STATUS QUO SORROWS: THE FAILURES OF ENERGY PROJECT CONSULTATIONS AND RECONCILIATORY PATHS FORWARD

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INTRODUCTION

Losers abound in the world of Canadian energy projects. Indeed, Indigenous peoples,¹ industry proponents, and governments alike have expressed frustration at the difficulties posed by the process of certifying and developing energy projects on Canadian and Indigenous lands. A leading cause of these frustrations is the uncertainty and unfairness of the constitutionally-mandated Indigenous consultation process. This process was initially intended to facilitate reconciliation between Indigenous peoples and Canada, but has resulted instead in protracted adversarial litigation, widespread disillusionment, and an increasingly wary energy industry. In short, the process aimed at informing and ameliorating the relationship between Indigenous peoples and the Crown, facilitating the development of Canada's resource economy, and ultimately benefiting all involved parties, seems to be benefitting no one.

Nevertheless, I argue that the Supreme Court of Canada's *vision* of the duty to consult and accommodate remains sound and, notwithstanding the pressing issues plaguing Canada's energy consultations, should not be categorically abandoned. Specifically, taking inspiration from the works of Dwight Newman and Jennifer Nedelsky, I characterize the Court's interpretation of section 35 of the *Constitution Act, 1982* ("Section 35") as grounded in a relational, process-driven vision for reconciliation. In so doing, the Section 35 jurisprudence aptly recognizes the inherent *unfixability* of 'reconciliation' in the face of vigorous debate on how it ought to be defined and implemented. Forgoing an inevitably flawed judicial imposition of substantive reconciliatory outcomes, the Court's consultation jurisprudence thus wisely seeks to

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¹ Echoing the Indigenous scholarship that I have encountered in my research, I adopt the term 'Indigenous' when referring to Indigenous peoples. When referring to specific constitutional doctrines related to Indigenous peoples, however, I use the term 'Aboriginal', as that is preferred by the courts.

transform Section 35 into a *trigger for dialogue* on the meaning of, arguably, Canada's most consequential social, economic, legal, and political project.

I find that the frustrations felt across Canada's energy consultation regime may be attributed to failures in effectively triggering dialogue on the meaning of Aboriginal rights and reconciliation among the various stakeholders involved in energy consultations. I trace these shortcomings to an obscure, deferential regulatory framework that has compelled parties to undertake litigation while provoking substantive grievance. Remarkably, the Section 35 jurisprudence recognizes that these grievances can only be addressed by out-of-court, good faith consultations engaged with the meaning of reconciliation itself. I conclude by exploring two proposed innovations to the consultation framework that have enjoyed growing scholarly attention, namely, Impact and Benefit Agreements ("IBAs") and a proposed Indigenous veto. I consider whether the adoption of these innovations may reanimate the vision of consultative reconciliation expressed by the Court, and I find that both have the potential to do so if implemented in a manner consistent with that vision.

"Meaningful Two-way Dialogue"² and a Process-driven Reconciliation

I begin by recognizing that the project of reconciliation is, by its very nature, contested. Various Indigenous scholars criticize the discourse of reconciliation by relying on a compelling reading of the constitution as inherently problematic. As Professor John Borrows writes, "[d]iscrimination, coercion, and inequality lie at the roots of Canada's legal system,"³ and as such, "[a]ttending to Canada's constitutional inconsistencies is not a demand for their reconciliation," since "[a]ny compromise with colonialism causes us to be compromised by colonialism."⁴ As such, Borrows finds that reconciling Indigenous peoples' title and other rights with the Crown's sovereignty – one which relies on the problematic legal fiction that "Indigenous peoples had imperfect claims to sovereignty... when Europeans arrived"⁵ – would merely *perpetuate* the colonialism that reconciliation, on its face, seeks to overcome.

Nevertheless, other voices writing on Indigenous rights and governance affirm that reconciliation represents a desirable and necessary objective for Indigenous peoples, echoing Chief Justice Lamer's oft-cited aphorism that "we are all here to stay."⁶ Certainly, many of these scholars align with Borrows in critiquing reconciliation if it were to amount to a "state-sanctioned process that ultimately supports the neocolonial status

² *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153 at para 558 [*Tsleil-Waututh*].

³ John Borrows, "Canada's Colonial Constitution," in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 18.

⁴ *Ibid* at 20.

⁵ *Ibid* at 18.

⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 186 [*Delgamuukw*].

quo”.⁷ However, they nonetheless recognize that “authentic reconciliation between Indigenous and settler peoples is possible,”⁸ and (albeit diversely) advocate for a reconciliation that “affirm[s] their own sovereignty and return[s] to the ‘partnership’ ambitions they held after Confederation.”⁹ In other words, for such scholars, reconciliation is *necessary*, but its *authenticity* (i.e. its *meaning*) must be vigorously contested – especially to avoid implicitly affirming and preventing the subversion of colonial power structures through this reconciliatory discourse.

