interpretation through a standard of reasonableness. The FNFN stated that the chambers judge was not mistaken, as he clearly found that the EAO's interpretation was not supported by the text of the *Regulation*, nor by its ordinary meaning, nor by the general purposes of the *Environmental Assessment Act.* The FNFN argued that the appellants were attempting to "extend the reasoning in *Davie Bay* to transform the regulatory scheme from one in which proponents apply the

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[392] *Fort Nelson*, para 271 (7)(i).
[393] *Fort Nelson*, para 68 and 271.

reviewable project thresholds to one in which their commercial interests define those thresholds."[394] The FNFN took issue with the approach taken by the EAO in its interpretation of the threshold, as it would favour economic development at the expense of environmental protection. CSI's interpretation and its approval by the EAO, and the Court of Appeal's validation of that interpretation created an opportunity for future projects that were potentially subject to environmental assessments to move forward without them. This precedent demonstrated to proponents that seeking advice from the EAO is not equivalent to a decision that is subject to judicial review.

The BC Supreme Court rejected the Province's statement that the EAO did not have a duty to respond to the FNFN's inquiries regarding the application of the *Regulation* to the Komie North Mine project or the other proposed projects. This was due to the fact that the EAO's function does not include an exercise of discretion. The Supreme Court did not accept the Province's assertion that the decision as well as the information regarding the decision that was delivered to the FNFN only provided the "views of the EAO on the interpretation of the *Regulation* and that "under statutory scheme, responsibility for determining whether a project is a reviewable project rests with the proponent."[395] The BCSC stated that this was, at worst, an attempt to avoid responsibility, given the significant environmental protection and oversight role that was given to the EAO by the Legislature.

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[394] *Fort Nelson*, para 78.
[395] *Fort Nelson*, para 264.

Although the Court of Appeal would not consider the Komie North Mine project within the context of the other five mine projects, the BC Supreme Court did consider these other projects in its decision regarding the Komie North Mine, and rightfully so. Narrowing the scope of the interpretation to only the Komie North Mine project was unreasonable in the greater context of reconciliation. As discussed in *Rio Tinto*,the duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown.[396] This is, of course, contingent upon the triggering of the duty to begin with. The BCSC found that the duty to consult was triggered, despite the EAO's submission that the decision was not a strategic high level decision, as this conflated issues of "general statutory interpretation with issues that are more fundamental to the process engaged in by CSI through the action or inaction of the Province in 'taking up' of lands over which the FNFN has, (by virtue of Treaty 8) rights to hunt, fish or trap, without any consultation concerning the environmental impact that taking up for the purpose of mining could have on those treaty rights."[397] The BCSC also stated that, in making the decision, the EAO did more than simply interpret the provisions of the sand and gravel threshold criteria in such a way that supported a proponent-lead assessment. Accordingly, the EAO accepted CSI's calculations of the Komie North project's production capacity without critical evaluation.[398]

The Supreme Court stated that the EAO's letters on September 30, 2013, and January 14, 2014, "cannot fairly be read as being part of a consultation process" as those

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[396] *Rio Tinto Alcan v. Carrier Sekani Tribal Council,* para 34.
[397] *Fort Nelson*, para 224.
[398] *Fort Nelson*, para 225.

letters seek only to justify the decision that had already been made. The EAO also did not substantively respond to the FNFN's repeatedly stated concerns, which began in the June 19 letter, and had not been addressed or discussed with the FNFN prior to the decision being made. Regarding this issue, the BCSC references Binnie J.'s statements in *Mikisew* at para. 54, which reads as follows: "… 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…"[399]

The SC also did not accept that the EAO had no duty to respond to the FNFN's inquiries about the application of the *Regulation* to the Komie North Mine project or to the other proposed projects because the EAO's function does not include an exercise of discretion. In the context of *Friends of Davie Bay*, the case upon which this is based, the proponent-driven approach to the interpretation and application of the thresholds in Table 6, the BCSC stated that it does not also apply in the case of a proponent-driven assessment in the beginning stages of the environmental regulatory process, wherein there is a very real potential to defeat existing treaty rights by allowing projects to be approved with no environmental assessment.

