THE EVOLUTION OF THE DUTY TO CONSULT: A FRAMEWORK FOR IMPROVING CONSULTATIONS, NEGOTIATIONS, AND RECONCILIATION

ALEJANDRO GONZALEZ*

INTRODUCTION

In Prime Minister Justin Trudeau's 2015¹ and 2017² mandate letters, the Prime Minister stated, "No relationship is more important to me and to Canada than the one with Indigenous Peoples."³ In 2019, the Federal Court of Appeal (FCA) in *Tsleil-Waututh Nation v Canada (Attorney General)*⁴ and the Supreme Court of Canada (SCC) in *Mikisew Cree First Nation v Canada (Governor General in Council)*⁵ delivered impactful judgments regarding the Crown's duty to consult Indigenous Peoples.

This paper will discuss the duty to consult as it relates to natural resource projects. Against the backdrop of the two rulings above, and the growing emphasis on resource equality and Indigenous rights, this paper will provide recommendations for project proponents and the Crown regarding the duty to consult. In the first section I outline the duty to consult in terms of its jurisprudential history and framework. The second section discusses the *Trans Mountain* and *Mikisew* cases and their implications for the duty. In the third section I highlight how project proponents and the Crown can better frame their processes in harmony with the duty to consult going forward. This will involve looking

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* Alejandro Gonzalez is a third-year student at Western Law in London, Ontario. His interests include Energy and Natural Resources Law, Mining Law, and Corporate/Commercial Law. Prior to beginning his legal studies, he completed a Bachelor of Arts (Honours) degree in Political Science and French at the University of Guelph, and worked at the Ministry of the Environment and Climate Change as Assistant Coordinator in the Freedom of Information Taskforce. Following his first year at Western Law, he summered at Green and Spiegel LLP, specializing in their corporate immigration practice. This past summer, he worked in-house at Lundin Mining Corporation, under the General Counsel and Corporate Secretary, where he was exposed to the wide range of responsibility attributable to an in-house mining lawyer.

¹ Canada, Office of the Prime Minister, "Minister of Indigenous and Northern Affairs Mandate Letter," by Prime Minister Justin Trudeau (Ottawa: 12 November 2015).

² Canada, Office of the Prime Minister, "Minister of Crown-Indigenous Relations and Northern Affairs Mandate Letter," by Prime Minister Justin Trudeau (Ottawa: 4 October 2017); Canada, Office of the Prime Minister, "Minister of Indigenous Services Mandate Letter," by Prime Minister Justin Trudeau (Ottawa: 4 October 2017).

³ *Ibid*; *supra* note 1.

⁴ 2018 FCA 153 [*Trans Mountain*].

⁵ 2018 SCC 40 [*Mikisew*].

to guidance from academics and industry practitioners. The fourth section examines the drawbacks and considerations of the various approaches to consultation. In my conclusion I suggest that the most effective way to organize a project involving consultation is to have parallel, collaborative negotiations and consultations between proponents, Indigenous groups, and the Crown. I propose a consultation structure in which the Crown acts as a watchdog over proponent-led negotiations and consultations, and where a new administrative review body informed with Indigenous beliefs specializes in the review of challenged consultations.

Please note that the terms “Indigenous” and “Aboriginal” will be used interchangeably throughout this article to refer to the First Nations peoples of Canada.

I. THE DUTY TO CONSULT: HISTORY, JURISPRUDENCE, AND FRAMEWORK

The duty to consult was formally established by the SCC in *Haida Nation v British Columbia (Minister of Forests)*.⁶ The court explained that Aboriginal rights guaranteed by section 35(1) of the *Constitution Act, 1982*⁷ create a procedural duty to consult.⁸ In the words of Chief Justice McLachlin, as she then was, “the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.”⁹ If the Crown possesses knowledge of a credible right, the duty is triggered.¹⁰ The duty exists on a sliding scale¹¹ and, depending on the circumstances, it can range from simple notice to the need for action and greater accommodation.¹²

Importantly, the duty is guided by the honour of the Crown. This principle requires the Crown to deal in good faith and to undertake meaningful consultation in a way that addresses the depth required of each specific case.¹³ While there is no duty to agree, good faith is required from both the state and Indigenous group(s), to understand and address issues at all stages of the consultation.¹⁴

The SCC made three other important statements that are relevant to understanding the duty as it stands after *Trans Mountain* and *Mikisew*. It stated that (1) Indigenous

⁶ 2004 SCC 73 [*Haida*].

⁷ *Constitution Act, 1982*, s 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁸ *Haida*, *supra* note 6 at para 32.

⁹ *Ibid.*

¹⁰ *Ibid* at para 37.

¹¹ *Ibid.*

¹² *Ibid* at paras 37, 43–45.

¹³ *Ibid* at para 41.