A meaningful treatment of this debate extends beyond the scope of this paper and would be inappropriate for a non-Indigenous law student like myself to engage in independently. However, I do find that an articulation of the current failures of the consultation framework and possible paths forward within that framework amounts to a useful contribution to the discourse on Indigenous peoples and their relationship to Canada, even if the project of reconciliation is ultimately rejected for a myriad of possible reasons. Moreover, by forcefully challenging the very notion of reconciliation, voices like Borrows’ certainly inform and enrich the discursive milieu that, as will be discussed *infra*, the duty to consult and accommodate is meant to engender.

To that end, I turn to the judicial interpretation of reconciliation, since Section 35 “has been primarily the creature of jurisprudence.”¹⁰ Indeed, Section 35’s plain language provides little guidance as to the appropriate objectives, expressions, and possibilities of reconciliation, instead merely ‘affirming’ the “existing aboriginal and treaty rights of the aboriginal peoples of Canada.”¹¹ It was thus left to the Court to uncover and articulate the reconciliatory purpose of Section 35 – a responsibility it accepted in decisions like *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*,¹² holding that, “[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective

⁷ Melanie Zurba & John Sinclair, “Learning and Reconciliation for the Collaborative Governance of Forestland in Northwestern Ontario, Canada,” in Aimée Craft & Paulette Regan, eds, *Pathways of Reconciliation: Indigenous and Settler Approaches to Implementing the TRC’s Calls to Action* (Winnipeg: University of Manitoba Press, 2020) at 148.

⁸ Paulette Regan, “Reconciliation and Resurgence: Reflections on the TRC Final Report,” in Michael Asch et al, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) at 210.

⁹ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciliation for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 187.

¹⁰ Michael Bryant, “The State of the Crown-Aboriginal Fiduciary Relationship: The Case for an Aboriginal Veto,” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2015) at 225.

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

¹² 2005 SCC 69 [*Mikisew*].

claims, interests and ambitions.”¹³ This framing, with its emphasis on the reconciliation of *peoples* and of their *interests* and *ambitions*, points not only to the reconciliation of particular legal interests but also of the extra-legal relationships between the parties engaged by Section 35 (i.e. all Canadians), and, most importantly, the reconciliation of their *diverse visions* of a shared future.

In light of this judicial language, scholarship on the duty to consult and accommodate generally understands the Court’s framing of Section 35 as a “*vehicle* of ‘reconciliation.’”¹⁴ These scholars compellingly argue that Section 35 entrenches a “constitutional imperative in support of certain goals, from which... Aboriginal rights and... the duty to consult then follow.”¹⁵ Put differently, the Court has identified a broad and ultimately *undefined* objective (i.e. ‘reconciliation’) embedded within Section 35 – one which is facilitated by the interpretation of the aboriginal and treaty rights the section affirms, as well as by the achievement of various ancillary and often more ‘practical’ goals. Notably, among such ‘subordinate’ goals is the amelioration of “the historically dire wealth gaps between Aboriginal and non-Aboriginal communities”¹⁶ – a concern of which the Court took notice in writing that the “inescapable economic component”¹⁷ of Aboriginal title is central to reconciliation. Indeed, it is, in my view, impossible to envision an effective form of reconciliation, despite contestations over its meaning, that does not address the undeniable and systemic economic inequalities that animate Canada’s relationship with Indigenous peoples. Yet, notwithstanding the importance of such objectives, it is clear, given the Court’s language, that the *primary goal* (or “fundamental objective”¹⁸) of Section 35 is to effect *reconciliation itself*.

This framing of Section 35 – aimed towards furthering the *goal* of reconciliation – raises the issue of whether a goal-oriented approach ought to be synonymous with a ‘substantive’ approach to reconciliation. Alive to this issue, the Court has in fact emphasized that its approach to Section 35, notwithstanding its focus on effecting the reconciliation of Indigenous and non-Indigenous peoples, must rest on process and not on outcome. In *Delgamuukw*, for instance, the Court famously held that reconciliation can only be achieved “through *negotiated settlements*, with good faith and give and take on all sides, *reinforced by the judgements of this Court*.”¹⁹ In other words, the Court unambiguously held that reconciliation can only arise through a *process* of dialogue (i.e.

¹³ *Ibid* at para 1.

¹⁴ Dwight Newman, “Consultation and Economic Reconciliation,” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2015) at 208 [emphasis added].

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Delgamuukw*, *supra* note 6 at para 166.

¹⁸ *Mikisew*, *supra* note 12 at para 1.

