

Section 35 Aboriginal Rights: Evolving Understandings in a Changing World of Consultation Duties*

Asmaa Khadim

Our French and English pioneers came to a populated continent. The First Nations greeted us with generosity and friendship, according to their spiritual beliefs and way of life...Those Europeans who took the time to observe native societies described a culture of consensus, co-operation, and sharing. In Aboriginal eyes, greatness came not from taking but from giving. Yet those who gave us the key to Canada found the door closed to them at Confederation... We owe the Aboriginal peoples a debt that is four centuries old. It is their turn to become full partners, in developing an even greater Canada. And the reconciliation required may be less a matter of legal texts than of attitudes of the heart.

– The Rt. Hon. Romeo LeBlanc, 25th Governor General of Canada¹

The 150th anniversary of Canadian Confederation presents a valuable opportunity to reflect upon these comments made by the Rt. Hon. Romeo LeBlanc over twenty years ago, advocating for Canadians “to encourage and recognize the Aboriginal people who long ago encouraged and recognized the rest of us.”² While, at the time, Mr. LeBlanc stressed the importance of viewing reconciliation as a matter of the heart rather than one dependent solely upon questions of law, the significant contributions of the legal community in interpreting and defining the scope and content of Aboriginal rights³ over the last fifty years cannot be understated. The law has been lauded, at times, for being instrumental in progressively advancing Aboriginal rights, and yet, it has also been heavily criticized for its failure to achieve just results for First Nations communities.⁴ In fact, Canadian Aboriginal law is anything but uncontroversial.

In considering the treatment of Aboriginal rights since Confederation, it is apparent that our conceptualization of the rights protected within Canada’s constitutive documents has evolved. It is now well settled in Canadian constitutional law that a duty to consult and

* This paper was presented at the Association for Canadian Studies in Australia and New Zealand (ACSANZ) conference, *Constituting Canada* (University of Wollongong, 13 July 2017), and subsequently published in the *Australasian Canadian Studies* journal (citation below).

¹ The Right Honourable Romeo LeBlanc, ‘Presentation of the 1996 Native Role Models’ (Speech delivered at the Presentation of the 1996 Native Role Models, Rideau Hall, Ottawa, 23 February 1996) <<http://archive.gg.ca/media/doc.asp?lang=e&DocID=140>>.

² Ibid.

³ Throughout this paper, unless explicitly stated otherwise, the term ‘Aboriginal rights’ is used in the broadest sense to include title, treaty rights and rights to engage in traditional customs and practices.

⁴ Andrew J Orkin, ‘When the Law Breaks Down: Aboriginal Peoples in Canada and Governmental Defiance of the Rule of Law’ (2003) 41 *Osgoode Hall Law Journal* 445, 446.

accommodate with Aboriginal peoples arises wherever the Crown contemplates actions or decisions that may affect an Aboriginal or treaty rights. Such duties are seen as necessary in order to give full effect to Aboriginal rights and encourage reconciliation with Aboriginal peoples. The necessity of engaging in a consultative process has been stressed in a line of landmark Supreme Court of Canada (“SCC”) decisions,⁵ and some view these advancements as an example of the progressive nature of Canada’s constitutional commitment to reconciliation with Indigenous peoples. Certainly, these cases have been influential in the development of a narrative that promotes greater inclusivity and recognition of the inherent value of Aboriginality within Canadian society.

Yet, there are ongoing challenges in the interpretation and application of these concepts that must be resolved if reconciliation is to ever become anything more than an elusive ideal. Some of these challenges relate to the standards imposed upon the Crown with respect to consultation. In determining the quality and nature of consultation that is constitutionally mandated where a proposed activity might negatively impact Aboriginal rights and interests, the courts have insisted that the Crown engage in “meaningful” and “good faith” consultation with the group that might be impacted.⁶ However, when is consultation “adequate,” and by what (or whose) standard is adequacy measured? Does “meaningful dialogue” during consultation really lead to meaningful solutions with regards to the adverse effects of resource development on Aboriginal rights? Due to this inherent subjectivity in the question of adequacy, the procedural aspects of consultation may be overemphasized to the detriment of substantive rights. This can have the effect of leaving some Aboriginal communities with the sense that these principles are applied in a rote manner, failing to give effect to the constitutional guarantees contained within Section 35 of the *Constitution Act 1982*.⁷ Simply stating that this is a question that must be answered on a case-by-case basis⁸ does little to clarify this murky landscape.

Other challenges relate to the Court’s reticence with regards to accommodation of Aboriginal concerns and interests. Consultation must be meaningful *with the intention* of substantially addressing Aboriginal concerns⁹ but this is not the same as actually requiring that Aboriginal concerns be addressed before a project proceeds. The courts have made it clear that there is no veto power inherent in the consultation process, and consultation

⁵ See especially *R v Sparrow* [1990] 1 SCR 1075 (*‘Sparrow’*); *R v Van der Peet* [1996] 2 SCR 507 (*‘Van der Peet’*); *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (*‘Delgamuukw’*); *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 (*‘Haida’*); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 SCR 550 (*‘Taku River’*); *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388 (*‘Mikisew Cree’*).

⁶ *Delgamuukw* [1997] 3 SCR 1010, 1113 [168]; *Haida* [2004] 3 SCR 511, 520 [10], 528 [33], 532 [41].

⁷ *Canada Act 1982* (UK) c 11, sch B (*‘Constitution Act 1982’*).

⁸ *Haida* [2004] 3 SCR 511, 533 [45].

⁹ *Delgamuukw* [1997] 3 SCR 1010, 1113 [168].

is not synonymous with consent.¹⁰ There is no express duty to reach agreement.¹¹ As a result, current formulations of the law of accommodation entail a more subjective approach to addressing the concerns of First Nations communities, with ultimate decision-making authority on questions like “how much accommodation is adequate in the circumstances” resting in the hands of the Crown or its delegates. This approach leaves much to be desired and the subtle distinctions can lead to a perception amongst First Nations communities that the legal system is silently working against their interests.¹²

This paper explores existing jurisprudence on Aboriginal consultation and accommodation, and considers how current interpretations may hinder the inclusion of First Nations communities as “full partners” in the ongoing development of Canada. An examination of the Aboriginal consultation framework within the context of oil sands development is used to demonstrate some of the practical difficulties encountered in applying these concepts to situations that require a careful balancing of Aboriginal rights with competing national or regional interests. Ultimately, it may be argued that reconciliation cannot be achieved without full partnership, and this in turn cannot be achieved unless First Nations communities are given a shared role in decision-making with regards to land and resources. A legal framework that relies heavily on subjective determinations of the “adequacy” or “meaningfulness” of consultation and inadequate notions of accommodation will only continue to exacerbate existing conflicts. As such, Canadian courts are being called upon to strengthen the law of consultation and accommodation in a manner that reflects Canada’s commitments to reconciliation, its constitutional values, and its obligations under the *UN Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’).¹³

Oil Sands Development and Historical Treaties

Consultation with local Aboriginal communities is an integral aspect of oil sands development in Alberta. Issues that arise within the oil sands industry are reflective of a broader phenomenon of resource dispossession that is systematically ignored (and

¹⁰ *Haida* [2004] 3 SCR 511, 535 [48]–[49]. McLaughlin CJ noted that the Aboriginal “consent” spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. In *Tsilhqot’in Nation v British Columbia* [2014] 2 SCR 257, 294 [76], McLaughlin CJ clarified this with respect to Aboriginal title, indicating that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use in question, the government’s only recourse is to show that the proposed incursion on the land is “justified under section 35 of the *Constitution Act, 1982*.” In other words, once Aboriginal title is established, section 35 permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown’s fiduciary duty to the Aboriginal group.

¹¹ *Haida* [2004] 3 SCR 511, 520 [10].

¹² Orkin, above n 4, 446.

¹³ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (2 October 2007) (‘UNDRIP’).

sometimes even promulgated) by the federal and provincial governments.¹⁴ As such, oil sands projects offer valuable insights into the practical implications of the constitutional consultation framework.

The Alberta oil sands underlie 142,200 square kilometres of land in the Athabasca, Cold Lake and Peace River areas of northern Alberta,¹⁵ considered to be larger than the size of the state of Florida.¹⁶ As of 2016, proven reserves were at 165.4 billion barrels, ranking it as the third largest oil reserve in the world after Venezuela and Saudi Arabia.¹⁷ Production is expected to increase from 2.8 million barrels per day in 2017 to 3.9 million barrels per day by 2027.¹⁸ As such, previous ambitions of producing 1 million barrels per day by 2020 were greatly exceeded as early as 2004, and this has led to concerns over the appropriate management of environmental impacts arising from this pace and scale of development.¹⁹

Development has largely been driven by a steadily rising market price for crude oil, uncertainty about global supply, and growing demand from the United States and Asia.²⁰ Capital investment in this industry amounts to tens of billions of dollars each year,²¹ and it is projected that a further \$247.5 billion will be invested in the ten-year period from 2017 to 2027.²² A recent Canadian Energy Research Institute report estimated that the oil sands may contribute up to \$1.7 trillion to the gross domestic product (GDP) of Canada, based on modest oil prices per barrel, representing about 3 per cent of Canada's GDP by 2020.²³ With this level of economic potential, it is perhaps not surprising that the industry received a makeover in the 1990s, when the National Oil Sands Task Force convened by the Alberta Chamber of Resources recommended replacement of the term “tar sands,” which sounded dirty, with the term “oil sands” in order to improve public perception.²⁴

The change in terminology has done little, however, to mask the environmental costs of mining oil sands, which requires wetlands to be drained, rivers to be diverted and all

¹⁴ As discussed in Orkin, above n 4, 447.