¹⁴ *Ibid* at para 42.

peoples do not have a veto power,¹⁵ (2) courts will continue to fill in the gaps in the duty,¹⁶ and (3) the Crown may delegate the procedural components of the duty.¹⁷

In the fourteen years since *Haida*, the principles therein have been cited in hundreds of cases and commentaries. In keeping with then Chief Justice McLachlin's pronouncement in *Haida*, the courts have been at work filling in the gaps in an attempt to create a functional process. The SCC's decision in *Beckman v Little Salmon/Carmacks First Nation*¹⁸ clarified the duty to consult in the context of treaties. The court recognized that some treaties establish their own process of consultation, and that in those cases a treaty's provisions will dictate the scope of the duty to consult.¹⁹ The court reinforced this idea in *Tsilhqot'in Nation v British Columbia*,²⁰ where the SCC held that the Crown "must obtain the consent of the Aboriginal title holders" to use the land or, where no prior consent was received, justify the infringement under section 35 of the *Constitution Act, 1982*.²¹

In the case of *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*,²² the SCC summarized the duty. Former Chief Justice McLachlin identified three elements: "(1) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) contemplated Crown conduct; and (3) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right."²³ The former Chief Justice further clarified that a potential of harm (as opposed to direct harm) is a sufficient threshold for triggering the duty.²⁴

The companion appeals of *Clyde River (Hamlet) v Petroleum Geo-Services Inc*²⁵ and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*²⁶ set the stage for *Trans Mountain* and *Mikisew*. In *Clyde River*, the SCC concluded that although the Crown alone is responsible for the suitability of consultation, it may nevertheless rely on a regulatory agency's actions to fulfill the duty.²⁷ In that case, the court determined that the National Energy Board (NEB) had the procedural power to consult and the remedial power to accommodate Indigenous groups as necessary.²⁸ The SCC also stated in *Clyde*

¹⁵ *Ibid* at para 48.

¹⁶ *Ibid* at para 11.

¹⁷ *Ibid* at para 53.

¹⁸ 2010 SCC 53.

¹⁹ *Ibid* at para 67.

²⁰ 2014 SCC 44.

²¹ *Ibid* at para 76.

²² 2010 SCC 43.

²³ *Ibid* at para 31.

²⁴ *Ibid* at para 44.

²⁵ 2017 SCC 40 [*Clyde River*].

²⁶ 2017 SCC 41 [*Chippewas*].

²⁷ *Supra* note 25 at para 30.

²⁸ *Ibid* at para 34.

River that in consultation, the inquiry is into the adverse impact on the *right* rather than into environmental effects in themselves.²⁹ In *Chippewas*, the SCC further clarified that if the regulatory agency in question lacks the necessary statutory powers, or if the consultation or accommodation is inadequate, “the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval.”³⁰

The framework of the duty to consult in these cases rests on the concepts of reconciliation and the honour of the Crown. The consultation process advances the goal of reconciliation by promoting Indigenous sovereignty³¹ through the process of ongoing negotiations with Indigenous groups.³² The duty is also in keeping with the honour of the Crown, which is maintained by striking a “balance [between] societal and Aboriginal interests in making decisions that may affect Aboriginal claims.”³³ Further, the honour of the Crown involves a connection to and respect for Indigenous sovereignty in the sense of upholding a “degree of control over the political decisions that affect their interests, lands, and livelihoods.”³⁴ These two concepts also correlate, as the Crown’s failure to act per its “honour” is also a failure to move toward reconciliation. If the Crown decides on a matter without balancing these interests or in a unilateral way, it undermines the autonomy and independence of unextinguished Indigenous sovereignty.³⁵ The SCC has made it clear that Crown agents must act in accordance with promises made by the Crown,³⁶ and although the conduct may be imperfect, it must not become “a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise.”³⁷ Put simply, the Crown must not agree to one thing only to do another. Recently, the court quashed the Yukon territory’s approval of its Peel Watershed project because the territory moved forward with modifications that departed from positions on which it had received agreement from the affected Indigenous peoples in its “Final Recommended Plan.”³⁸

Given the complexities inherent in consultation as it arises between different proponents, agencies, and Indigenous groups, there remain gaps in the process despite the

²⁹ *Ibid* at para 45.

³⁰ *Supra* note 26 at para 32.

³¹ Richard Stacey, “Honour in Sovereignty: Can Crown Consultation with Indigenous Peoples Erase Canada’s Sovereignty Deficit?” (2018) 68:3 UTLJ 405 at 407, DOI: <10.3138/utlj.2017-0110>.

³² Deborah Curran, “Legalizing the Great Bear Rainforest Agreements: Colonial Adaptations Toward Reconciliation and Conservation” (2017) 62:3 McGill LJ 813 at 820.

³³ *Haida*, *supra* note 6 at para 45.

³⁴ Stacey, *supra* note 31 at 438.

³⁵ *Ibid*.

³⁶ *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 80.

³⁷ *Ibid* at para 82.

³⁸ *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paras 52, 64.

SCC's efforts. Professor Michael Coyle suggests that there is a lack of clarity with the sliding scale principle, making it nearly impossible to craft a consultation template.³⁹ This is a compelling assertion, because the case-specific inquiry required makes each process necessarily unique. There also exists some ambiguity surrounding the creation of the negotiation process itself, with the Crown or proponents generally crafting the process and then implementing it without input from the affected Indigenous groups.⁴⁰ The duty to consult largely serves to address a deficit in Indigenous sovereignty,⁴¹ while mitigating the detrimental effects of the Crown's exercise of its own sovereignty.⁴² A case-specific inquiry typically begins with the parties assessing the strength of the right, whereby either the parties will agree to the tenuous or *prima facie* nature of a rights claim or receive guidance from a tribunal or court.⁴³ The next step is engagement with the goal of understanding and qualifying the Indigenous group's "perspective as to the scope of its rights and the potential impacts of the proposed decision."⁴⁴ From there, the process is qualified in that it must be meaningful,⁴⁵ and depending on the strength of the claim, it may require accommodation.⁴⁶ It is at this stage that *Trans Mountain* adds to the duty's growing jurisprudence on the duty to consult.