According to the BC Court of Appeal, the preliminary issue at hand was whether the August 8, 2013 letter contained a "decision" that was subject to judicial review. The BCCA claims that the BC Supreme Court did not question whether this was the case, and

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[399] *Fort Nelson*, para 271 (7)(m).

simply went ahead and accepted that there was "some decision" that was subject to judicial review. The BCCA stated that, according to the EAO, the August 8th letter was not a decision and was not subject to judicial review, as it was "merely an expression of a non-binding opinion without legal effect." CSI, on the other hand, claimed that the August 8th letter did contain a "decision" that was subject to judicial review, as it was a determination of how to interpret the *Regulation,* as it has consequences further along in the regulatory approval process. CSI did not, however, believe that subsequent communications between the EAO and the FNFN were subject to judicial review. The FNFN, however, believed that that the entirety of this correspondence was subject to judicial review, in addition to the August 8th letter.

Whether or not the duty to consult was fulfilled was of little concern to the Court of Appeal, and their deliberation in the case primarily concerned itself with the specifics of the interpretation of the *Regulation.* The tone of the case is dismissive of the concerns of the FNFN, and the concerns they expressed regarding their rights and the potential effects on those rights and their traditional territory are entirely omitted from the court's reasons. According to the FNFN, the interpretation and application of the reviewability threshold triggered the duty to consult. They stated that, as a result of the EAO's decision, the Project will be subject to reduced environmental oversight and may therefore expose the FNFN's treaty rights to significant adverse impacts. The FNFN argued that interpretation of the threshold was, in fact, compatible with consultation, with no clear

distinction being evident between legislative interpretation and the exercise of discretion.[400]

The chambers judge accepted that, in principle, the interpretation of a regulation standing alone does not attract a duty to consult, and the Court of Appeal agreed as regulations are rules of general application. The chambers judge concluded that the interpretation of the *Regulation* may be seen as a strategic high-level decision that could have adverse effects on the FNFN's treaty rights, while the Court of Appeal disagreed with this statement. Accordingly, the CA felt that the issuing of a permit under the *Mines Act* would be the stage at which the duty may arise. This, however, is ignorant of the implications of a decision to either require an environmental assessment, or for a project to be allowed to move forward without an EA. This is problematic for a number of reasons, particularly when regarded in conjunction with the duty to consult. The Fort Nelson First Nation had concerns regarding the potential effects of the Komie North Mine project, as well as the other projects that were poised to be developed on FNFN's traditional territory, and they were adamant that an environmental assessment should take place. Rather than being consulted regarding the reviewability of a project, the FNFN's opportunity to be consulted was entirely contingent upon the interpretation of the reviewability; a deliberation in which the FNFN was not consulted or heard.

In the opinion of the Court of Appeal, the relevant Crown conduct that may affect the FNFN's treaty rights is not the 'decision,' but the potential approval of the permit

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[400] *Fort Nelson*, 117.

under the *Mines Act*, or other forthcoming approvals. This, however, ignores the established notion of meaningful consultation, which is, in part, characterized by early engagement with affected Indigenous groups. Despite the confounding elements of this case, the issue at hand in this analysis is the application of the duty to consult as it relates to the environmental assessment process. The labyrinthine court discussions in the cases discussed here are exemplary of this issue: that the duty to consult can be not only inhibited by its integration with the EA process, but it can also be interpreted through a context within which it does not belong. The very pillars of the duty itself are the honour of the crown and reconciliation. Its constitutional basis should prevent it from being bogged down in the extraneous details of statutory interpretations under unclear regulations, and yet, when combined with the environmental assessment process, the duty to consult and the Indigenous groups whose rights and interests are at risk are at the mercy of such inane factors. The fact that the interpretation of the *Regulation* is the crux upon which the duty to consult may or may not be triggered in this case is a threat to the integrity of the duty as a constitutional imperative. Whether or not the duty to consult is triggered can and should be clear to all involved parties. In *Fort Nelson*, there is a significant presence and effect of confounding variables that affect the triggering of the duty, as well as the level of consultation that may be required. The convoluted approach to the duty to consult that is used when an environmental assessment process is involved is neither just nor effective, and it certainly does not function through good faith and reconciliation as it should.