¹⁵ Alberta Energy, *Facts and Statistics* <<https://www.energy.alberta.ca/OS/AOS/Pages/FAS.aspx>> ('Alberta Energy Statistics').

¹⁶ Dan Woynillowicz, Chris Severson-Baker and Marlo Reynolds, 'Oil Sands Fever: The Environmental Implications of Canada's Oil Sands Rush' (Report, The Pembina Institute, November 2005) <<https://www.pembina.org/reports/OilSands72.pdf>>.

¹⁷ Alberta Energy Statistics, above n 15.

¹⁸ Alberta Energy, *Oil Sands* <<https://www.energy.alberta.ca/OS/Pages/default.aspx>>.

¹⁹ Woynillowicz, Severson-Baker and Reynolds, above n 16.

²⁰ *Ibid.*

²¹ Alberta Energy Statistics, above n 15. Capital investment in Alberta's upstream energy sector, which includes oil sands, conventional oil and gas, mining and quarrying was equal to \$23.4 billion in 2015 and \$28.3 billion in 2016, estimated at \$26.5 billion in 2017 and is forecast at \$23.7 billion in 2018.

²² Ganesh Doluweera, Paul Kralovic and Dinara Millington, 'Economic Impacts of Canadian Oil and Gas Supply in Canada and the US (2017-2027)' (Study No 166, Canadian Energy Research Institute, August 2017) 41.

²³ *Ibid.*

²⁴ Woynillowicz, Severson-Baker and Reynolds, above n 16.

vegetation to be stripped from the surface.²⁵ The activity is energy and water intensive, requiring two to five barrels of water (roughly 159 litres or the size of an average bathtub) to extract a barrel of bitumen.²⁶ One such barrel also produces one and half barrels of liquid waste that is held in tailings ponds, and Alberta's tailings ponds are now said to hold over 1.18 trillion litres of toxic waste containing lead, mercury, arsenic and benzene.²⁷ Approximately 198 million m³ of fresh water is withdrawn from local rivers annually,²⁸ creating controversies over impacts to fisheries, birds and other wildlife, water and air quality, human health and loss of regional biodiversity.²⁹ The environmental impacts of oil sands are well documented and beyond the scope of this paper. However, they are mentioned here to highlight the potential for adverse consequences in relation to the rights of Aboriginal peoples and their cultural survival, which are intimately linked to their unique relationship with and dependence upon the ecosystem.³⁰

Canadian oil sands are mainly situated on lands that were the subject of various treaties entered into by the British Crown with the Indigenous peoples of northwestern Canada.³¹ Treaty No. 8, signed in 1899, represented an agreement between the Crown and the Cree, Beaver, Chipewyan and other Aboriginal peoples inhabiting portions of Northern Alberta, British Columbia, Saskatchewan, and Northwest Territories.³² The middle and lower parts of Alberta, which are also areas of oil sands extraction and pipeline development, are covered by Treaty No. 6, signed in 1876 by Crown representatives and Cree, Assiniboine and Ojibwa leaders, and Treaty No. 7, signed in 1877 by five of the Plains First Nations, the Siksika (Blackfoot), Kainai (Blood), Piikani (Peigan), Stoney-Nakoda, and Tsuut'ina

²⁵ Ibid.

²⁶ Ibid.

²⁷ Natural Resources Defence Council and Environmental Defence, 'One trillion litres of toxic waste and growing: Alberta's tailings ponds' (June 2017) <<https://www.nrdc.org/sites/default/files/media-uploads/edc-and-nrdc-one-trillion-litres-of-toxic-waste-and-growing-albertas-tailings-ponds-june-2017.pdf>>.

²⁸ Canadian Association of Petroleum Producers (CAPP), 'Canada's Oil Sands' (July 2018) <<https://www.capp.ca/~media/capp/customer-portal/publications/316441.pdf?>>. CAPP statistics are for 2016.

²⁹ Woynillowicz, Severson-Baker and Reynolds, above n 16.

³⁰ Jennifer Huseman and Damien Short, 'A Slow Industrial Genocide: Tar Sands and the Indigenous Peoples of Northern Alberta' (2012) 16 *International Journal of Human Rights* 216, 223–224; Brenda L Parlee, 'Avoiding the Resource Curse: Indigenous Communities and Canada's Oil Sands' (2015) 74 *World Development* 425; Indigenous Environmental Network, *What are the Tar Sands?* <<http://www.ienearth.org/what-are-the-tar-sands/>>.

³¹ Anthony L Moffa, 'The Oil Sands of Time: Pipelines and Promises' (2017) 22 *Ocean and Coastal Law Journal* 111, 114; Huseman and Short, above n 30, 223.

³² *Treaty No. 8 Made June 21, 1899, and Adhesions, Reports, etc.*, signed 21 June 1899 ('Treaty No. 8').

(Sarcee).³³ Approximately 23,000 Indigenous people from 18 First Nations and six Métis settlements currently live in Alberta's oil sands region.³⁴

Interestingly, it was the discovery of mineral resources that prompted the treaty-making process initiated by the government in these regions.³⁵ Prior to the signing of Treaty No. 8, the Canadian government consulted with experts to formulate a strategy to account for settlement, resource extraction and economic development, as well as the conditions of the Aboriginal population living there at the time.³⁶ Archival records suggest that reports of significant mineral wealth in the region from the Department of the Interior and the Geological Survey Department convinced the government of the need for treaties with local Indigenous populations, “to extinguish their aboriginal title to the land.”³⁷ In fact, the presence of tar and oil oozing from the banks of the Athabasca had been observed as early as 1793, and by the late 1800s, it had been estimated that there was approximately 4,700 million tons of tar in the region, along with natural gas, bitumen, oil and pitch.³⁸ It was believed that it would be easier to deal with Aboriginal communities at that time, than later on when the land was “overrun with prospectors and valuable mines discovered.”³⁹ There is no doubt when one examines the historical context of the treaty-making process that it was largely motivated by the economic potential of resource extraction within the territory.

Numbered treaties during this era of Canadian development served the purpose of effectuating the legal surrender of Aboriginal land claims and extinguishment of underlying Aboriginal title, in exchange for reserved land, cash payments, and supplies for agriculture, hunting and fishing.⁴⁰ By the time Treaty 8 was negotiated, some of the consequences of earlier treaty-making endeavors had become apparent to the Aboriginal communities of northwestern Canada.⁴¹ As a result, they were clear in their refusal to be confined to reserves like the Aboriginal communities of the Prairies, and in their desire to retain their freedom of movement and traditional ways of life.⁴² In order to secure their

³³ Moffa, above n 31, 121; *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River*, signed 23 August and 9 September 1876 (“Treaty No. 6”); *Treaty No. 7 between Her Majesty the Queen and the Blackfeet and Other Indian Tribes, at the Blackfoot Crossing of Bow River and Fort Macleod*, signed 22 September 1877 (“Treaty No. 7”).

³⁴ Ian Hussey, Nicole Hill and Angele Alook, ‘Ten things to know about Indigenous people and resource extraction in Alberta’ on *Parkland Institute Blog* (21 June 2017) <http://www.parklandinstitute.ca/ten_things_to_know_about_indigenous_people_and_resource_extraction_in_alberta>.

³⁵ *Ibid.*

³⁶ Richard Daniel, ‘The Spirit and Terms of Treaty 8’ in Richard X Price (ed), *The Spirit of the Alberta Treaties* (The University of Alberta Press, 1999) 47, 55.

³⁷ Huseman and Short, above n 30, 218.

³⁸ Daniel, above n 36, 58.

³⁹ Report by James Walker, North West Mounted Police Officer, dated 1897, quoted in Huseman and Short, above n 30, 218.

⁴⁰ Moffa, above n 31, 119 – 120.

⁴¹ Huseman and Short, above n 30, 219.