II. *TRANS MOUNTAIN* AND *MIKISEW*: FILLING IN THE GAPS

In the context of a high-profile energy project, the *Trans Mountain* case provides an example of inadequate consultation and guidance on how to improve such. *Trans Mountain* involved six Indigenous groups: the Tsleil-Waututh, Squamish Nation, Coldwater Indian Band, Stó:lō Collective,⁴⁷ Upper Nicola Band, and Secwepemc Nation. It also involved the cities of Vancouver and Burnaby, and two non-governmental organizations (the Rainforest Conservation Foundation and Living Oceans Society). From the outset, the Indigenous groups expressed discontent with the funding they received to participate in the process.⁴⁸ Likewise, the initial phases involved only correspondence and informational meetings with no substantive discussion about

³⁹ Michael Coyle, "From Consultation to Consent: Squaring the Circle" (2016) 67 UNBLJ 235 at 237–38.

⁴⁰ *Ibid* at 238, 254.

⁴¹ Stacey, *supra* note 31 at 407.

⁴² James S Anaya & Sergio Puig, "Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples" (2017) 67:4 UTLJ 435 at 437, DOI: <10.3138/utlj.67.1>.

⁴³ *Haida*, *supra* note 6 at para 37. The SCC also pointed out that ambiguities in the evidence of a claim or in defining a claim do not negate the duty to consult but, rather, add content to the duty.

⁴⁴ Coyle, *supra* note 39 at 245.

⁴⁵ *Haida*, *supra* note 6 at para 42.

⁴⁶ *Ibid* at paras 37, 44.

⁴⁷ *Supra* note 4 at para 36.

⁴⁸ *Ibid* at para 100.

Indigenous rights and concerns.⁴⁹ All Indigenous groups expressed concerns because they had not been involved in the configuration of the consultation process itself, and thus were left out of its design and disappointed by its execution.⁵⁰ They further expressed doubts as to the suitability of the NEB regulatory review and environmental assessment.⁵¹ The Crown's response was to either offer, as the court puts it, "generic and vague" assurances that concerns could be addressed in the future, or else to note the concerns and pass them off to decision-makers.⁵²

Justice Dawson found that the issue of funding was not to be enough of an issue to derail the consultation process.⁵³ The court also found that the selection of the process for consultation (i.e., the four-phase process) was not a breach of its duty to consult.⁵⁴ Interestingly, there was no mention or discussion of whether it would be more appropriate for Indigenous groups to be included at the outset of the consultation process design. The *National Energy Board Act* (now repealed),⁵⁵ set out that the NEB was to submit its report to a minister who brought it before the Governor in Council (GIC). The GIC would then return the report to the NEB for reconsideration with further terms, conditions, and recommendations.⁵⁶ It also gave the NEB the authority to determine the procedural structure of the hearings before it.⁵⁷ For these reasons, the FCA found that the selection of the process did not breach the Crown's duty to consult, even though there was no design input from the Indigenous groups. As such, the court in *Trans Mountain* determined that the Crown's decision to rely on the NEB process for consultation, and the process itself, was adequate.⁵⁸ The only qualification to be made when relying on the NEB's process is that the Crown must adhere to section 53 of the *NEB Act*, in that it can disagree with NEB findings and send them back for re-evaluation. This qualification is crucial to the ruling in this case, as the Crown did not exercise discretion, and instead relied wholly on the NEB to the detriment of the consultation.

In *Trans Mountain*, Justice Dawson ruled that the consultation did not go beyond note-taking, and thus that Canada did not "engage, dialogue and grapple with the concerns

⁴⁹ *Ibid* at paras 110–11.

⁵⁰ *Ibid* at paras 111–12, 115, 511.

⁵¹ *Ibid* at para 602.

⁵² *Ibid* at paras 653, 756.

⁵³ *Ibid* at para 541.

⁵⁴ *Ibid* at para 519.

⁵⁵ RSC 1985, c N-7. The NEB is now the Canada Energy Regulator, such that although the *NEB Act* has been repealed, more comprehensive legislation has been enacted in its stead. See *Canadian Energy Regulator Act*, SC 2019, c 28, s 10.

⁵⁶ *Ibid*, ss 52–53.

⁵⁷ *Ibid*, s 8.