¹⁹ *Delgamuukw*, *supra* note 6 at para 186 [emphasis added].

negotiation) that is merely *reinforced* by the Court. This view was later echoed in *Haida Nation v British Columbia (Minister of Forests)*, where Chief Justice McLachlin emphasized that “reconciliation is not a final leg remedy” but rather a “process flowing from rights guaranteed by s. 35(1).”²⁰ Finally, the Court similarly held in *Tsleil-Waututh* that “meaningful two-way dialogue”²¹ is a prerequisite of reasonable consultation,²² underscoring that the *process* of reconciliatory conduct remains as the focus of the Court’s attention on review. Throughout these processes, the Court imposes obligations on both the Crown and Indigenous peoples to engage meaningfully, finding that “good faith on both sides is required.”²³ Therefore, across the various applications of Section 35, the Court emphasizes a “full and honourable *process* of reconciliation,”²⁴ rather than directly imposing or otherwise requiring any substantive outcome.²⁵

The goal-oriented yet procedural approach to reconciliation articulated by the Court is sensible in light of the ongoing contestations over the *meaning* of reconciliation. At the risk of oversimplifying a remarkably complex discourse that certainly extends beyond the scope of this paper, I note that two general ‘strands’ or ‘camps’ of theorizing on reconciliation have emerged in academic literature: Indigenous activism and government policy. In the words of Professor Sheryl Lightfoot, the first of these camps is characterized by an often tacit endorsement of the ‘Doctrine of Discovery’ model of Canadian sovereignty. As such, this strand generally seeks to effect a ‘return’ to an arguably illusory conciliatory relationship between Indigenous peoples and the Crown while supporting “the maintenance of liberal and colonial institutions.”²⁶ Lightfoot and others contrast such theorizing with ‘holistic’ visions of reconciliation that, albeit diversely, advocate for “a set of transformational policies”²⁷ that often include strengthening Indigenous self-determination and sovereignty²⁸ and more comprehensive affirmations of Indigenous legal traditions as constitutive elements of Canada’s legal pluralism.²⁹ The Court’s approach to Section 35 is certainly responding to these

²⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32 [*Haida*].

²¹ *Tsleil-Waututh*, *supra* note 2 at para 558.

²² *Ibid* at para 564.

²³ *Haida*, *supra* note 20 at para 42.

²⁴ The Honourable Chief Justice Lance Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice,” Indigenous Legal Orders and the Common Law Paper 2.1 (Vancouver, BC: Continuing Legal Education Society of British Columbia, 2012) at para 43 [emphasis added].

²⁵ *Haida*, *supra* note 20 at para 42.

²⁶ Sheryl Lightfoot, “Conclusion,” in Aimée Craft & Paulette Regan, eds, *Pathways of Reconciliation: Indigenous and Settler Approaches to Implementing the TRC’s Calls to Action* (Winnipeg: University of Manitoba Press, 2020) at 268.

²⁷ *Ibid*.

²⁸ See e.g. Gordon Christie, *Canadian Law and Indigenous Self-determination* (Toronto: University of Toronto Press, 2019).

²⁹ See e.g. Kristen Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (London: Routledge, 2016).

contestations over the meaning of reconciliation. Indeed, the Court's affirmation of a necessary *dialogue* on reconciliation is grounded in the ineluctable conclusion, given these divergent camps, that reconciliation is inherently *unfixable*. In other words, it cannot appropriately be 'determined' by any one stakeholder or institution, let alone an institution as intimately connected to Canadian sovereignty as the judiciary.

Thus, in endorsing a *process* of reconciliation rather than mandating some set of outcomes, the Court essentially engages in what Professor Jennifer Nedelsky terms the 'relational' approach to rights. Nedelsky argues that an approach to rights as mere trumps against government or other parties' actions overlooks the "highly contested nature of the meaning of rights themselves,"³⁰ and thus "obfuscates the real political issues"³¹ that underlie these contestations. According to Nedelsky, this trumping view also *individualizes* rights, which prevents rights from being understood in their larger socio-historical context and thus "help[s] us avoid seeing some of the relationships of which we are in fact a part."³² To that end, Nedelsky argues for a conception of rights as "triggers for a dialogue,"³³ finding that such a view encourages accountability of power-holders and fosters effective inquiries into otherwise hidden social problems that afflict legal communities.³⁴ Ultimately, Nedelsky finds that rights must be understood as *triggers for dialogue* on the structures of social relations and on the shared or conflicting values that animate them.³⁵ Notably, Nedelsky points to the *Canadian Charter of Rights and Freedoms*³⁶ as particularly well suited to implementing such an approach to rights,³⁷ arguing that the *Charter*'s justification of infringements on rights – either judicially through section 1's 'reasonable limits' clause or politically through section 33's 'notwithstanding clause' – "create[s] a *dialogue* about the meaning of rights... in public debate, the legislatures, and the courts."³⁸

The parallels between the *Charter*'s 'triggers for dialogue' model and Section 35's relational, dialogue-driven jurisprudence are clear. First, the Court explicitly endorses such a view of rights through its privileging of 'good faith dialogue' in effecting reconciliation, as described above. More interestingly, the Court also seems to demand such a dialogue by constructing a right to infringe on aboriginal rights where no such right is present on a plain reading of Section 35. In other words, the Court has not only

³⁰ Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2012) at 233.

³¹ *Ibid* at 247.

³² *Ibid* at 251.

³³ *Ibid* at 232.

³⁴ *Ibid* at 271.

³⁵ *Ibid* at 236.

³⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

³⁷ Nedelsky, *supra* note 30 at 247.