⁴² *Ibid.*

agreement, government negotiators repeatedly assured Aboriginal communities that their way of life would remain intact and that they would not be moved onto reserves.⁴³ In his opening speech at the commencement of treaty negotiations, Commissioner Laird, on behalf of the Canadian government, informed Aboriginal representatives that “you will be just as free after signing the treaty as you are now... Indians who take treaty will be just as free to hunt and fish all over as they now are.”⁴⁴ This was accompanied by contradictory statements to the effect that all “Indians” would be subject to the law, regardless of whether they entered into a treaty or not.⁴⁵ Statements made by Father Albert Lacombe in the Cree language indicate the extent to which government officials went to provide further assurances, by soliciting the assistance of respected and trusted missionaries to act as intermediaries:

Your forest and river life will not be changed by the Treaty, and you will have your annuities, as well, year by year, as long as the sun shines and the earth remains. Therefore I finish my speaking by saying, Accept.⁴⁶

As a result of the provisions of Treaties 6, 7 and 8, First Nations people were guaranteed the right to a subsistence livelihood, but at the same time, divested of large tracts of potentially resource-rich land.⁴⁷ Specifically, Treaty No. 8 guarantees the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered, “saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”⁴⁸ The other numbered treaties discussed herein preserve the vocations of Aboriginal people with similar exceptions, hunting and fishing in the case of Treaty No. 6 and hunting alone in the case of Treaty No. 7.⁴⁹ Oil sands development has been challenged by impacted First Nations on the basis that these rights are rendered meaningless in key areas of their traditional territory.⁵⁰ Elders of the Fort Chipewyan area continue to maintain the view that Treaty No. 8 guarantees their rights to hunt, fish and trap *without restriction*.⁵¹ Even though there is a clear exception for mining on ceded land within each of these treaties, it is argued that the current extent of development, particularly in northern Alberta,

⁴³ Huseman and Short, above n 30, 218.

⁴⁴ Daniel, above n 36, 75.

⁴⁵ Huseman and Short, above n 30, 219.

⁴⁶ Ibid.

⁴⁷ Moffa, above n 31, 121.

⁴⁸ *Treaty No. 8*.

⁴⁹ *Treaty No. 6; Treaty No. 7*.

⁵⁰ *Alphonse Lameman on his own behalf and on behalf of all other Beaver Lake Cree Nation beneficiaries of Treaty No 6 and Beaver Lake Cree Nation v Her Majesty the Queen in Right of the Province of Alberta and the Attorney General of Canada* (2013) ABCA 148 (Alberta Court of Appeal). This case is now styled *Germaine Anderson on her own behalf and on behalf of all other Beaver Lake Cree Nation beneficiaries of Treaty No. 6 and Beaver Lake Cree Nation v Her Majesty the Queen in Right of the Province of Alberta and the Attorney General of Canada* (*BCLN v Alberta and Canada*).

⁵¹ Huseman and Short, above n 30, 219.

constitutes a *de facto* breach of the rights to maintain traditional vocations as guaranteed by the treaties.⁵²

It is notable that government officials considered Treaty No. 8 to be a significantly cheaper version of previous treaties that had been negotiated as it was anticipated that Aboriginal populations would be able to subsist adequately on unoccupied lands in the region, thereby dispensing with the requirement for a government-funded welfare safety net.⁵³ Treaty No. 8 also provided less compensation to Aboriginal peoples as they were not expected to give up most of their land.⁵⁴ This is ironic when one considers the extent of land that has since been allocated to resource development, including mining, and the resulting economic benefits flowing to the Canadian government and industry investors.

This resource driven treaty-making process has had serious implications for Aboriginal rights. In recent decades, Aboriginal communities in northern Alberta have become increasingly vocal in their resistance to oil sands development on or near their traditional lands.⁵⁵ They have advocated for the protection of treaty rights before various judicial, political and administrative bodies, at provincial, national and international levels, with mixed results.⁵⁶ Key points of contention include issues surrounding the extent to which Aboriginal concerns over oil sands are accommodated (as a result of a framework that supports consultation rather than consent), the timing of consultation (when the duty ought to arise), and the scope of consultation with regards to cumulative impacts. Each of these will be discussed in further detail below, after a brief review of existing Canadian jurisprudence on consultation and accommodation.

Overview of the Existing Aboriginal Consultation Framework

Treaties and the Honour of the Crown

Until the enactment of the *Constitution Act 1982*, the treaty rights of Aboriginal peoples could easily be overridden by legislation.⁵⁷ Treaties were subject to the doctrine of Parliamentary sovereignty, which permitted Parliament to enact statutes infringing the terms of a treaty or extinguishing Aboriginal rights altogether⁵⁸ by virtue of its authority over “Indians and lands reserved for Indians” under Section 91(24) of the *Constitution Act*

⁵² Moffa, above n 31, 121.

⁵³ Huseman and Short, above n 30, 218.

⁵⁴ *Ibid.*

⁵⁵ Danielle Droitsch and Terra Simieritsch, ‘Canadian Aboriginal Concerns with Oil Sands’ (Briefing Note, The Pembina Institute, September 2010)
<<https://www.pembina.org/reports/briefingnoteosfntoursep10.pdf>>.

⁵⁶ *Ibid.*

⁵⁷ *R v Marshall* [1999] 3 SCR 456, 496 (‘*Marshall*’).

⁵⁸ Brian Slattery, ‘Making Sense of Aboriginal and Treaty Rights’ (2000) 79 *The Canadian Bar Review* 196, 210.

1867.⁵⁹ As a result, during this period the law offered no special protection for Aboriginal rights and practices such as hunting.⁶⁰ Since 1982, however, Section 35 of the *Constitution Act 1982*⁶¹ has allowed successive courts to strike down legislation that is inconsistent with the terms of Aboriginal treaties,⁶² unless infringements can be justified according to the tests articulated in *R v Sparrow*⁶³ and *R v Badger*.⁶⁴

Since the Supreme Court of Canada decision in *Calder*⁶⁵ in 1973, Canadian courts have adjudicated extensively upon matters relating to Aboriginal rights. The enactment of Section 35 strengthened these rights by ensuring constitutional protection and recognition, thus fostering the development of a robust body of law. These decisions have empowered Aboriginal communities in the assertion of their claims and placed increasing pressure on the Canadian government at all levels to acknowledge its responsibilities to Aboriginal peoples and make better efforts to negotiate with them.⁶⁶

An important feature of Canadian Aboriginal law is a distinction that is drawn between different types of rights that vary depending on the degree of connection with the land, ranging from Aboriginal title at the highest end, to rights to engage in “practices, customs and traditions integral to the distinctive Aboriginal culture” at the low end.⁶⁷ In considering the relationship between treaty rights and Aboriginal rights, Slattery notes that the relationship may vary depending upon the precise terms of the treaty and the overall context.⁶⁸ The treaty may recognize and guarantee certain existing Aboriginal rights in some cases, while in others, it may alter them by consolidating, redefining, sharing or ceding them.⁶⁹ Slattery cautions that treaty recognition and guarantee of Aboriginal rights does not convert them into treaty rights unless there is clear language to that effect, as treaties throw a “protective mantle over Aboriginal rights,” thereby adding a layer of security to these “treaty-protected Aboriginal rights.”⁷⁰

The historic treaties with Aboriginal peoples cannot be understood without recognition of how the parties are viewed relative to one another under Canadian law.⁷¹ This has been characterized as a “unique position” in which the Crown is situated as the “ultimate suzerain and protector,” holding certain fiduciary obligations, while the Aboriginal party

⁵⁹ *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3 (*‘Constitution Act 1867’*).

⁶⁰ *Marshall* [1999] 3 SCR 456, 496.

⁶¹ *Canada Act 1982* (UK) c 11, sch B (*‘Constitution Act 1982’*).

⁶² Slattery, above n 58, 210.

⁶³ *Sparrow* [1990] 1 SCR 1075.

⁶⁴ *R v Badger* [1996] 1 SCR 771 (*‘Badger’*).

⁶⁵ *Calder v Attorney-General of British Columbia* [1973] SCR 313 (*‘Calder’*).

⁶⁶ Ava Murphy, Gareth Duncan and Gillian Piggott, ‘Primer: Canadian Law on Aboriginal and Treaty Rights’ (University of British Columbia Faculty of Law, 2008).

⁶⁷ *Delgamuukw* [1997] 3 SCR 1010; *Van der Peet* [1996] 2 SCR 507.