⁵⁸ *Supra* note 4 at paras 526, 531.

expressed to it.”⁵⁹ He explained that the duty is a two-way dialogue with a goal of mutual understanding, and it cannot be satisfied by a process where information is simply exchanged.⁶⁰ Further, in cases like this where multiple Indigenous groups claim right or title, the FCA stated that each individual group is entitled to a consultation based on its unique situation.⁶¹ Although the funding and process were not flawed, the Crown’s execution thereof was found to fall short of the standard required.⁶² As the court states, “Canada’s representatives limited their mandate to listening to and recording the concerns of the Indigenous applicants and then transmitting those concerns to the decision-makers.”⁶³

Trans Mountain is important because it helps to fill in the gaps as to what “meaningful” consultation requires. The court identified three barriers to meaningful consultation: the Crown’s teams being limited to note-taking, their unwillingness to depart from NEB findings, and their mistaken view that they could not impose additional requirements on *Trans Mountain*.⁶⁴

First, the court outlined the meaningful dialogue that should have followed the note-taking. For meaningful consultation to have taken place, Crown agents needed to be responsive and seriously consider the concerns raised by the Indigenous groups,⁶⁵ weigh the suggested accommodation measures, and then outline how those concerns shaped the decision to approve the project.⁶⁶

The lack of meaningful, two-way dialogue ties into the second barrier, which is the unwillingness to depart from the NEB’s findings. The lack of responsiveness and consideration, evidenced in the correspondence between the parties, was motivated by “a closed-mindedness when concerns were expressed about the Board’s report,”⁶⁷ and the Crown’s reluctance to depart therefrom. As mentioned above, the Crown’s unwillingness to exercise its discretion under section 53 of the *NEB Act* led to a self-imposed restriction on its consultation that hampered its ability to meaningfully consult.⁶⁸ The court found that the NEB’s report did not cover all aspects of the consultation(s), including the nature and scope of the Indigenous rights being claimed and of the Crown’s duty to consult.⁶⁹ Further, the NEB made recommendations to be considered, and reviewed for errors,

⁵⁹ *Ibid* at para 599.

⁶⁰ *Ibid* at para 500, citing *Clyde River*, *supra* note 25 at para 49.

⁶¹ *Ibid* at para 506.

⁶² *Ibid* at para 557.

⁶³ *Ibid* at para 558.

⁶⁴ *Ibid* at para 562.

⁶⁵ *Ibid* at para 559.

⁶⁶ *Ibid* at paras 563–64.

⁶⁷ *Ibid* at para 603.

⁶⁸ *Ibid* at para 615.

⁶⁹ *Ibid* at para 567.

which should have led to dialogue about those findings.⁷⁰ The NEB's lack of complete assessment was reflected by Trans Mountain's own efforts, as it failed to "assess how the residual effects of the Project, or the Project itself, could adversely impact traditional governance systems and claims to Aboriginal title."⁷¹ Although the Crown is not to be held to a standard of perfection in its duty to consult,⁷² these issues were within the purview of that duty, and it could have avoided them through the exercise of its discretion over the NEB and Trans Mountain's reports. The court ruled that consultation in Phase III needed to be redone; in Phase III, note-taking should have evolved into meaningful dialogue.

In *Trans Mountain*, the court repeatedly cited its decision in *Gitxaala Nation v Canada*.⁷³ It was in *Gitxaala* that the court stressed the GIC's power to impose conditions on NEB certificates;⁷⁴ the requirement to "engage, dialogue and grapple"⁷⁵ with Indigenous concerns; that the standard for Canada is reasonableness, not perfection;⁷⁶ and the problems inherent in a consultation restricted to note-taking.⁷⁷ *Gitxaala* is important to consider because it reviews the legislative scheme (the *NEB Act*) that, to the court's satisfaction, provided the GIC with the power to impose conditions on NEB certificates, which embodied the Crown's responsibility to ensure the suitability of consultation.⁷⁸ This case shaped the ruling in *Trans Mountain*, and the court ultimately found flaws in both consultations.

The most recent SCC ruling on the duty to consult is *Mikisew*. This case did not involve a challenge to the consultation process. Rather, the issue was whether there is a duty to consult if the legislative process involves decisions that could adversely impact Indigenous peoples. The court ruled 7–2 against the imposition of the duty on the legislative process, but the ruling consists of four separate decisions. Justice Karakatsanis, with Chief Justice Wagner and Justice Gascon concurring, wrote that to extend the duty to consult to the legislative process would be a misuse of the power of judicial review, upsetting the balance between the three branches of government.⁷⁹ She further stated that the case law is clear that the duty to consult has only been applied to conduct taken by or on behalf of the executive.⁸⁰ However, this reasoning becomes murky when on the one

⁷⁰ *Ibid* at para 628.

⁷¹ *Ibid* at para 567.

⁷² *Ibid* at para 762.

⁷³ 2016 FCA 187 [*Gitxaala*].

⁷⁴ *Ibid* at paras 163–68.

⁷⁵ *Ibid* at para 279.

⁷⁶ *Ibid* at paras 182, 185.

⁷⁷ *Ibid* at paras 264–65.

⁷⁸ *Ibid* at paras 164, 166, 168.

⁷⁹ *Mikisew*, *supra* note 5 at para 2.