The narrowed issue at hand was the interpretation of "production capacity," and, by extension, whether the EAO's statement of its non-binding opinion served as a

"decision" that could be subject to judicial review. According to the Court of Appeal, this statement of opinion did not serve as a binding decision, as the reviewability of the project was proponent driven. The EAO does not possess statutory power to decide whether a project is reviewable. The Minister of Environment or the Executive Director of the EAO can, however, independently order that a non-reviewable project undergo an environmental assessment. The only avenue for a third party such as the FNFN to challenge the proponent's decision regarding the reviewability of a project is to seek judicial review of the authorization of the project. In this case, this involved the various permits and authorizations under the *Mines Act* and the *Land Act.* The Court of Appeal held that the interpretation of "production capacity" put forth by the EAO was, in fact, reasonable, in accordance with the notion that the ordinary grammatical meaning of production capacity suggest a relation to economic output rather than total excavation of materials.[401] The court disagreed with the FNFN's assertion that this interpretation was inconsistent with the purpose of the Act due to its neglect of environmental impact.[402] According to the court, the thresholds for reviewable projects under the Regulations are imperfect "proxies" that serve to provide clear guidance to proponents as to whether a project is reviewable. Therefore, the thresholds would be defined in light of proponent concerns, or, more astutely, economic outcomes. The Court concluded that the EAO's interpretation was reasonable considering the Minister or Executive Director can order an EA in cases wherein there are potentially serious environmental effects. The Court of

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[401] *Fort Nelson*, 74.
[402] *Fort Nelson,* 74.

Appeal also held that a decision regarding the interpretation of a regulation does not trigger the duty to consult. Regardless of whether the duty was triggered, the Court found that correspondence between the EAO and FNFN was sufficient in fulfilling the duty even if it were applicable.

According to the FNFN, the EAO approval of the proponent driven approach to "production capacity" is limiting as it would inhibit an environmental assessment from being required. This puts commercial agendas ahead of environmental protection. The FNFN submitted that with the Sand and Gravel Threshold being limited to the intention of "sale or use," the proponents enabled themselves to excavate an unlimited amount of product from a new mine without triggering an EA so long as they stayed within the 250000 tonne limit for a four year period.[403] The FNFN also stated that the proponent driven limit on production capacity meant that the statutory threshold would no longer serve to identify sand and gravel mines for review based on environmental impact.[404]

The most poignantly problematic element of the Court of Appeal's views on the case was the statement that, even if the duty to consult was triggered, it was sufficiently fulfilled. As is evident in the analysis by the BC Supreme Court, there was significant evidence to the contrary. According to the Court of Appeal, "the FNFN expressed their views on the proper interpretation of the sand and gravel pit threshold in two letters to the EAO" and "the EAO's letters of September 30, 2013 and January 15, 2014 to the FNFN demonstrate that the EAO considered the position of the FNFN, explained why it did not

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[403] *Fort Nelson*, para 138.
[404] *Fort Nelson*, para 139.

adopt its position, and provided detailed rationales for its own interpretation.[405] Nothing in its correspondence with CSI limited the ability of the EAO to agree with the FNFN's interpretation, if it found that interpretation persuasive."[406] The Court of Appeal believed the FNFN had "a full opportunity to argue its case."[407] This is an unsubstantiated and absurd claim. Unless access to the Canadian postal service is considered an adequate consultation opportunity, the FNFN were given no opportunity to express their concerns, nor was there any indication that their interests were taken into account. The Court of Appeal felt that no more was required by way of consultation given "the various ways in which the duty to consult is engaged elsewhere in the regulatory scheme."[408] This concept is not expanded upon, and the FNFN's right to be consulted is effectively dismissed.

Conclusion

Whether the Court of Appeal was correct in its conclusion is debatable. The issue at hand, however, concerns the duty to consult and its integration with environmental assessments. The case of *Fort Nelson First Nation v. British Columbia (Environmental Assessment Office)* demonstrates several issues that can occur when conflating the duty to consult with the EA process. The interpretation of the *Regulation* was controversial in its ability to properly trigger an environmental assessment, and integrating the constitutional duty to consult to this is, as is evident in the need for judicial review, a regrettable and

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[405] *Fort Nelson*, para 127.
[406] *Fort Nelson*, para 127.
[407] *Fort Nelson*, para 127.
[408] *Fort Nelson*, para 127.

unjust action. Affected First Nations are entitled to meaningful consultation that occurs early and often in the environmental assessment process, and the interpretation of the *Regulation* is a part of that process. The issue with setting trigger thresholds is connected to the triggering of the duty to consult, and this is not in keeping with the constitutional nature of the duty to consult. This gives the Crown an element of control over the triggering of the duty, through the formulation of ambiguous regulations and, by extension, through the interpretation of those regulations. The complex nature of the statutory interpretation involved in the environmental assessment application phase of this project and the implications it had on this case shows the irrationality of integrating the duty to consult with the EA process. In addition, the immense differences in both the findings and reasoning of the British Columbia Supreme Court and the British Columbia Court of Appeal are demonstrative of the issues with the EA process as an avenue for the duty to consult.