⁶⁸ Slattery, above n 58, 210.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Slattery, above n 58, 209

is seen as a protected and partially autonomous entity that can act independently within its own sphere of authority, but owing ultimate allegiance to the Crown.⁷² The fiduciary obligations owed by the Crown to Aboriginal peoples have given rise to principles that emphasize a generous interpretation of treaty terms that is, in theory anyway, intended to be favourable to Aboriginal peoples and take into account their concerns and perspectives at the time of entering into the treaty.⁷³ This fiduciary relationship has alternatively been described by the courts in terms of “honour of the Crown” and “trust.”⁷⁴

The honour of the Crown imposes a duty upon the government to always act honourably in its dealings with Aboriginal peoples, in order to achieve reconciliation of pre-existing Aboriginal societies with the sovereignty of the Crown.⁷⁵ Given the fiduciary obligations of the Crown arising out of its treaty-making endeavors, the process of interpreting treaties must be approached in a manner that maintains the integrity and honour of the Crown.⁷⁶ As such, the Crown must always be assumed to intend to fulfill its promises⁷⁷ and it must act in the best interests of Aboriginal groups where it has assumed discretionary control over their lands or other property.⁷⁸

Aboriginal Rights Not Absolute

The courts interpret Section 35 in keeping with its purpose, which is said to include a recognition of Aboriginal occupation of the land prior to European arrival; protection of Aboriginal and treaty rights and the cultural survival of Aboriginal communities; and the requirement that the Crown act honourably in its dealings with Aboriginal people.⁷⁹ However, while Section 35 provides a *constitutional guarantee* of Aboriginal and treaty rights, which cannot be altered or extinguished by ordinary legislation, there was the question of whether these rights were guaranteed absolutely.⁸⁰ In deciding this issue in *Sparrow*, Parliament’s Section 91(24) power to legislate with respect to Aboriginal peoples was read together with Section 35 to find that that Section 35 rights were not

⁷² *Ibid.*

⁷³ *Simon v The Queen* [1985] 2 SCR 387, 404; *R v Sioui* [1990] 1 SCR 1025 (‘*Sioui*’), 1043–5; *Badger* [1996] 1 SCR 771, 813; *R v Sundown* [1999] 1 SCR 393, 407; *Marshall* [1999] 3 SCR 456, 511.

⁷⁴ Peter W Hogg and Daniel Styler, ‘Statutory Limitation of Aboriginal or Treaty Rights: What Counts as Justification?’ (2015) 1 *Lakehead Law Journal* 3, 6. Hogg and Styler have suggested that, in light of later developments in the jurisprudence that have narrowed the application of “trust” and “fiduciary duty” concepts to Aboriginal title, it would be best to think of the relationship between the Crown and Aboriginal peoples in non-title situations in terms of the broader concept of “honour of the Crown.”

⁷⁵ *Haida* [2004] 3 SCR 511, 522 [17].

⁷⁶ *Guerin v The Queen* [1984] 2 SCR 336 (‘*Guerin*’); *Badger* [1996] 1 SCR 771, 794.

⁷⁷ *Guerin* [1984] 2 SCR 336; *Badger* [1996] 1 SCR 771.

⁷⁸ *Guerin* [1984] 2 SCR 336; *Ermineskin Indian Bank and Nation v Canada* [2009] 1 SCR 222.

⁷⁹ *Van der Peet* [1996] 2 SCR 507; *Sparrow* [1990] 1 SCR 1075; *Haida* [2004] 3 SCR 511; *Delgamuukw* [1997] 3 SCR 1010.

⁸⁰ *Sparrow* [1990] 1 SCR 1075, 1109.

absolute and could, in fact, be limited or infringed by legislation. In order to reconcile this federal power with federal duty (i.e. the honour of the Crown), the Court demanded that any government regulation infringing or denying Aboriginal rights be justified in accordance with certain standards.⁸¹

Drawing from *Sparrow* and subsequent cases, including *Delgamuukw v British Columbia*, *R v Gladstone*, *Tsilhqot'in Nation v British Columbia* and others, a framework has emerged for determining whether a Section 35 infringement can be justified.⁸² In order to justify infringement or limitation of an Aboriginal right, it would have to be established that the infringing legislation or action has a compelling and substantial government objective, one that reconciles Aboriginal interests with broader societal interests.⁸³ However, the legislation or government action must still be consistent with the fiduciary duties of the Crown.⁸⁴ In addition, infringement cannot be justified if no attempt has been made to consult the Aboriginal right-holders and, if necessary, make a reasonable accommodation of their interests.⁸⁵ Furthermore, it must be shown that the law or government project would only minimally impair the interests of Aboriginal right-holders, no further than is reasonably necessary to carry out the governmental objective. Finally, proportionality of the impact on Aboriginal interests must be assessed by weighing the adverse (and salutary) effects of the governmental law or action on right-holders against the governmental objective.⁸⁶ These principles apply similarly to treaty, title and Aboriginal rights.⁸⁷

Crown Consultation Duties

In addition to being a factor in the test for justification of infringements, the Crown has an independent constitutional duty to consult Aboriginal peoples about proposed activities that might negatively impact their interests and rights.⁸⁸ This duty makes it imperative that the Crown engage in “meaningful” and “good faith” consultation with the group that might be impacted by the proposed activity, with the intention to substantially address Aboriginal concerns.⁸⁹ The Crown must also ensure that the Aboriginal group is

⁸¹ *Ibid.*

⁸² *Delgamuukw* [1997] 3 SCR 1010; *R v Gladstone* [1996] 2 SCR 723 (*'Gladstone'*); *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257; Hogg and Styler, above n 74, 11.

⁸³ *Ibid.*

⁸⁴ *Tsilhqot'in* [2014] 2 SCR 257.

⁸⁵ *Delgamuukw* [1997] 3 SCR 1010; *Gladstone* [1996] 2 SCR 723; *Tsilhqot'in* [2014] 2 SCR 257; Hogg and Styler, above n 74, 11.

⁸⁶ *Ibid.*

⁸⁷ *Badger* [1996] 1 SCR 771, *Delgamuukw* [1997] 3 SCR 1010; *Gladstone* [1996] 2 SCR 723; *Tsilhqot'in* [2014] 2 SCR 257.

⁸⁸ *Guerin* [1984] 2 SCR 336; *Haida* [2004] 3 SCR 511; *Taku River* [2004] 3 SCR 550; *Mikisew Cree* [2005] 3 SCR 388.

⁸⁹ *Haida* [2004] 3 SCR 511.

fully informed regarding the proposed action.⁹⁰ This duty to consult can arise in the case of proven rights as well as those that have been asserted but not proven.⁹¹ In the case of unproven Aboriginal rights or claims, consultation serves the purpose of protecting them from irreversible harm in the interim.⁹² In other words, faced with the prospect of possible compromise of constitutionally protected rights, even those that are undefined or unclear, it is necessary to err on the side of caution and protect them through consultation.⁹³ The duty to consult can also be used to fill a procedural gap in a treaty, such as the failure to specify a *process* by which Aboriginal lands might be “taken up” (which might affect the right to hunt, fish or trap on those lands).⁹⁴

In *Taku River*, the Supreme Court clarified that fulfillment of the duty to consult is an ongoing process, existing at all stages and owed by both provincial and federal governments and all representatives and agents of the Crown.⁹⁵ Though the duty to consult remains with the Crown and is not an obligation placed upon third parties, it can be legitimately delegated to others.⁹⁶ In practice, the procedural aspects of consultation are often delegated to natural resource developers and administrative bodies, as in the case of the National Energy Board (NEB), a federal administrative tribunal and regulatory agency responsible for issuing authorizations in relation to oil and gas production.⁹⁷ The Supreme Court has recently confirmed that the Crown may rely on steps taken by administrative bodies such as the NEB to fulfill its duty to consult, so long as the agency possesses the statutory powers to fulfill the requirements of consultation and it is made clear to the First Nations that the Crown is so relying.⁹⁸ In fact, as the final decision maker on certain projects, the NEB is obliged to consider whether the Crown’s consultation was adequate if this is raised as a concern.⁹⁹ The substance of the duty does not change when a regulatory agency holds final decision-making authority.¹⁰⁰

When the duty to consult arises is, of course, critical to addressing any question of adverse impacts. The *Haida* case provides guidance for when the duty to consult is engaged: “...the duty arises when the Crown has knowledge, real or constructive, of the potential

⁹⁰ *Ibid.*

⁹¹ *Haida* [2004] 3 SCR 511; *Taku River* [2004] 3 SCR 550; *Mikisew Cree* [2005] 3 SCR 388.

⁹² *Rio Tinto Alcan v Carrier Sekani Tribal Council* [2010] 2 SCR 650 (*‘Rio Tinto’*); *Haida* [2004] 3 SCR 511; *Taku River* [2004] 3 SCR 550.

⁹³ E Ria Tzimas, ‘Haida Nation and Taku River: A Commentary on Aboriginal Consultation and Reconciliation’ (2005) 29 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 461.

⁹⁴ *Mikisew Cree* [2005] 3 SCR 388; *Beckman v Little Salmon/Carmacks First Nation* [2010] 3 SCR 103 (*‘Little Salmon’*); See also Chris W Sanderson, Keith B Bergner and Michelle S Jones, ‘The Crown’s Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose and Limits of the Duty’ (2012) 49 *Alberta Law Review* 822.

⁹⁵ *Haida* [2004] 3 SCR 511; *Taku River* [2004] 3 SCR 550.