³⁸ *Ibid* [emphasis added].

affirmed that the meaning of aboriginal rights and their relationship to reconciliation must be negotiated, but it has explicitly compelled such negotiation. This was done by embedding a negotiated infringement of aboriginal rights, notwithstanding the absence of an infringement mechanism in Section 35 akin to the *Charter*'s sections 1 or 33. To summarize, the Court's Section 35 jurisprudence may be understood as recognizing that the possibilities for reconciliation cannot be 'fixed' or predetermined by any single institution. Instead, the courts seem to endorse a Nedelsky-like *relational* view of reconciliation. This view must be dynamically fashioned through principled, good-faith, and meaningful negotiation and dialogue between all affected parties. This is necessary to ultimately achieve the aim of "relationship building."³⁹

Adversarial Litigation, Disillusionment, and "Procedural Wrangling"⁴⁰ in Energy Consultations

The Court's interpretation of Section 35 seems promising to the extent that it recognizes that it is not the courts' place to determine the character of reconciliation, but rather to facilitate the relational dialogue necessary for it to take shape. However, analyzing the Court's approach to reconciliation as translated *in practice*, particularly in the context of major energy projects, provides considerable evidence that the jurisprudence has often failed to encourage the meaningful negotiation and dialogue that the Court so clearly intended. Indeed, the milieu of contemporary energy consultations presents countless examples of contestations that are unfortunately left to the *courts* to resolve through bitter adversarial litigation animated by problematic determinations of the 'adequacy' of consultations by largely unaccountable administrative bodies. A process intended to transparently encourage good faith and meaningful dialogue outside of the courts has thus paradoxically encouraged unsatisfactory, 'top-down' assessments of consultations by ill-equipped institutions like the National Energy Board ("NEB")/Canada Energy Regulator ("CER"). This ultimately brings the courts, through judicial review, back into the fray of a discourse the Court clearly wanted to avoid shaping.

The history of Canadian energy projects provides numerous examples of consultations devolving into costly and often unsatisfying litigation. As Bryn Gray writes, the world of major energy projects is in fact populated by "hundreds of court cases over the last 10 years,"⁴¹ most often arising because "[Indigenous] concerns were not

³⁹ Kirk N Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) at 83.

⁴⁰ See Bryant, *supra* note 10 at 233.

⁴¹ Canada, Minister of Indigenous and Northern Affairs, *Building Relationships and Advancing Reconciliation through Meaningful Consultation*, by Bryn Gray, Catalogue: R5-126/2016E-PDF (Gatineau: Indigenous and Northern Affairs Canada, 2016) at 68.

adequately addressed at an earlier junction.”⁴² The process of consultation, which has failed to provide satisfactory outcomes, has compelled affected parties to shift their attention towards the courts as a means of remedying their dissatisfaction. Gray and others thus conclude that this adversarial litigation – which the process of reconciliation as framed by the courts precisely intends to avoid – has plainly “harmed the cause of reconciliation” and “undermine[d] efforts to improve federal-Aboriginal relations.”⁴³

The regulatory structure that oversees energy project certification – one endorsed by the courts as an effective vehicle for reconciliation – unfortunately aggravates the litigious tendencies of major energy project consultations and further stifles the relational dialogue that such consultations are meant to engender. Namely, in *Haida*, the Court recognized that the NEB may “administer Aboriginal rights and... evaluate the Crown’s duty to consult.”⁴⁴ This power arises from the Court’s broader affirmation in *Haida* that “it is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages,”⁴⁵ alongside the Court’s general willingness “to treat tribunal proceedings as part of a larger framework for achieving consultation.”⁴⁶ Put differently, administrative tribunals are empowered by both legislatures and the courts to actively *assess* and, depending on the language of their home statutes, even *directly participate* in the broader dialogue on reconciliation contemplated under Section 35.

Despite these affirmations that administrative bodies ‘fit’ into the Court’s vision for a process-driven, goal-oriented reconciliation, the limitations of the NEB/CER *in particular* as a vehicle for such reconciliation are readily apparent. Many of these issues arise, according to Professor Sari Graben and Abbey Sinclair, from Chief Justice McLachlin’s distinction, articulated in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*,⁴⁷ “between the authority to determine whether consultation is adequate and the authority to engage in consultation itself.”⁴⁸ The Court relied on this distinction in *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc*⁴⁹ to characterize the NEB’s home statute as allowing the board to approve a pipeline “without first undertaking a *Haida* analysis”.⁵⁰ That is, the Court held that the NEB/CER is not required to *discharge*

⁴² *Ibid* at 39.

⁴³ *Ibid* at 68.

⁴⁴ Sari Graben & Abbey Sinclair, “Administering Consultation at the National Energy Board: Evaluating Tribunal Authority,” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2015) at 237-38 [emphasis added].

⁴⁵ *Haida*, *supra* note 20 at para 51.

⁴⁶ Graben & Sinclair, *supra* note 44 at 238.

⁴⁷ 2010 SCC 43.

⁴⁸ Graben & Sinclair, *supra* note 44 at 240.