CHAPTER 6: CONCLUSION

The purpose of this paper is to analyze the duty to consult as it operates through the environmental assessment process. The literature review served as a sample of the available scholarly writing regarding the duty to consult, traditional ecological knowledge, and environmental assessments in Canada, and provided a brief analysis of this literature as it relates to the unsuitability of the integration of the EA process and the duty to consult. As has been reiterated throughout this paper, the roots of the duty to consult are constitutional, and this imperative is undermined through the integration of the duty to consult and the EA process and the paralleling of the consultation process with a flawed administrative process. This becomes evident upon examination and analysis of several court cases, including *Gitxaala, Clyde River, Chippewas,* and *Fort Nelson,* wherein meaningful, good faith consultation was lacking. The integration of the duty to consult and the environmental assessment process is proven to be unsuitable in this analysis. An appropriate consideration of the importance and gravity of Aboriginal rights, reconciliation, and the constitutional nature of the duty to consult would allow for the creation of a foundation upon which a process that is suitable for the substantive and procedural elements of the duty to consult.

In the context of environmental assessments, administrative tribunals are given more power to influence the duty to consult than are Indigenous peoples themselves. The duty to consult was established as a flexible procedural standard, and the courts were then provided with the responsibility of developing the duty to consult jurisprudence. With the complex nature of the duty to consult in general comes the complexity of what is required in order to move forward successfully with both procedural aspects and substantive

outcomes. The environmental assessment process is limited in its ability to progress the fundamental formulation of the duty to consult jurisprudence, as well as its ability to further reconciliation. The interpretations of the duty to consult jurisprudence have the potential to be very damaging to the duty to consult. The more closely the duty is aligned with administrative processes such as the EA process, the more deeply the two become integrated and, as a result, the more the duty to consult jurisprudence is affected by the influence of the procedural elements of EAs. This is problematic for several reasons.

Litigation and the Duty

In the most general sense, the unsuitable nature of the EA process as an avenue for the duty to consult becomes evident in the simple examination of the number of court cases that involve the duty to consult and EAs. Although there are certainly projects that undergo EAs and are bound by the duty to consult that do not become subject to litigation, it was stated by the court in *Haida* that cooperation is preferable to litigation, and this is supported throughout the literature. Therefore, a project that was subject to the duty to consult and ended up in court as a result of this in some way may be considered a failure. The establishment of cooperation as preferable as well as the required consideration of reconciliation indirectly dictates that, if the duty is carried out properly with these concepts in mind, litigation should not be necessary. In reality, however, many Indigenous groups have no choice but to take their argument to court in order to protect their Aboriginal rights and preserve their constitutional right to be consulted meaningfully and in good faith. The need to resort to litigation would be diminished if the duty to consult were applied through a process more suitable than EAs to its constitutional nature and its requirements for honourable behaviour on the part of the

Crown. Although recourse within court must be available in order to ensure that the duty is meaningful, the integrity of the duty to consult is dependent upon working through cooperation and consideration of reconciliation in order to diminish the need for the involvement of the court.

On Reconciliation

The duty to consult is presented by the Government of Canada as a carefully thought out and loyally applied process which benevolently serves the Indigenous population of Canada. This, however, has been proven time and again not to be the case. Decision makers are likely to seek only the degree of information and participation that is required in order to move forward with the associated project and are, as a result, unlikely to seek supplementary participation or information as it is not in their best interest to do so. In addition, the pursuit of reconciliation must include the possibility of a project not going ahead as a result of consultation. This, however, is rare, and when projects are sufficient to pass the environmental assessment stage, there seems to be a penchant for extending that sufficiency to the integrated consultation process as well. In a sense, this epitomizes the main issue discussed in this analysis: when the EA and consultation processes are integrated, the requirements for each are integrated as well, in spite of their vast differences.

A recurring theme in the studied cases is the sheer lack of understanding and clarity regarding the party responsible for carrying out the duty to consult and, perhaps more significantly, the lack of clarity regarding whether the duty has been carried out

before litigation becomes necessary. This lack of clarity was discussed by Ariss, McCallum Fraser, and Somani:[409] the notion that engagement with multiple parties results in confusion regarding which party is responsible for fulfilling the duty to consult. This becomes particularly evident in cases wherein the duty itself is heavily delegated. *Gitxaala*, for example, involved an over-delegation of the duty to consult, which resulted in a process riddled with confusion, particularly regarding roles and responsibilities. As discussed in Case Study #1, the over-delegation of the duty as well as the assessment of whether the duty was over-delegated is inherently a fool's errand: delegation and the level of delegation that is appropriate or permitted is entirely unclear, and, therefore, the term 'delegation' is open to interpretation, allowing the Crown to decide how delegation may benefit them. Administrative tribunals that are designed to carry out a duty of fairness are, as a result, delegated the duty to consult and provided with the opportunity that comes with the ambiguity of the duty, allowing them to alter the process according to government and proponent interests.