⁹⁶ *Haida* [2004] 3 SCR 511.

⁹⁷ *Clyde River (Hamlet) v Petroleum Geo-Services* [2017] 1 SCR 1069 (*‘Clyde River’*); *Chippewas of the Thames First Nation v Enbridge Pipelines* [2017] 1 SCR 1099 (*‘Chippewas’*).

⁹⁸ *Ibid.*

⁹⁹ *Chippewas* [2017] 1 SCR 1099.

¹⁰⁰ *Clyde River* [2017] 1 SCR 1069.

existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”¹⁰¹ The case also provides guidance regarding the scope and content of the duty to consult, which is said to vary in accordance with the strength of the Aboriginal claim.¹⁰² On the low end of the spectrum, the Crown may have notice and disclosure obligations arising where the title claim is weak, where the Aboriginal right in question is a limited one or where the infringement is considered minor. At the other end of this spectrum is an obligation for “deep consultation” with the goal of finding a “satisfactory interim solution.”¹⁰³ Such a situation would arise where there is a strong claim, where the right and potential infringement have a strong significance for Aboriginal peoples, and the risk of non-compensable damage is high.¹⁰⁴ The seriousness of adverse effects can increase the scope and content of consultation, and the level of consultation required is essentially determined on a case-by-case basis.¹⁰⁵

The Supreme Court has observed that in the intervening years since *Haida*, Aboriginal consultation has become an important part of the resource development process.¹⁰⁶ Aboriginal groups have even taken the initiative in recent years to create their own consultation policies, outlining how the First Nation expects to be engaged and guiding the operation of their consultation offices.¹⁰⁷ However, *Haida’s* spectrum of *varying* consultation duties has been a source of contention. In particular, where the exploitation of natural resources clashes with existing Aboriginal rights to hunt, fish, trap, or utilize the natural environment in other ways, Aboriginal groups occasionally have difficulty in establishing that their rights might be adversely impacted such that a higher level of consultation is required.¹⁰⁸ The question of when the duty to consult arises has also been a point of disagreement in the extractives sector, as will be discussed below.

Accommodation or Consent?

Perhaps most significant for Aboriginal rights-holders is the fact that consultation is not synonymous with consent. The courts have made it clear that there is no veto power inherent in the consultation process.¹⁰⁹ The rationale for this restriction is based in the idea that requiring consent of Aboriginal peoples would amount to a veto power over

¹⁰¹ *Ibid.*

¹⁰² *Haida* [2004] 3 SCR 511.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Rio Tinto* [2010] 2 SCR 650.

¹⁰⁷ Dwight D Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Purich Publishing Limited, 2014) 132.

¹⁰⁸ For example, in *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212, the court found that any infringement or adverse effects on the rights of the First Nations would be minimal, and therefore the duty to consult and accommodate fell on the low end of the spectrum (a point with which the First Nations disagreed).

¹⁰⁹ *Haida* [2004] 3 SCR 511.

Crown affairs. Instead, reliance is placed upon the Crown upholding its own honour in its dealings with Aboriginal lands, resources and rights, as the Supreme Court has indicated that the controlling question in determining the level of consultation required is “what is required to maintain the honour of the Crown and to effect reconciliation.”¹¹⁰

The Supreme Court does make tangential reference to Aboriginal consent in *Haida*,¹¹¹ and in that regard, it is important to note that the case involved unproven Aboriginal rights and title claims (as did *Taku River*), so the comments made with respect to consultation and accommodation are made within that context. The Court in *Haida* recognised that meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations, leading to the accommodation stage. In its discussion of duty to consult, reference is made by the Court to the seminal decision in *Delgamuukw*, which suggested that the content of the duty varies with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor,” through the “significantly deeper than mere consultation” that is required in “most cases,” to “full consent” of First Nations on very serious issues.¹¹² Tzimas refers to the Court’s approach to accommodation as an interlocutory or quasi-injunctive measure that would avoid irreparable harm or minimize the effects of the infringement pending a final resolution of the underlying claim.¹¹³ However, the *Haida* Court shies away from this notion of consent, stating that the “Aboriginal ‘consent’ spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case.”¹¹⁴

Instead, the *Haida* Court emphasizes the need for a process of balancing interests, “of give and take,” indicating that “balance and compromise are inherent in the notion of reconciliation,” and pointing out that the reconciliation of Aboriginal rights with the interests of the Crown is the ultimate aim of consultation.¹¹⁵ In other words, the government would need to engage in meaningful dialogue in order to reconcile the assertion of Crown sovereignty with “pre-existing Aboriginal sovereignty, occupation and *de facto* control over the land.”¹¹⁶

Thus, where accommodation is required in making decisions that may adversely affect unproven rights and title claims, the Crown is entrusted with the task of balancing Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.¹¹⁷ Where, however, the right in question is

¹¹⁰ *Ibid.*

¹¹¹ *Ibid* 535 [48].

¹¹² *Ibid* 535 [48].

¹¹³ Tzimas, above n 93, 474.

¹¹⁴ *Haida* [2004] 3 SCR 511, 535 [48].

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid* 536 [50].

one that is existing and proven, as in *Mikisew Cree*,¹¹⁸ the Crown has an obligation to attempt to deal with the Aboriginal group in good faith and with the intention of substantially addressing their concerns.¹¹⁹ The Court stresses that the Crown must solicit and listen carefully to the Aboriginal group's concerns, and attempt to minimize adverse impacts on its treaty rights.¹²⁰

As discussed earlier, the agreement of the First Nations to the terms of Treaty 8 in 1899 was secured by providing assurances of continuity in traditional patterns of economic activity, including express promises on the part of the Crown that their rights to hunt, fish and trap would continue "after the treaty as existed before it."¹²¹ In that regard, the *Delgamuukw* approach seems to offer the greatest protection for Aboriginal rights, stressing that even in the rare cases when the minimum acceptable standard is consultation, it must be conducted in a good faith manner "with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue." This is a much higher minimal standard than *Haida's* notice and disclosure obligations for cases of minor infringement and weaker claims. The *Delgamuukw* view that, in most cases, the duty will be significantly deeper than mere consultation, and "some cases may even require the full consent of the Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands"¹²² seems more fitting in light of the promises made at the time of treaty negotiation.

The issue of Aboriginal consent has been revisited by the courts in recent years, as litigation over resource conflicts has increased. In *Beckman v Little Salmon/Carmacks First Nation*, the Court framed the First Nations' argument as one that advocated for both the procedural protections of consultation and a substantive right of accommodation.¹²³ In finding that there is no such substantive right found in "the treaty or in the general law, constitutional or otherwise," the Court reaffirmed that First Nations communities do not have a veto right over the approval process.¹²⁴ This has been followed by more recent comments from the bench indicating that Section 35 guarantees a process, not a particular result.¹²⁵ In *Ktunaxa Nation v British Columbia*, the Court stressed that here is no guarantee that, in the end, the specific accommodation sought will be warranted or possible. Again, the Court reiterated that Section 35 does not give unsatisfied claimants a

¹¹⁸ *Mikisew Cree* addresses the taking up of Treaty 8 land, which would have resulted in a reduction of the territory over which the Mikisew Cree First Nation would be entitled to exercise the right to hunt, fish and trap. Under Treaty 8, in exchange for the surrender of land, the First Nations were promised reserves and the rights to hunt, trap and fish throughout the land surrendered to the Crown except "such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

¹¹⁹ *Mikisew Cree* [2005] 3 SCR 388.

¹²⁰ *Ibid* 421 [64].

¹²¹ *Badger* [1996] 1 SCR 771; *Mikisew Cree* [2005] 3 SCR 388, 413 [47].

¹²² *Delgamuukw* 1113 [168].

¹²³ *Little Salmon* [2010] 3 SCR 103.

¹²⁴ *Ibid* 121 [14].

¹²⁵ *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)* [2017] 2 SCR 386.

veto, and where adequate consultation has occurred, a development may proceed without consent.¹²⁶

These decisions appear to be in direct contradiction of others in which the Supreme Court has cautioned against leaving Aboriginal groups with no meaningful right to hunt, fish or trap in their traditional territories, in the taking up of land for forestry or other purposes, as this could potentially give rise to an action for treaty infringement.¹²⁷ They also raise questions about the extent to which the concept of Free, Prior and Informed Consent (FPIC) can be applied in Canada to allow Aboriginal groups to veto resource development projects that impair their rights, given Canada's endorsement of the principles of UNDRIP.¹²⁸ Although Canada initially resisted UNDRIP by voting against it, it became a full supporter in 2016 after the Trudeau government asked the Minister of Indigenous and Northern Affairs and other ministers to implement the Declaration.¹²⁹

Given the fundamental importance of treaty promises, it may be argued that the aims of reconciliation cannot be achieved in a climate that supports the progressive erosion of rights, particularly where resource development is concerned. Alberta's oil sands development and regulatory approvals process offers greater insights into the difficulties encountered in applying the current consultation framework in practice, as will be discussed below.