⁴⁹ 2009 FCA 308 [*Standing Buffalo*].

⁵⁰ Graben & Sinclair, *supra* note 44 at 241.

the duty to consult and accommodate as if it were acting on behalf of the Crown. Graben and Sinclair clarify this, stating that “as a result of the NEB’s independent and quasi-judicial nature it was *incapable* of acting as a Crown agent and therefore could not be expected to undertake a *Haida*-style analysis.”⁵¹ As such, the Court’s decisions in *Haida* and *Standing Buffalo*, while affirming that the NEB/CER plays a part in its jurisprudential framework for achieving reconciliation, have also paradoxically “released tribunals from the legal strictures of [that same] jurisprudence”.⁵² Tribunals like the NEB/CER have come to occupy a liminal space in which they are entrusted with assessing the adequacy of consultations – understood in reference to the relational, dialogue-driven Section 35 jurisprudence – and yet remain shielded from being bound by that same jurisprudence.

Evidence that energy tribunals are willing to *exploit* this paradoxical judicial treatment by certifying projects *despite* uncertainties surrounding consultation makes their role in energy consultations all the more troubling. For instance, Graben and Sinclair explain that “of the forty-two applications” before the NEB since 2000, “where the adequacy of consultation was considered ...forty-one applications were approved”, indicating that “the duty to consult ...is not a determinative factor in the NEB’s regulatory approval process.”⁵³ Graben and Sinclair further find “that the NEB overwhelming[ly] relied on three justifications” to certify projects *notwithstanding* unresolved consultation issues, chief among them “that [the tribunal] lacks *jurisdiction* to consider the consultation at issue”.⁵⁴ Thus, in certifying projects where the adequacy of consultation is contested, the NEB/CER seems aware of its position as both a key component of the consultation process and, confoundingly, as free from the constraints of the consultation jurisprudence.

Moreover, in any litigation contesting the *adequacy* of consultation, the NEB/CER’s reasoning is generally not reviewed as it is the actions of the Governor in Council (GIC), acting on the mere recommendations of the NEB/CER, that must satisfy the honour of the Crown. Furthermore, post-*Vavilov*, determinations of the scope or strength of the duty to consult and accommodate constitute constitutional questions for which the rule of law requires a final and determinate answer from the courts (i.e., a correctness standard of review).⁵⁵ However, where the adequacy of the consultations (in light of the required ‘strength’ of the duty) is being reviewed, the novel presumption of reasonableness remains unrebutted.⁵⁶ Such reasonableness review, as informed by *Vavilov*, must be focused on the reasons provided for the decision rather than its outcome.

⁵¹ *Ibid.* [emphasis added].

⁵² *Ibid.* at 238.

⁵³ *Ibid.* at 238 [footnote omitted].

⁵⁴ *Ibid.* at 238-39 [emphasis added].

⁵⁵ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 55 [*Vavilov*].

⁵⁶ *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 27 [*Coldwater*].

Additionally, this review cannot encourage such strong judicial intervention so as to entitle Indigenous peoples to pursue a ‘veto’ through intervention whenever they disagree with the substantive outcome of consultations.⁵⁷

Thus, deficiencies in the process of consultation as administered by certifying bodies like the NEB/CER have driven parties to turn to the courts on weakened standards of review to collaterally remedy unsatisfactory outcomes that the Court’s goal-oriented jurisprudence is ultimately meant to achieve. As such, a good faith dialogue envisioned by the courts plainly transforms into a reactionary, adversarial reality. This is only further undermined by an unaccountable, opaque regulatory regime that, when reviewed, is judged on the merits of its own decision-making rather than the robustness of the discourse *among the parties themselves* that it is meant to encourage.

In light of these issues, the various parties involved in major energy project consultations have understandably expressed dissatisfaction with the prevailing regime. Drawing on his experiences as former Ontario Minister of Aboriginal Affairs, Bryant writes that for many Indigenous peoples the consultation process remains “too onerous [and] too nebulous,” making them feel “consumed” and “overwhelm[ed].”⁵⁸ Prominently, the costs of the process, especially if it devolves into litigation, are disproportionately felt by Indigenous peoples. As Young explains, the fact that “any disputes arising over [consultation] processes require... Indigenous nations to re-subject themselves to the Court”⁵⁹, this remains an unreasonable prospect for Indigenous litigants because of the “historically dire wealth gaps”⁶⁰ between Indigenous litigants and the Crown or industry proponents. Finally, many Indigenous peoples unsurprisingly link this “capacity deficit” to a longstanding and continuing “history of shameful treatment by outsiders”,⁶¹ which further animates the same legitimate distrust, anger, and exclusion that reconciliation is meant to address and (hopefully) overcome.

Likewise, for the Crown and industry proponents, the consultation process remains confusing, frustrating, costly, and prohibitive. Bryant, writing now from the perspective of a proponent for development, cautions that the energy industry considers the duty to consult as a source of “risk and delay.”⁶² Bryant writes that industry proponents appreciate that once litigation begins, “the relationship [between the parties] has unraveled, the trust is lost, and the project is doomed.”⁶³ In fact, Indigenous leaders

⁵⁷ *Ibid* at para 55.