⁸⁰ *Ibid* at para 27.

hand Justice Karakatsanis states that the law-making process does not trigger the duty,⁸¹ and on the other hand says that to allow “the Crown to do by one means that which it cannot do by another would undermine the endeavour of reconciliation.”⁸² Although the decision clarifies that subordinate legislation (i.e., regulations and rules) is executive conduct covered by the duty,⁸³ it is unclear, following Justice Karakatsanis’s reasoning, as to whether the honour of the Crown might suggest that a duty to consult could in fact be imposed on the law-making process.⁸⁴

Justices Abella and Martin provide a more nuanced analysis. Justice Abella writes that the duty to consult is triggered by the *effect* of government conduct, rather than its *source*.⁸⁵ This analysis gives the honour of the Crown a more central focus regarding government action, whereby its constitutional authority cannot be set aside simply through a claim of parliamentary sovereignty.⁸⁶ Justice Abella asserts that the honour of the Crown embodies everything that can be considered as the government’s relations with Indigenous peoples,⁸⁷ such that the duty is an “overarching obligation to deal honourably with Indigenous peoples when regulating their rights.”⁸⁸ Following this approach, the law-making process seems to be directly applicable. For Justice Abella, the constitutional primacy of the honour of the Crown and the duty, as protectors of section 35 rights, are only meaningful so long as the legislature cannot sidestep them when carrying out its mandate.⁸⁹ The duty exists as a limit on Crown sovereignty,⁹⁰ to try to impede the infringement of Indigenous rights. Justice Abella eloquently points out that the provision of notice to affected parties and the right to make submissions is as much a part of the duty to consult as it is a standard of the law-making process.⁹¹ Finally, Justice Abella concludes that if the Crown fails to consult during the law-making process when it has knowledge of potential adverse effects on Indigenous groups, those groups will be entitled to declaratory relief.⁹²

Justice Brown writes his own opinion, with which Justice Rowe, writing for Justices Moldaver and Côté, is in agreeance.⁹³ Justice Brown firmly believes that the

⁸¹ *Ibid* at para 32.

⁸² *Ibid* at para 44.

⁸³ *Ibid* at para 51.

⁸⁴ *Ibid* at para 52.

⁸⁵ *Ibid* at para 55.

⁸⁶ *Ibid*.

⁸⁷ *Ibid* at para 63.

⁸⁸ *Ibid* at para 67.

⁸⁹ *Ibid* at para 85.

⁹⁰ *Ibid* at para 88.

⁹¹ *Ibid* at para 92.

⁹² *Ibid* at para 98.

⁹³ *Ibid* at para 148.

whole legislative process, from policy to royal assent, is legislative power that is “immune from judicial interference.”⁹⁴ He further clarifies that even Cabinet ministers, although part of the executive, are acting in a legislative capacity when engaged in law-making.⁹⁵ For Justice Brown, policymaking is legislative, while implementation and administration thereof is executive.⁹⁶ The term “Crown” encompasses the Monarchy and the executive branch.⁹⁷ Moreover, Parliament enacts legislation, not the Crown, and as such the honour of the Crown does not constrain Parliament.⁹⁸ Justice Rowe closely examines the costs and difficulties associated with ruling that there is a duty to consult for the law-making process. Specifically, he points out that imposing the duty in the law-making process would be “highly disruptive” and would call for an interventionist role by the judiciary.⁹⁹ For Justice Rowe, the law as it stands currently provides a venue for the “protection and vindication of Aboriginal rights *and* for upholding the constitutional principles of parliamentary sovereignty and the separation of powers,”¹⁰⁰ all in accordance with the honour of the Crown.

Trans Mountain and *Mikisew* clarify the requirements of a meaningful consultation, while limiting the duty to consult as a general principle. The *Trans Mountain* decision is more readily applicable in the context of natural resource projects because it clarifies essential aspects of that process. Whereas *Mikisew* is undoubtedly an important precedent, it is for future cases to determine how exactly to apply the reasons therein enumerated. Although seven justices agreed that the duty did not extend to the legislative process, the SCC may revisit Justice Karakatsanis’s reference to the overarching honour of the Crown in a future case to clarify this important principle. The following sections of this paper endeavour to propose an end-to-end mechanism of effective consultation and negotiation in order to avoid the need for significant court cases and to further the goal of reconciliation.

III. LESSONS FOR PROPONENTS AND GOVERNMENTS

Dwight Newman views the duty to consult as consisting of four narratives: the honour of the Crown, negotiation, reconciliation, and a procedural broadening of Aboriginal law.¹⁰¹ In essence, these are the four building blocks of the duty, and they

⁹⁴ *Ibid* at para 117.

⁹⁵ *Ibid* at para 113.

⁹⁶ *Ibid* at para 117.

⁹⁷ *Ibid* at para 128.

⁹⁸ *Ibid* at para 135.

⁹⁹ *Ibid* at para 149.

¹⁰⁰ *Ibid* at para 153 [emphasis in original].

¹⁰¹ Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) at 28–33.

provide a means of analyzing the duty through different angles. First, it is important to situate the Crown's duty to consult as a limit on Crown sovereignty¹⁰² and Crown action,¹⁰³ which also acts to promote the reconciliatory goal of increasing the breadth of Indigenous sovereignty.¹⁰⁴ This is helpful because if the Crown unilaterally imposes what it perceives to be "good" for Indigenous peoples, it denies them agency and therefore impedes reconciliation.¹⁰⁵ Next, the pursuit of reconciliation, and therefore of increased Indigenous sovereignty, fosters policy, executive action, and case law that foment the expansion of Aboriginal law. While these three narratives seem to feed into each other, negotiations between industry, government, and Indigenous people can result in a breakdown of all three.