Criticisms of the Consultation Framework within Oil Sands Development

The project development process in Canada inherently involves three essential functions, as described by Lambrecht, namely planning, approval and control.¹³⁰ Crown or government functions that correspond to each of these stages include environmental assessment and regulatory review, project approval and regulatory oversight.¹³¹ In Alberta, planning and control functions in relation to project development are undertaken by tribunals that have been created by the government – the National Energy Board at the federal level and the Alberta Energy Regulator (formerly the Energy Resources Conservation Board) at the provincial level.¹³²

Project development in Canada entails some form of Crown or government responsibility

¹²⁶ Ibid.

¹²⁷ *Grassy Narrows First Nation v Ontario* [2014] 2 SCR 447.

¹²⁸ Sarah-Grace Ross, 'From Consultation to Consent: A Comparative Analysis of Arctic States' in B O'Donnell et al (ed.), *Arctic Summer College Yearbook* (Springer International Publishing AG, 2018) 9.

¹²⁹ Aboriginal Affairs and Northern Development Canada, *United Nations Declaration on the Rights of Indigenous Peoples* (3 August 2017) < <http://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>>.

¹³⁰ Kirk N Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (University of Regina Press, 2013) 4.

¹³¹ Ibid.

¹³² Ibid.

in the development process, and as highlighted in the preceding section, where Crown decisions in the project development cycle have the potential to adversely impact Aboriginal rights or interests, consultation and accommodation may be required.¹³³ The duty to consult and accommodate has been said to have the greatest impact when the Crown makes strategic policy decisions through legislative or regulatory change, as in the case of land use or resource allocation.¹³⁴ This is particularly evident in oil sands development where, in a constitutionally mandated consultation framework that does not seek the consent of affected Aboriginal communities, development approvals have been granted even where severe and detrimental impacts on treaty rights are anticipated.

Extent of Accommodation Required

Both *Haida* and *Mikisew Cree* discuss at length what is required for consultation to be meaningful, and indicate the importance of consultation occurring at the planning and decision-making stages of the proposed action, rather than at the operational stages.¹³⁵ The Court in *Mikisew Cree* rejects arguments advocating for unilateral Crown action in cases of surrendered treaty land, and an approach that allows the Crown to do whatever it likes with surrendered land has been criticized for ignoring the mutual promises of the treaty, both written and oral.¹³⁶ In fact, the Court goes so far as to call this the “antithesis of reconciliation and mutual respect.”¹³⁷

The process is not meant to be an exercise in “blowing off steam,” as consultation that precludes any form of accommodation would be meaningless.¹³⁸ In fact, the standard imposed upon the Crown is that it must ensure that Aboriginal concerns are “seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.”¹³⁹ The realities on the ground, however, do not appear to live up to these standards and it has been alleged that both Alberta and the federal government have failed in their responsibilities to Aboriginal peoples.¹⁴⁰

The question of accommodation is a particularly contentious one in oil sands development. A dispute surrounding an application by Shell Canada for the expansion of Jackpine Mine serves as an example. The decision by the Canadian government to permit the Shell Jackpine Mine Expansion to proceed was challenged by the Athabasca

¹³³ Ibid.

¹³⁴ Maria Morellato, ‘The Crown’s Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights’ (Research Paper, National Centre for First Nations Governance, February 2008) 72.

¹³⁵ *Haida* [2004] 3 SCR 511; *Mikisew Cree* [2005] 3 SCR 388.

¹³⁶ *Mikisew Cree* [2005] 3 SCR 388, 414 [49].

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Droitsch and Simieritsch, above n 55 (referring to comments by Chief Allan Adam, Athabasca Chipewyan First Nation, and Chief Don Testawich, Duncan’s First Nation).

Chipewyan First Nation (“ACFN”) in an application for judicial review before the Federal Court of Canada in 2014.¹⁴¹ This decision had been made in the face of clear evidence that significant adverse environmental effects were likely to occur, though these were deemed “justified in the circumstances” by the Governor in Council.¹⁴² The Governor in Council gave no reasons for such a conclusion, and during the proceedings, the Crown asserted privilege over those records.¹⁴³

The Athabasca Chipewyan had previously objected to the project and sought its outright rejection, or in the alternative, appropriate accommodations to address the adverse effects on the ACFN’s rights. As part of the approvals process, the federal Minister of the Environment and the Chairman of the Alberta Energy Resources Conservation Board entered into an *Agreement to Establish a Joint Review Panel for the Jackpine Mine Expansion Project*.¹⁴⁴ This integrated their respective regulatory processes by creating an independent Joint Review Panel to conduct the environmental assessment through hearings, consultations with First Nations, and examinations of data.¹⁴⁵ Consultations between the ACFN, the Crown and Shell began in 2007, and resulted in an approval being granted subject to a list of conditions binding upon Shell that were meant to address concerns arising out of the consultation process.¹⁴⁶

The project envisioned destruction of a 21 km stretch of the Muskeg River, much of which was on ACFN traditional land, and included more than 10,000 hectares of wetland, 85% of which could never be reclaimed.¹⁴⁷ The Joint Review Panel found that the project would likely have significant adverse environmental effects on wetlands, traditional plant potential areas, wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity. Moreover, the Panel concluded that the Jackpine Mine project, in combination with other existing, approved, and planned projects in the region, would likely have significant adverse cumulative environmental effects on the environment and on Aboriginal traditional land use, rights, and culture.¹⁴⁸

Thus, it was clear that the project would have adversely affected the ACFN’s rights, notably its Treaty No. 8 rights to hunting, fishing, and the harvesting of animals and plants, and would have interfered with the maintenance of the ACFN’s culture and way of life.

¹⁴¹ *Allan Adam and Athabasca Chipewyan First Nation v Minister of Environment, Attorney General of Canada and Shell Canada Ltd.*, 2014 FC 1185 (CanLII) (*‘Adam v Canada (Environment)’*).

¹⁴² *Ibid.*

¹⁴³ *Ibid* 6 [18].

¹⁴⁴ *Shell Canada Energy Application to Amend Approval 9756, Jackpine Mine Expansion Project, Fort McMurray Area*, 2013 ABAER 011 (Report of the Joint Review Panel, CEAA Reference No 59540, 9 July 2013) 11 [46].

¹⁴⁵ *Adam v Canada (Environment)*, above note 141.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid* 3 [6].

¹⁴⁸ *Shell Canada Energy Application to Amend Approval 9756, Jackpine Mine Expansion Project, Fort McMurray Area*, 2013 ABAER 011 (Jackpine Mine Expansion Project Joint Review Panel, CEAA Reference No 59540, Summary and Decision) 2 [9].

The Joint Review Panel concluded that some of the significant adverse effects on the environment and on Indigenous peoples were irreversible and inadequately mitigated. It also specifically noted that the cumulative effects of this and other projects in the region would likely result in significant harm to Aboriginal rights and the environment. However, the Panel determined that the management of these cumulative effects could not be the sole responsibility of Shell.¹⁴⁹

The decision of the Joint Review Panel prompted an application for judicial review before the Federal Court in 2014. In its decision, the Federal Court observed that the Crown had a “deep” duty to consult with the ACFN due to the high significance of the rights and their potential infringement, as well as the high risk of non-compensable damage.¹⁵⁰ However, because the ACFN had participated extensively over a number of years, filing hundreds of pages of submissions, examining and cross-examining lay and expert witnesses, and making final submissions, and because the Crown had made alterations to the original proposal in order to account for some of the ACFN’s concerns, the Court found that the Crown had fulfilled its duty to consult. The Court noted that *Haida* required deep consultation aimed at finding a satisfactory interim solution in such cases, a burden that the Court found the Crown to have met when it addressed many of the concerns that the ACFN raised during consultation.¹⁵¹

The ACFN maintained the view that the Crown had made only minor changes to the project conditions, neglecting the most important accommodations sought by them or recommended by the Panel.¹⁵² In particular, the ACFN sought wildlife conservation offsets to be included as a project condition, funding and assistance with development of a Traditional Land Use Management Plan, funding for cultural maintenance, conditions for the protection of woodland caribou and recovery of wood-bison, and more rigorous conditions for the protection of migratory birds.¹⁵³

Unfortunately for the ACFN, these accommodations sought were found to lie outside the Crown’s jurisdiction due to the federal-provincial distribution of powers, as they were matters over which Alberta had exclusive jurisdiction.¹⁵⁴ While the Federal Court decision

¹⁴⁹ Ibid 4 [11].

¹⁵⁰ Ibid 26 [71].

¹⁵¹ Ibid.

¹⁵² Ibid 12 [41].

¹⁵³ Ibid 12 [42].