Stated plainly, criteria that satisfy environmental assessment requirements simply do not suffice to thoroughly and properly fulfill the duty to consult. The environmental assessment process in Canada is flawed, and is, as a result, not a suitable avenue through which to carry out the duty to consult. The constitutional nature of the duty as well as the intricacies involved in the triggering of the duty, evaluating the strength of claims and where required consultation falls on the spectrum, and in carrying out that consultation in

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[409] See "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?"

such a way that the honour of the Crown is upheld through meaningful, good faith consultation (and, if necessary, accommodation) demonstrate this unsuitability,

As discussed by Beanlands and Duinker, the lack of attention that is paid to the scientific elements of EIAs has created a divergence between the two major groups involved: on the one side stand the administrators and their scientific advisors responsible for establishing the reference terms for assessments and judging whether the resulting studies are adequate; on the other side stand the project proponents and their environmental consultants who translate the reference terms, typically without understanding the scientific standards that will be implemented by the project's reviews. As a result, a disconnect is created, from which a muddled and frustrating review process is produced, which then occurs within a relatively well-defined administrative process. This points to the very core of the issue discussed within this analysis: although the EA process is, in and of itself, sufficient in its ability to determine and assess the potential environmental effects of a project, the integration of the duty to consult within that process leads to befuddlement and misunderstanding in carrying out the duty, and rather than harming the proponent or the Crown, there is much more likelihood of harming the affected Indigenous group.

There is a significant range in the outcomes of environmental assessments that involve the duty to consult, with different EA authorities as well as different proponents and different combinations of each resulting in a variety of consequences. *Gitxaala* is an interesting example, as it represents an utter failure in the consultation process itself in conjunction with a victory in court. If, however, the Gitxaala and the several other First Nation appellants had chosen not to pursue litigation, Enbridge would have continued

with their project plans, potentially without hindrance resulting from the utter failure that was the consultation process. The courts have, in cases such as this, become the only option for Indigenous groups to pursue what they are rightfully owed.

Theoretically, the duty to consult has significant potential to repair and address the injustices against Indigenous rights. Conceptually, the duty to consult appears to serve Indigenous interests and pursue justice in the relationship between Indigenous peoples and the Crown. There is, however, a significant gap in theory and practice, wherein the latter is seriously lacking in its ability to foster and promote reconciliation and justice. Cooperation between Aboriginal groups and the Crown is often traded for proponent-led assessments, neglect or devaluation of Indigenous interests, concerns, and TEK, and a focus on and prioritization of economic benefit justified under the pretense of the greater good.

The issues surrounding the duty to consult as a reconciliatory process are particularly poignant, and the general neglect for pursuing and promoting reconciliation through consultation processes is alarming. The duty to consult jurisprudence itself is limiting in its neglect to address what the court referred to in *Chippweas* as "historical grievances." This demonstrates an utter failure on the part of the court to consider the duty to consult through a reconciliatory lens. The use of the term "historical grievances" is reductionist in its ignorance of the effects a project may have already had upon an Indigenous group prior to the consultation process. This becomes particularly relevant in cases (such as Chippewas) wherein a new project is not being proposed, but, rather, changes to an existing project are afoot. In addition, it neglects consideration of issues with past projects that may be relevant to the complaints of the affected Indigenous

group. The court's abnegation of Indigenous peoples' historical issues is entirely ignorant of the duty to consult's reconciliatory nature. The integration of the consultation process with the administrative EA process further dilutes the significance of the duty to consult, and the mirroring of administrative law requirements within both procedural and substantive elements of the duty represents an utter failure to recognize the nature of the duty to consult and its effects on Indigenous rights as well as the lives of Indigenous people in Canada.