Governments generally encourage proponent-led consultation, which does not satisfy the Crown's duty legally, but may do so practically.¹⁰⁶ This is due to industry's innate understanding of their projects and their ability to develop and implement accommodations in line with projects.¹⁰⁷ Further, proponents have more resources at their disposal, in the form of employment, business, or financial opportunities, that can allow them to more effectively negotiate instead of the Crown.¹⁰⁸ Proponents have an interest in achieving effective consultation for two main reasons, namely that the duty can impede their ability to "harvest" resources, and that its effective execution can safeguard against future conflicts.¹⁰⁹ The transaction costs for proponents may increase, but "prospective costs and liabilities directly faced by resource firms for consultation with Aboriginal rights claimants"¹¹⁰ are reduced to reflect the Crown's overarching responsibility.

Keith Bergner suggests an approach for undertaking effective, proponent-led consultation.¹¹¹ He envisions a "two-track" approach that consists of a "robust, thorough, well-planned, diligently executed and well-documented" consultation, and a negotiation with an "interest-based approach ... [with the goal of achieving] a mutually-acceptable

¹⁰² Mikisew, *supra* note 5 at para 88.

¹⁰³ Coyle, *supra* note 39 at 247.

¹⁰⁴ Stacey, *supra* note 31 at 407.

¹⁰⁵ *Ibid* at 429.

¹⁰⁶ Kirk N Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) at 10.

¹⁰⁷ *Ibid* at 12.

¹⁰⁸ Keith Bergner, "Navigating a Changing Landscape: Challenges and Practical Approaches for Project Proponents and Indigenous Communities in the Context of the Review and Assessment of Major Projects" in Dwight G Newman, ed, *Business Implications of Aboriginal Law* (Toronto: LexisNexis, 2018) 193 at 207.

¹⁰⁹ Cherie Metcalf, "Market Reactions to Aboriginal Rights: A Look at Canada's Resource Industries" in Newman, *supra* note 108, 107 at 116.

¹¹⁰ *Ibid* at 115.

¹¹¹ *Supra* note 108 at 193.

impact-benefit agreement.”¹¹² If followed, this approach would synergize with Crown consultation by preceding it and allowing it to be informed by design changes, established proponent-Indigenous group relations, and regulatory review.¹¹³ Following Bergner’s approach, a project proponent can coordinate with affected Indigenous groups in advance of making their project application, allowing them to cost-effectively implement changes in the early design stages.¹¹⁴ This can also lead to a project being oriented or shifted toward maximizing economic potential for Indigenous groups,¹¹⁵ and opening the door to long-term opportunities for Indigenous involvement in the project.¹¹⁶ Proponents have the opportunity to build a better understanding and relationship with Indigenous groups, which makes for improved negotiations.¹¹⁷

Bergner envisions a consultation where the proponent delivers project information to the Indigenous group and creates a space for raising concerns or asking questions.¹¹⁸ Next, the proponent fully and fairly considers the concerns and appropriately responds with a view to mitigation or accommodation.¹¹⁹ Such consultation would be well-documented, helping both parties in the interim and informing the Crown, while helping the proponent secure application approval.¹²⁰ Moreover, it would also occur in parallel to negotiations, building relations through consultation in order to better negotiate mutually acceptable agreements.¹²¹ To answer critics who say one should solely negotiate because proponent-led consultations will be inherently self-interested, Bergner suggests that consultation is a two-way, reciprocal exchange that informs Indigenous groups and allows them to show good faith.¹²² Further, concerns raised at the outset are easier to address given the flexibility of early design changes, as opposed to changes suggested after the conclusion of negotiations when such changes are more costly.¹²³ The process of give-and-take consultation builds relations between proponents and Indigenous communities in the pre-application approval stages of a project.¹²⁴ When these consultations are executed jointly with negotiations, proponents can secure Indigenous support that “can provide significant commercial advantages by facilitating the permitting

¹¹² *Ibid* at 199–200.

¹¹³ Lambrecht, *supra* note 106 at 120.

¹¹⁴ *Ibid* at 11.

¹¹⁵ *Ibid*.

¹¹⁶ Bergner, *supra* note 108 at 208. Bergner notes that, currently, employment opportunities are mostly short-term and unlikely to meet the needs of both parties.

¹¹⁷ *Ibid* at 200.

¹¹⁸ *Ibid* at 202.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* at 204–5.

¹²¹ *Ibid* at 200.

¹²² *Ibid* at 205–6.

¹²³ *Ibid* at 205.

¹²⁴ *Ibid*.

process and materially de-risking the project [in a way that creates] legal certainty, which the law on its own does not provide.”¹²⁵

The obvious *caveat* is that these negotiations must produce comprehensive and effectively worded contractual agreements in order to regulate future behaviour as the project moves forward. Although negotiations remove risk for project proponents, once major approvals are obtained, there need to be incentives (such as contractual terms and/or remedies) to hold proponents to their promises.¹²⁶ By combining consultation with negotiation, proponents and Indigenous groups are able to genuinely engage and move toward reconciliation “in the shorter-term[,] while opening the door for negotiations of longer-term solutions to unsolved legal problems.”¹²⁷ Of equal importance is the fact that “Aboriginal groups often assert the right to be consulted by the Crown in a process separate from Aboriginal consultation by a proponent.”¹²⁸ To address this, the Crown needs to be involved from the beginning.