¹⁵⁴ For an interesting discussion of the source and extent of provincial jurisdiction to infringe Aboriginal title for the purposes of resource development, see Kent McNeil, ‘Aboriginal Rights, Resource Development and the source of the Provincial Duty to Consult in *Haida Nation* and *Taku River*’ (2005) 29 *The Supreme Court Law Review: Osgoode’s Annual Constitutional Cases Conference* 447. McNeil argues that, before deciding whether the Sparrow justification test applies in the context of provincial legislation, the Supreme Court in *R v Cote* [1996] 3 SCR 139 should have addressed the question of whether the provinces even have the constitutional authority to infringe Aboriginal rights, given Section 91(24) of the *Constitution Act 1867* and the doctrine of interjurisdictional immunity.

acknowledged that Alberta has the same duty to consult as the federal Crown,¹⁵⁵ it ignored the realities of the integrated consultation process conducted jointly by the Crown and Alberta through the Joint Review Panel.¹⁵⁶ Nevertheless, the Crown was determined to have fulfilled its responsibilities with regards to accommodation because of the various conditions included within the project approvals, since the Crown had offered to cooperate with Alberta on a number of matters lying within Alberta's exclusive jurisdiction,¹⁵⁷ and because ultimately, the Court found that the duty to accommodate does not guarantee Aboriginal groups everything that they wish to obtain.¹⁵⁸

The Jackpine Mine decision and others like it highlight the need for further guidance regarding *Haida's* "satisfactory interim solution" as well as the appropriate scope of accommodation. Chief Allan Adam (ACFN) has criticized the process of consultation as a box ticking exercise that leaves Aboriginal communities feeling that the government does not deal with the real issues.¹⁵⁹ The ACFN has voiced concern that there has not been adequate consultation to thoroughly understand the long-term impacts in the Shell Jackpine case, and First Nations throughout the oil sands region fear that industry growth is damaging treaty rights by leaving less and less land on which to exercise their traditional rights.¹⁶⁰ Arguably, such concerns can only be meaningfully addressed through an expansion of the duty to accommodate.

Timing of Consultation

The province of Alberta has also been accused of systematically narrowing the scope of public hearings to exclude treaty-based arguments and of limiting the scope of consultation,¹⁶¹ as demonstrated by the debate over the timing of oil sands related consultation.

¹⁵⁵ *Ibid* 32 [92], 34 [94].

¹⁵⁶ *Ibid* 4 [8].

¹⁵⁷ The Crown committed itself to collaborating with Alberta on community baseline health studies in collaboration with Aboriginal groups; water quality and quantity management; environmental monitoring of air and water, fish and bird health, and biodiversity, including some species at risk and migratory birds; to contribute input as requested on conservation offsets in Alberta's land use planning policies; to contribute technical advice for the development of a caribou range plan; to contribute technical expertise to improve reclamation of wildlife habitat; on incorporation of Aboriginal traditional land use in regional planning; and on stewardship of traditional resources and natural resource management in collaboration with Aboriginal groups.

¹⁵⁸ *Adam v Canada (Environment)* 2014 FC 1185, 37 [104].

¹⁵⁹ Bob Weber, 'First Nation in Alberta waits on government's next move after losing oilsands review', *The Canadian Press* (online) 12 January 2015 <<http://www.cbc.ca/news/indigenous/first-nation-in-alberta-waits-on-government-s-next-move-after-losing-oilsands-review-1.2897992>>.

¹⁶⁰ Chief Allan Adams, Athabasca Chipewyan First Nation, quoted in Weber, above n 159.

¹⁶¹ *Ibid*.

Despite the Supreme Court's emphasis on consultation at the planning and decision-making stages,¹⁶² the timing of when consultation commences in oil sands development is a sore point for Aboriginal communities in Alberta. The provincial government owns most of the oil and gas resources and disposes of mineral rights through an entirely discretionary process without any form of public participation. Opportunities for public input are made available long after the disposition of mineral rights, often when the project progresses to the review and approval stages, and Alberta has taken the position that leasing of mineral rights does not trigger the need for Aboriginal consultation.¹⁶³ The province has argued that Crown leasing of mineral rights does not, in and of itself, adversely impact Aboriginal rights and that many tenure agreements expire without any exploration or development activities ever taking place on the land.¹⁶⁴ At the same time, it has also acknowledged that potential surface activities associated with the exploration and development of mineral resources might adversely impact Aboriginal rights or traditional uses.¹⁶⁵

Alberta's approach to consultation has been criticized as untenable under judicial doctrine,¹⁶⁶ given that consultation ought to be triggered when the Crown has real or constructive knowledge of an Aboriginal right and is planning an activity that may adversely impact the continued exercise of that right.¹⁶⁷ The Supreme Court has even taken the view that consultation should properly occur at the strategic land and resource planning stage, even before the disposition of mineral rights and the issuance of surface rights. This has been proposed not only because of the real or constructive knowledge of anticipated impacts upon rights that exists at that point, but also because this is seen as the stage at which Aboriginal concerns can be most meaningfully accommodated.¹⁶⁸

However, the fact that consultation does not occur until the point of exploration or, in some cases, until the point of project development, means that if Aboriginal communities oppose a project, their interests and concerns are pitted directly against the company's,¹⁶⁹ and in some cases, the province's larger economic goals. Much has been invested financially in the development of a project to the approval stage, and many Aboriginal communities view development as a foregone conclusion by then. The fact that

¹⁶² *Haida* [2004] 3 SCR 511; *Mikisew Cree* [2005] 3 SCR 388.

¹⁶³ Government of Alberta, 'The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013' (3 June 2013) <<http://www.indigenous.alberta.ca/policy-guidelines.cfm>>.

¹⁶⁴ Monique M Passelac-Ross and Veronica Potes, 'Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal?' (Occasional Paper No 19, Canadian Institute of Resource Law, May 2007).

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ *Delgamuukw* [1997] 3 SCR 1010; *Haida* [2004] 3 SCR 511; *Mikisew Cree* [2005] 3 SCR 388.

¹⁶⁸ Passelac-Ross and Potes, above n 164.

¹⁶⁹ Amanda Annand, 'From Alberta to Standing Rock, indigenous peoples must be consulted', *The Globe and Mail* (online), 5 April 2017 <<https://www.theglobeandmail.com/opinion/from-alberta-to-standing-rock-indigenous-peoples-must-be-consulted/article33057232/>>.

consultation and accommodation only take place at the operational stages in oil sands development and only on a project-by-project basis means that, ultimately, there is a failure to consider the cumulative impact of development on Aboriginal rights.¹⁷⁰

These policies with respect to the timing of consultation have been challenged on a number of occasions, though with little success. For example, in 2008, the ACFN sought judicial review of four oil sands tenures that were granted without any consultation, which they claimed encompassed an area of land that must be protected in order to ensure their cultural survival.¹⁷¹ The ACFN sought a declaration that the province has a duty to consult *before* granting tenures on First Nation traditional lands, as well as a duty to consult on the ongoing impacts of those tenures.¹⁷² However, the application was dismissed in large part due to having been brought outside of the six-month limitation period.¹⁷³ The matter was appealed to the Alberta Court of Appeal and then the Supreme Court of Canada, without success. The decision was viewed as a “rather harsh result in which rules of civil procedure... were allowed to trump legitimate concerns about the lack of consultation when it comes to real infringements of Aboriginal rights.”¹⁷⁴

Accommodation of Concerns over Cumulative Impacts

Compounding the issues over consultation is the question of cumulative impacts; in other words, the aggregate loss of traditional land as a result of industrial development.¹⁷⁵ Project-by-project approval fails to consider the cumulative impacts of oil sands development, precluding proper accommodation of Aboriginal rights and interests.¹⁷⁶ The courts have made it very clear that consultation is not a means of seeking resolution

¹⁷⁰ Passelac-Ross and Potes, above n 164.

¹⁷¹ Droitsch and Simieritsch, above n 55.

¹⁷² *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)* (2009) 481 AR 270 (Alberta Court of Queen's Bench).

¹⁷³ The case ultimately appeared to turn on the question of whether time began to run from when the decision to issue the leases was made, or when the ACFN obtained notice of the issuance of the leases. The court declined to decide on this point and determined that the ACFN must be taken to have obtained constructive notice of the issuance of the leases due to electronic posting of notices, and that time began to run from then. The notion of constructive notice is contrary to the principles articulated in *Haida*. For further discussion, see Nigel Blakes, ‘The role of a limitations defence in a judicial review application involving the Crown’s duty to consult’ on University of Calgary Faculty of Law, *ABlawg.ca* (26 October 2009) <<https://ablawg.ca/2009/10/26/the-role-of-a-limitations-defence-in-a-judicial-review-application-involving-the-crown’s-duty-to-consult/>>

¹⁷⁴ Email interview with ACFN counsel Larry Innes, quoted in Shari Narine Sweetgrass, *Supreme Court won’t hear ACFN appeal challenging consultation process* (2012) Aboriginal Multi-Media Society (AMMSA) <<http://www.ammsa.com/publications/alberta-sweetgrass/supreme-court-won’t-hear-acfn-appeal-challenging-consultation-proces>>.