⁵⁸ Bryant, *supra* note 10 at 224.

⁵⁹ Stephen M Young, “The Deification of Process in Canada’s Duty to Consult: *Tsleil-Waututh Nation v Canada (Attorney General)*” (2019) 52:3 UBC L Rev at 1105.

⁶⁰ Newman, *supra* note 14 at 208.

⁶¹ Bryant, *supra* note 10 at 233.

⁶² *Ibid* at 229.

⁶³ *Ibid*.

like Bellegrade have pointed specifically to litigation over the adequacy of consultation as a potential (albeit costly) strategy for Indigenous communities to harm the viability of (or even outright prevent) projects that are not developed through true “partnerships with Indigenous peoples.”⁶⁴

Finally, Bryant writes that the Crown, in attempting to appease the competing interests and demands of the parties involved, is left to “apply the jurisprudence like a nervous sous-chef following a sacred recipe”⁶⁵ as if “the court has established process as the Holy Grail.”⁶⁶ Consequently, the Crown ends up mired in a process rendered “*reductio ad absurdum*” by judicially-mandated ongoing consultations that continue “*ad infinitum*,”⁶⁷ and seem unlikely to result in satisfactory agreements (or determinative disagreements) over proposed actions. As Ignatieff explains, the Crown recognizes that “the status quo is simply unsustainable.”⁶⁸ Therefore, a process intended by the Court to engender trusting and productive relationships between Canada and Indigenous peoples through relational, meaningful, and good faith negotiation and dialogue, has instead failed to encourage such a process, and consequently seems to be benefitting no one.

“to work and grow on their own terms”:⁶⁹ Section 35, IBAs, and an Indigenous Veto

The Section 35 framework articulated by the courts, as translated into practice in the major energy project context, seems to be undermining, rather than forwarding, the project of reconciliation. However, the claim embedded in the Section 35 jurisprudence – namely, that the courts’ role should be limited to encouraging and supervising the relational dialogue necessary to effect reconciliation – remains compelling in light of the inescapable contestations over the meaning of reconciliation as a complex socio-political project. How, then, can such a vision be more effectively translated in practice? In this section, I consider the extent to which two possible innovations to the prevailing consultation process – namely, industry-Indigenous IBAs and a proposed Indigenous veto – may help achieve the Court’s relational vision for reconciliation and ameliorate the concerns of all involved parties.

⁶⁴ Greg Quinn, “Aboriginal Consultation Needed to Expedite Resource Projects; First Nations Chief Says Partnerships Would Avoid Court, Political Challenges”, *Ottawa Citizen* (11 April 2015) at D.14.

⁶⁵ Bryant, *supra* note 10 at 225.

⁶⁶ *Ibid* at 234.

⁶⁷ *Ibid*.

⁶⁸ Michael Ignatieff, “Afterword,” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2015) at 511.

⁶⁹ John Borrows, “Legislation and Indigenous Self-Determination in Canada and the United States,” in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2015) at 497.

Impact and Benefit Agreements

IBAs are contractual and often confidential⁷⁰ agreements “entered into prior to the commencement of operations”⁷¹ on major projects “between resource companies and Indigenous groups,”⁷² and are thus intentionally outside the Crown’s purview.⁷³ These agreements require Indigenous peoples affected by resource projects to “accept some restrictions to the exercise of their traditional rights and Aboriginal title” in exchange for “a ‘package of measures’ that includes economic benefits and the minimization of negative impacts on the environment and people.”⁷⁴ In practice, these benefits are provided through “direct payments, employment opportunities, the protection of particular landscapes or resources, and/or a greater role in impact monitoring.”⁷⁵ Although fast-becoming “institutionalized as [resource] firms have come to recognize that it is in their commercial interest to address evident gaps in the regulatory process,”⁷⁶ IBAs are not governed by legislation in British Columbia mandating any “minimum standards.”⁷⁷ Certain jurisdictions, however, have enacted statutory frameworks for IBAs, and in some circumstances have even made their formation a requirement “prior to the commencement of any ‘Major Development Project.’”⁷⁸

Crucially, IBAs – as *formal agreements* between Indigenous groups and resource firms – represent a category of those same “negotiated settlements, with good faith and give-and-take on all sides”⁷⁹ that the Court in *Delgamuukw* identified as the proper vehicles of reconciliation. For one, IBAs require firms interested in resource development that may affect Indigenous peoples to *prospectively* engage in good faith consultations. In doing so, firms may be encouraged to proactively determine which mitigation efforts

⁷⁰ Cathleen Knotsch & Jacek Warda, *Impact Benefit Agreements: A Tool for Healthy Inuit Communities (Full Report)* (Ottawa: National Aboriginal Health Organization, 2009) at 7.