Traditional Ecological Knowledge and the Duty to Consult

The literature included in this paper demonstrates the value of TEK as it relates to consultation and shows that TEK has a place in consultation process as well as in general assessments of environmental impacts. As noted in the literature, TEK cannot be used properly if it is not situated within the social and political structures in which it is embedded. As a result, examination and use of TEK findings becomes a more holistic approach than simply collecting the information. TEK is intertwined within Indigenous cultures, and traditional ways of knowing are incredibly valuable both for their cultural and informational worth. Particularly in the local context, TEK offers insights that western science simply cannot, and this comes from thousands of years of data collection, observation, and interaction with ecosystems. In addition to its value as a consultative tool, TEK is also a cultural element that must be preserved. This becomes a significant reconciliatory measure, wherein vast amounts of TEK have been lost due to linguistic and cultural destruction, assimilation, and environmental damage. Reconciliation within the context of consultation must account for the preservation of and respect for TEK. If TEK is to be utilized, it must be done in a respectful manner; one that accounts for oral

traditions, Indigenous peoples' hesitation to share TEK, and the cultural and traditional heritage involved in the acquisition, preservation, and transmission of TEK.

Addressing the Issues and a Way Forward

In conclusion, the integration of the duty to consult and the environmental assessment process in Canada is unsuitable for a number of reasons which have been discussed throughout this paper. The EA process puts the duty at risk for being over-delegated, which may result in issues of confusion regarding who bears responsibility for what. The EA process has a tendency to favour the 'balance' of interests, which is not appropriate in the context of protection of Aboriginal rights. The purpose of the duty- which is rooted in reconciliation and the protection of s.35 rights- is minimized in favour of maximizing the efficiency of the EA process. This is evident in the changes made by *CEAA 2012,* which were made in order to create a more efficient process as well as reduce the number of EAs that would occur. In addition, constraints such as shorter timeframes, expedited participation processes, and the neglect for communication and cooperation become rampant within the EA process, and these are particularly problematic in sufficiently carrying out the duty. EA processes can also be too focused on proponent-led assessments and consultation, and this has obvious consequences for Indigenous groups as proponents do not typically understand how consultation should occur, nor are they motivated to pursue consultation or reconciliatory approaches as this is likely to be damaging to their development goals. Generally speaking, the EA process was designed for an entirely different focus: the assessment of potential environmental harm that may be caused by a project. Not only was it not designed to implement the duty to consult, include TEK, or prioritize Aboriginal rights or reconciliation, but the EA

process also has a tendency to fail even in its stated purpose. The process is both fundamentally and procedurally flawed. In addition, although “fair” procedures are an important part of protecting Aboriginal rights, they are not sufficient where Aboriginal rights and reconciliation are concerned. The duty of fairness required within the EA process is not equivalent to the requirements of duty to consult, and the unique obligations involved in the duty are not incorporated in the EA process. The procedural requirements of environmental assessments vary depending upon the potential for environmental harm, and this most poignantly summarizes the issue at hand: environmental harm is not the equivalent to harm to Aboriginal rights, and should not be treated as such. In order for the environmental assessment process to be made suitable for the integration of the duty to consult, it must rectify this array of issues and move forward with reconciliation and the protection of s. 35 rights in mind.

A suitable process for duty to consult would involve an independent process within which would reside the capability to allow for and encourage consideration of Indigenous interests as well as the constitutionality of the duty to consult, the value of cooperation, the possibility for accommodation, the incorporation of TEK, and the provision of sufficient information and resources to affected Indigenous groups. A reconciliatory approach would be at the foreground of this process, wherein Aboriginal rights would be paramount over procedural fairness, and the ‘balance’ of interests that currently has a significant presence in EA processes and consultative approaches would be replaced by protection of Aboriginal rights. Reconciliation as a token term would fall by the wayside, and true reconciliatory actions would become the norm within the consultation process and the ensuing projects.

Albeit seemingly far-fetched, these ideals are simply what is constitutionally owed to Indigenous peoples in Canada. As has been discussed throughout this paper, the duty to consult is an ambiguous concept, and this ambiguity is dangerous in its allowance for freedom of interpretation; and yet, this ambiguity is a two-sided coin, as it also presents the opportunity to further develop the duty in such a way that benefits Aboriginal groups, protecting and prioritizing their rights and allowing for reconciliatory approaches and meaningful consultation to become not only conceptually important but legally necessary. This is how we will see true change within duty to consult jurisprudence, beginning, most importantly, with the abolition of the integration of the duty to consult and the environmental assessment process as it currently exists. This will require either the formulation of an entirely new consultation process that is independent from EA, or the overhaul of the EA process with the requirements and unique obligations of the duty to consult becoming integrated appropriately.

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