¹⁷⁵ Geoffrey Morgan, ‘An inside look at the bitter legal battle over cumulative impacts of oil sands activity’, *Alberta Oil* (online), 16 September 2013 < <https://www.albertaoilmagazine.com/2013/09/impacts-of-oil-sands-activity-first-nations/>>.

¹⁷⁶ Passelac-Ross and Potes, above n 164.

of historical underlying continuing infringements.¹⁷⁷ In order to trigger the duty, a causal relationship between the specific proposed government activity and a potential for adverse impacts on pending Aboriginal claims or rights must be shown, and past wrongs, even previous breaches of the duty to consult, will not constitute a sufficient trigger.¹⁷⁸

Cumulative effects management has become an increasingly prominent issue in aboriginal consultation, as the industry struggles with how to manage consultations that take into account adjacent and nearby projects.¹⁷⁹ During the Jackpine Mine expansion hearings, the Mikisew Cree expressed concern that the government was “failing to uphold the honour of the Crown in their approach to the assessment and management of cumulative effects in the Lower Athabasca Region.”¹⁸⁰ The Joint Review Panel also critiqued Shell’s approach and found that the regional effects on Aboriginal traditional land use in the area were not being fully addressed, going on to say that it was unclear whether or not the reclaimed landscape would ever be suitable for traditional land use once all development ceased.¹⁸¹

The Alberta government unveiled a new management framework, the Lower Athabasca Regional Plan (LARP), in 2012 to address the issue of cumulative effects in the oil sands. However, a recent report by the LARP Review Panel pointed to the province’s failures in protecting Aboriginal rights, lands and health from industrial development, concluding that LARP has been used by both industry and government to erode traditional land use in favour of economic interests.¹⁸² The Review Panel made a number of recommendations in relation to oil sands, based on its findings that the Fort McKay First Nation has been “more than minimally harmed” as a result of increasing oil sands operations in their Traditional Territory, leading to adverse effects on health, income and “quiet enjoyment of property.”¹⁸³ The Review Panel also made some general observations about the inclusion of Aboriginal peoples in land use planning outcomes and activities, questioning whether much progress had been made to date.¹⁸⁴

The panel observed that for Alberta to achieve an effective cumulative management system to balance economic development opportunities and social environmental considerations, it would have to implement all proposed management frameworks,

¹⁷⁷ Chris W Sanderson, Keith B Bergner and Michelle S Jones, ‘The Crown’s Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose and Limits of the Duty’ (2012) 49 *Alberta Law Review* 822.

¹⁷⁸ *Rio Tinto* [2010] 2 SCR 650; *Chippewas* [2017] 1 SCR 1099.

¹⁷⁹ Passelac-Ross and Potes, above n 164.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² Bob Weber, ‘Alberta failing aboriginal people in the oilsands area: report’, *CBC/The Canadian Press* (online), 2 February 2016 <<http://www.cbc.ca/news/canada/edmonton/alberta-failing-aboriginal-people-in-the-oilsands-area-report-1.3430762>>.

¹⁸³ Review Panel Report 2015, Lower Athabasca Regional Plan, Pursuant to subsection 19.2(2) of the *Alberta Land Stewardship Act*, SA 2009, c A-26.8.

¹⁸⁴ *Ibid.*

including those relating to First Nations traditional land use.¹⁸⁵ It was also highlighted that LARP ought to recognize that the terrestrial land footprint of the First Nations is being reduced annually as a result of increased resource development, including bitumen, conventional oil and natural gas extraction, pipelines, power lines, oil sands, forest harvesting and municipal growth.¹⁸⁶

Perhaps most importantly for the purposes of this discussion, the panel recommended that the province stop examining development on a project-by-project basis, and suggested that the regulatory regime look instead to the overall proliferation of resource development projects and their impact on the local population.¹⁸⁷ Undue focus on project or site-specific consultation results in a failure to take into account the cumulative effects of all projects planned or occurring in a region, and Alberta has yet to incorporate criteria for assessing the direct and cumulative impacts of resource development.¹⁸⁸

In response to the cumulative effects of large-scale oil sands and other petroleum development in their territory, the Beaver Lake Cree Nation (“BCLN”) commenced a claim against the Governments of Alberta and Canada in 2008.¹⁸⁹ The claim alleges that the Alberta and federal governments have failed to adequately discharge their duty to consult in issuing 19,000 authorizations for 300 projects related to oil sands development in Alberta.¹⁹⁰ The BCLN seeks a declaration that the cumulative effects of these developments unjustifiably infringe treaty rights. It is also argued that a duty to consult and accommodate First Nations in relation to the cumulative effects of development exists and by failing to consider cumulative effects during the approval process, the governments have not satisfied their duty to consult.¹⁹¹ In a surprising ruling by the Alberta Court of Appeal, cumulative effects of oil sands development were found to be a legitimate issue for trial, and the government’s argument that a claim relating to thousands of authorizations would be too large to be manageable was rejected by the Court. If the claim is successful at trial, it may force the government to revamp the way in which it reviews and approves industrial projects, and thus have widespread implications for oil sands development. The case is currently winding its way through court, as the Beaver Lake Cree gather funds to support litigation.¹⁹²

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Adam Anderson, *Western Canadian Approaches to Aboriginal Consultation: A Comparative Analysis* (Master of Public Policy Thesis, University of Calgary, 2015) 47.

¹⁸⁹ *BCLN v Alberta and Canada* (2013) ABCA 148.

¹⁹⁰ The case was narrowed in scope, as initially, the Beaver Lake Cree sought to revoke government authorization for and limit the cumulative effects of more than 15,000 approved or proposed projects within their territory.

¹⁹¹ Ibid.

¹⁹² Beaver Lake Cree Nation, *BCLN vs Alberta & Canada* <<http://www.beaverlakecreenation.ca/Raven-Trust-JFK/>>.

Concluding Remarks

Aboriginal land rights and energy resource development in Canada are said to be two irreconcilable objectives.¹⁹³ Yet, while the process of reconciliation in Canada will likely be a lengthy one, it has been pointed out by many scholars and legal experts that reconciliation is possible through the recognition and implementation of UNDRIP.¹⁹⁴ Consequently, government strategies that are incompatible with the principles of UNDRIP may be incompatible with reconciliation itself.¹⁹⁵ As such, it is imperative that policymakers seriously explore the implementation of UNDRIP, including concepts like Free, Prior and Informed Consent (FPIC), rather than dismissing it as an aspirational document.

The theme of Aboriginal reconciliation has been at the forefront of the Aboriginal rights narrative for some time now. Nonetheless, Canadian federal and provincial policy has not appropriately addressed a critical aspect of the duty to consult – that of full consent of Aboriginal communities for very serious issues – as mandated by *Delgamuukw*.¹⁹⁶ In considering the development of Aboriginal law within the context of oil sands, it is important to seek greater clarification post-*Haida* on the limits of this notion of balance and compromise that appears to be inherent in the process of reconciliation. This requires at least some consideration of the extent to which Aboriginal peoples may be asked to continue to compromise their rights, before those rights become meaningless and unviable. It also requires assessment of the effectiveness of “meaningful dialogue” during consultation in leading to meaningful solutions with regards to adverse effects on Aboriginal rights.

In concluding, perhaps the words of Chief Justice McLaughlin writing for the majority in *Haida* are most fitting:

This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights have been decided. As this framework is applied, courts, in the age-old tradition of

¹⁹³ Sandrine Tolazzi, ‘Indigenous Land Rights and Energy Resource Development in the Context of Environmental Sustainability: A Case for Reconciliation in Canada and Australia’ (2012) 30 *Australasian Canadian Studies* 1, 5.

¹⁹⁴ Paul Joffe, ‘UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation’ (2010) 26 *National Journal of Constitutional Law* 121, 157; Open letter from legal scholars and experts, ‘UN Declaration on the Rights of Indigenous Peoples: Canada Needs to Implement This New Human Rights Instrument’ on *Nation Talk* (1 May 2008) <<http://nationtalk.ca/story/open-letter-un-declaration-on-the-rights-of-indigenous-peoples-canada-needs-to-implement-this-new-human-rights-instrument>>.

¹⁹⁵ Joffe, above note 194, 157.

¹⁹⁶ Ben Segal-Brown, ‘CFSC Briefing Paper on Leases and the Oil Sands’ (Briefing Paper, Canadian Friends Service Committee (Quakers), 26 August 2010).

the common law, *will be called on to fill in the details of the duty to consult and accommodate* (emphasis added).

At this juncture, while we ponder the question of a common vision for the future, Canadian courts are being called on to strengthen the law of consultation and accommodation in keeping with Canada's commitments to reconciliation, its constitutional values, and its obligations as a member of the international community.