I propose that the Crown act as a watchdog in proponent-led consultations and negotiations, which allows it to tailor its duty to consult to fit with those negotiations, while overseeing the process and intervening if necessary. This three-way approach would, as highlighted above, provide proponents with an opportunity to build relations with Indigenous groups and to effect changes early on. It would also allow Indigenous groups to obtain information from industry and/or project experts, while making their concerns known at the outset. Additionally, it would ensure that Indigenous groups are heard by both project proponents and government agents through dual consultation. The Crown’s duty is more easily satisfied by observing the initial process of proponent-led consultation and allowing its successes and failures to inform and situate its own consultation duty. Finally, through its presence and its active awareness of proponent-led initiatives, the Crown can act as a safeguard against sharp dealings or as a quasi-mediator, in keeping with its ultimate responsibility to ensure the duty to consult is fulfilled.¹²⁹ This approach ultimately results in the most effective and comprehensive mechanism through which to negotiate and consult on natural resource projects. If escalation to a tribunal or judicial review body were required, there would be an extensive record of bi-lateral and tri-lateral talks that could speak to good faith and the honour of the Crown. In essence, I propose this process as a means of combatting the complexities inherent in consultation which the Crown alone cannot fix. As Bergner puts it, “[c]onsultation and negotiations

¹²⁵ *Ibid* at 206.

¹²⁶ *Ibid*.

¹²⁷ Newman, *supra* note 101 at 114.

¹²⁸ Lambrecht, *supra* note 106 at 10.

¹²⁹ *Clyde River*, *supra* note 25 at para 30.

between proponents and Indigenous groups essentially involve a bi-lateral effort to solve a tri-lateral problem.”¹³⁰

To strengthen my proposed mechanism, I would also follow Matthew Hodgson’s recommendation of a specialized tribunal dealing exclusively with consultation.¹³¹ This would function as the “further avenues” for meaningful consultation to be provided by the Crown, as per the ruling in *Chippewas*.¹³² On judicial review, Hodgson points out that courts often rely on administrative decision-maker’s specialized knowledge, since those decisions generally require applying the reasonableness standard.¹³³ In this context, the prevailing federal policy is to infuse Indigenous consultation with regulatory review, and vice versa.¹³⁴ Hodgson suggests that this process could be improved by including evaluative criteria approved by Indigenous people, which empowers them with greater discretion.¹³⁵ For this to work, the regulatory review process should be tweaked such that tribunal decisions “give adequate weight—and provide sufficient evidence to that effect in their reasons—to the constitutional nature of the duty and the rights it serves to protect.”¹³⁶ In this vein, a tribunal that includes Indigenous people as adjudicators and focuses solely on assessing the adequacy of consultation can better address “failed” consultations that end up in tribunal and judicial review processes.¹³⁷ Recent legislative changes in British Columbia show some movement toward greater Indigenous discretion in the regulatory review process. Minister of Environment and Climate Change Strategy George Heyman is spearheading changes to environmental assessment legislation that would include First Nations in the environmental review process from the outset.¹³⁸

The recent pronouncements in *Trans Mountain* and *Mikisew* affect any proposed changes to consultation processes. *Trans Mountain* is especially critical of the Crown for not imposing higher standards on regulators and not exercising its own discretion to ensure completeness of consultation. One must also note the difference between energy projects, typically involving the NEB, and other forms of natural resource projects. Wherever a regulatory body is involved, *Trans Mountain* stresses the importance of executive discretion and the meaningfulness of consultation. Such consultations can

¹³⁰ *Supra* note 108 at 216.

¹³¹ Matthew J Hodgson, “Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board” (2016) 54:1 Osgoode Hall LJ 125 at 172–73.

¹³² *Supra* note 26 at para 32.

¹³³ *Supra* note 131 at 136, 141.

¹³⁴ *Ibid* at 145.

¹³⁵ *Ibid* at 147.

¹³⁶ *Ibid* at 171–72.

¹³⁷ *Ibid* at 172.

¹³⁸ “New act will boost Indigenous participation in B.C. environmental assessments” (6 November 2018), online: *CBC News* <cbc.ca/news/canada/british-columbia/new-act-indigenous-participation-environmental-assessments-1.4893432>.

adhere to my proposed model by integrating regulatory involvement into the process either instead of the Crown or in concert with it. As such, the regulatory agency would glean all of the benefits of the proponent-led consultations and negotiations, while being subject to closer Crown scrutiny. In contrast, in the absence of regulatory involvement, other types of resource projects can more easily adhere to my suggested mechanism of consultation. Similarly, legislation will play a role in the development of an improved consultation mechanism such as I have proposed. This may run up against *Mikisew*, whereby Indigenous groups may not be consulted before such a process is designed and subjected to the law-making process. Further, as it stands, “current federal and provincial consultation policies rarely require the participation of Aboriginal groups in the design of the processes through which their concerns will be discussed.”¹³⁹ The following section canvasses the drawbacks and concerns of consultation in general, in order to more concretely identify areas of improvement.