⁷¹ BC First Nations Energy and Mining Council [FNEMC], “Sharing the Wealth: First Nations Resource Participation Models” (March 2010), online: *BC First Nations Energy and Mining Council* <<http://fnemc.ca/?portfolio=sharing-the-wealth>> at 10.

⁷² Neil Craik, Holly Gardner & Daniel McCarthy, “Indigenous-Corporate Private Governance and Legitimacy: Lessons Learned from Impact and Benefit Agreements,” 52 *Resources Policy* (2017) at 379.

⁷³ Guillaume St-Laurent & Philippe Le Billon, “Staking Claims and Shaking Hands: Impact and Benefit Agreements as a Technology of Government in the Mining Sector,” 2 *Extractive Industries & Society* (2015) at 591.

⁷⁴ Ken Caine & Naomi Krogman, “Powerful or Just Plain Power-full? A Power Analysis of Impact and Benefit Agreements in Canada’s North” (2010) 23 *Organization & Environment* at 80.

⁷⁵ Jen Jones & Ben Bradshaw, “Addressing Historical Impacts through Impact and Benefit Agreements and Health Impact Assessments: Why it Matters for Indigenous Well-being,” (2015) 41 *Northern Review* at 82.

⁷⁶ *Ibid* at 85.

⁷⁷ Woodward & Company, *Benefit Sharing Agreements in British Columbia: A Guide for First Nations, Business, and Governments* (Victoria, British Columbia: Woodward & Company, 2009) at IV-5.

⁷⁸ See e.g. *ibid* at IV-7 (Nunavut). Note “a ‘Major Development Project’ is a defined term applying to any project belonging to a Crown corporation or private sector initiative of various types and can range in size measures by years of employment or overall capital cost” at IV-7.

⁷⁹ *Delgamuukw*, *supra* note 6.

and benefits affected groups will consider necessary to provide support for the project. Such agreements, free as they are from the strictures of consultations undertaken through the NEB/CER regime, likewise invite Indigenous peoples to engage in robust, good faith bargaining and to enter a meaningful two-way dialogue directly with industry proponents.⁸⁰ Notably, the culmination of these dialogue-driven efforts – namely, *contractual* instruments – are also left to the courts to enforce on a *substantive* basis rather than through weakened standards of review contemplated in the post-*Vavilov* administrative law framework.

Moreover, while the Court has clarified that “the Crown cannot delegate its *authority* to consult,”⁸¹ it has held that the Crown “may delegate the *procedural* aspects of consultation to industry proponents.”⁸² Seeing as the Court has embraced a *procedural* vision of consultation, procedural delegation to industry means that “in practice, much of the obligation to consult falls to industrial proponents.”⁸³ Relatedly, since the Court considers reconciliation to ultimately contemplate the reconciliation of Canada’s *various peoples*,⁸⁴ – including, presumably, industry proponents whose activities intimately affect Indigenous peoples – IBAs become a prominent site of the inter-personal dialogue that the Court intends to facilitate as part of its vision of Section 35. As such, IBAs seem to provide an avenue for industry and Indigenous communities to foster an evidently productive, relational dialogue over their respective visions for development and co-existence, hopefully to the benefit of all involved.

To that end, proponents of IBAs argue that these agreements foster an effective “*ongoing relationship*” between industry and Indigenous peoples,⁸⁵ and are therefore inherently “forward-looking.”⁸⁶ Indeed, as St-Laurent and Billon explain, the linguistic emphasis on *benefits* in these agreements “aims to extend this relationship [between industry and Indigenous communities] into the realm of ‘partnership.’”⁸⁷ IBAs are thus seen, at best, as the contractual *foundations* for more robust, equitable, and dynamic relationships between resource firms and Indigenous communities.⁸⁸ For her part, Jai even argues that the “principle of co-management” embedded in treaties between Indigenous peoples and the Crown implies that IBAs may be considered a *modern*

⁸⁰ Ginger Gibson & Ciaran O’Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements* (Toronto: Gordon Walter & Duncan Foundation, 2015) at 31.

⁸¹ *Ibid* at 30.

⁸² *Haida*, *supra* note 20 at para 53.

⁸³ Gibson & O’Faircheallaigh, *supra* note 80 at 30.

⁸⁴ *Mikisew*, *supra* note 12 at para 1.

⁸⁵ Craik, Gardner & McCarthy, *supra* note 72 at 387.

⁸⁶ Caine & Krogman, *supra* note 74 at 79.

⁸⁷ St-Laurent & Billon, *supra* note 73 at 591.

⁸⁸ Pierre-Yves Le Meur, Leah S Horowitz & Thierry Mennesson, “‘Horizontal’ and ‘Vertical’ Diffusion: The Cumulative Influence of Impact and Benefit Agreements (IBAs) on Mining Policy-production in New Caledonia” (2013) 38 *Resources Policy* at 649.

requirement flowing from historical treaties.⁸⁹ Understood through Nedelsky's work, this view of IBAs suggests that they may be a useful tool not only for firms and Indigenous peoples to meet the Court's insistence on negotiations, but also to engage in the *relational* aspects of reconciliation that underlie the Section 35 jurisprudence.