IV. DRAWBACKS AND CONSIDERATIONS

It is important to consider the capacity to engage in negotiations with the Crown from the perspective of Indigenous communities. Their responsibilities can be difficult to manage, particularly as Indigenous leadership may be expected to liaise with the Crown, while simultaneously liaising with regulators and proponents.¹⁴⁰ Moreover, “some First Nations receive hundreds or even thousands of consultation requests each year ... merely making funding available is not necessarily a solution.”¹⁴¹ My proposal helps to improve the capacity to engage by ensuring exchange of information between proponents and Indigenous groups, and providing a concrete process for voicing concerns. There is the additional worry that proponents themselves will be too narrow in their consultation scope. For some projects, proponents may consider their consultation duties applicable only to Indigenous communities within a set distance of the project site(s).¹⁴² It is also important to consider consent, as there is a growing debate around whether consultation should be built around Indigenous consent.

Compelling jurisprudence tells us that Indigenous people do not have a veto power when it comes to consultation.¹⁴³ As Coyle points out, “concern about current consultation practices is one of the factors that has led a growing number of Canadian companies to declare that they will seek the consent of Indigenous peoples.”¹⁴⁴ The

¹³⁹ Coyle, *supra* note 39 at 254.

¹⁴⁰ Newman, *supra* note 101 at 70–71.

¹⁴¹ *Ibid* at 71.

¹⁴² *Ibid* at 136.

¹⁴³ *Haida*, *supra* note 6 at para 48.

¹⁴⁴ Coyle, *supra* note 39 at 248.

*United Nations Declaration on the Rights of Indigenous Peoples*¹⁴⁵ (UNDRIP) contains a number of articles that speak to the strengthening and recognition of the rights of Indigenous peoples to their land and resources. Of particular importance is the concept of “free, prior and informed consent” (FPIC) found in article 19.¹⁴⁶ This concept has drawn significant attention in the literature, and from the courts. Canada has declared itself a “full supporter, without qualification” of UNDRIP, and has committed to its adoption and implementation.¹⁴⁷ Unfortunately, UNDRIP is non-binding as far as international law goes, and its value is persuasive at best for courts during consultation disputes.¹⁴⁸ The reality is that not having a veto power means that projects can be approved in the absence of Indigenous support. This means that the Crown, regulatory bodies, and proponents can move ahead with a project even if Indigenous communities are opposed to it. While British Columbia has shown it is willing to embrace the UNDRIP principles in legislation,¹⁴⁹ this only binds the provincial government, which stresses the need for firmer federal footing on UNDRIP. This issue is precisely what efforts in the amelioration of the consultation process are trying to prevent, for all parties involved. My proposal is first and foremost about the *structure* of negotiation and consultation, with the safeguard of a specialized tribunal, rather than a means of assigning specific powers to the parties. Although there is debate about a potential veto power, this is more of a last resort. By infusing Indigenous beliefs into a tribunal and addressing the capacity to engage and the adequacy of the exchange of information, the playing field should be made more level. Additionally, I recognize that my proposed structure, like any other, is subject to the context and parties around which it is implemented.

It is equally important to always remember that the main goal is reconciliation. This creates a discrepancy, as disagreement about rights claims or project impacts can lead to the failure of the consultation process in a way that truly hampers reconciliation.¹⁵⁰ Similarly, there are cases where an Indigenous group’s failure to comply in good faith

¹⁴⁵ GA Res 61/295, UNGAOR (2007), online: <un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

¹⁴⁶ *Ibid*, art 19.

¹⁴⁷ Indigenous and Northern Affairs Canada, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples” (10 May 2016), online: <canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

¹⁴⁸ Coyle, *supra* note 39 at 238–39; See also *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981, Strickland J (“UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty” at para 104).

¹⁴⁹ Karin Larsen, “‘We are moving forward together’: Premier urges feds to follow B.C.’s lead in enshrining UNDRIP” (3 December 2019), online: *CBC News* <cbc.ca/news/canada/british-columbia/assembly-of-first-nations-recognizes-b-c-s-historic-undrip-legislation-1.5382649>.

¹⁵⁰ Coyle, *supra* note 39 at 238.

results in a project moving ahead and irreparably affecting that group's rights.¹⁵¹ There needs to be a strong desire to at the minimum engage in discussions on all sides, including but not limited to business, government and indigenous communities. While one can theorize in the abstract and propose more effective mechanisms, it is the will of the parties that will often dictate final outcomes.

CONCLUSION

In this brief paper, I have attempted to build on the duty to consult literature by proposing a new mechanism for tri-lateral (and quadrilateral) consultations and negotiations. This is a complex area of the law precisely because it involves a mix of common law rulings, Crown and regulatory policies, and legislative provisions. In essence, I have suggested going beyond the law to attempt to improve natural resource project consultations. While legislation or policy may be involved in the reformulation of my proposed mechanism, the end-result is hopefully a means through which all parties can come together to try to reach agreement on terms that will permit such projects while recognizing and strengthening Indigenous sovereignty. Recent legislative movements in British Columbia lead the way, as does the new Canada Energy Regulator and its more comprehensive legislation.¹⁵² If Prime Minister Trudeau intends to implement his mandate, then a move toward FPIC and greater emphasis on improving Indigenous people's capacity to engage would be a strong step toward true reconciliation.

¹⁵¹ See *Bigstone Cree Nation v Nova Gas Transmission Ltd*, 2018 FCA 89.

¹⁵² See e.g. *Canadian Energy Regulator Act*, *supra* note 55, ss 56–59.