However, notwithstanding the jurisprudential appeal of such a framing, many IBAs seem to be more *compensatory* than relational in practice. Per Kielland, the "*primary purpose of IBAs is to compensate Aboriginal communities for the adverse effects of development.*"⁹⁰ As such, IBAs are generally structured so that any 'forward-looking' benefits accrued by Indigenous groups from a continuing relationship with resource firms are necessarily *rooted* in "impacts on environment and local culture and other economic activities" that the resource development is likely to generate.⁹¹ In other words, the benefits enjoyed by Indigenous peoples, whatever their "nature, scope, and value",⁹² are *exchanged* for consent to the myriad of potential harms posed by development.

If IBAs are indeed compensatory, their ability to play a significant role in forwarding the Court's vision of reconciliation becomes more problematic. It is particularly troubling that, when framed as compensatory documents, IBAs merely facilitate a *tradeoff* between a robust exercise of Indigenous rights and productive relationships with industry. As aforementioned, several scholars have framed IBAs as agreements that require Indigenous peoples to "accept some *restrictions* to the exercise of their traditional rights and Aboriginal title" in exchange for "economic benefits and the minimization of negative impacts."⁹³ IBAs thus arguably allow industry (and, indirectly, the Crown) to avoid meaningfully addressing the *content* of Aboriginal rights and reckoning with how such rights can be *reconciled* with the interests of various non-Indigenous peoples. As such, if IBAs amount to little more than 'buy-offs' of Indigenous rights and title, they may undermine rather than forward the Court's vision of a dialogue-driven, negotiated reconciliation.

IBAs also face considerable criticism for their confidentiality. As Hummel explains, "nearly all [IBAs] are hidden from public view by industry-standard

⁸⁹ Julie Jai, "Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 146.

⁹⁰ Norah Kielland, *Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements*, In Brief No 2015-29-E (Ottawa: Library of Parliament, 2015), online: <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201529E> [emphasis added].

⁹¹ Brad Gilmour & Bruce Mellett, "The Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations" (2013) 51 Alberta L Rev 2 at 388.

⁹² *Ibid* at 392.

⁹³ Caine & Krogman, *supra* note 74 at 80 [emphasis added].

confidentiality clauses,” noting that “[i]n some cases, IBAs are inaccessible even to the members of the communities that sign them.”⁹⁴ This obscurity “prevents communities from looking to other agreements for ideas, precedents and standards,” exacerbating the already uneven bargaining positions between comparatively experienced and resource-rich industry actors and Indigenous communities.⁹⁵ Moreover, Hummel notes that “the history of oppression suffered by First Nations at the hands of the federal government”⁹⁶ further complicates the use of confidentiality clauses in these agreements, as these experiences of oppression have “contributed to the climate of distrust that deters openness” among some Indigenous signatories.⁹⁷ Finally, IBAs’ confidentiality also prevents the outside scrutiny of, *inter alia*, activists and scholars, which is necessary to determine whether such agreements truly act as meaningful triggers for dialogue and relationship-building, as opposed to being merely compensatory ‘trade-offs’ for the comprehensive exercise of Aboriginal rights. To that end, IBAs’ confidentiality prevents them from becoming an accountable tool for furthering the relational view of reconciliation that the Court, in recognizing procedural delegation to industry, intends that such agreements become.

Finally, the potentially *coercive* aspects of these agreements seemingly further undermine their capacity to facilitate a meaningful dialogue between industry proponents and Indigenous peoples. To borrow Jai’s concerns (albeit in the context of treaties) about “bargains made in bad times,”⁹⁸ the complexities and inequities of the prevailing consultation process may incentivize Indigenous groups to enter into IBAs merely to *avoid* the myriad of pitfalls presented by the formal consultation processes with the Crown. That is, faced with the prospect of a consultation process that guarantees nothing more than ongoing negotiation and that is likely to devolve into costly and uncertain litigation over its adequacy, Indigenous communities – disadvantaged as they are by entrenched inequalities – may be unduly compelled to enter into more IBAs that at least promise some tangible benefits. In so doing, IBAs may ultimately set aside the truly meaningful dialogue necessary to reconcile, rather than merely ‘exchange’ or ‘buy-off,’ robust expressions of Aboriginal rights.

To conclude, I find that IBAs are able to address some key deficiencies in the Aboriginal consultation process, including, most prominently, by preventing costly litigation to fix the substantive outcomes of major projects and ultimately framing resource development as a unique opportunity for triggering dialogue over the shared

⁹⁴ Chris Hummel, “Behind the Curtain: Impact Benefit Agreement Transparency in Nunavut,” 60 *Les cahiers du droit* 2 (2019) at 369.

⁹⁵ *Ibid* at 387.

⁹⁶ *Ibid* at 373.

⁹⁷ *Ibid*.

⁹⁸ Jai, *supra* note 89 at 105.

futures of all Canadians. Indeed, the very act of negotiating IBAs requires both Indigenous communities and industry proponents to ‘come to the table’ with informed suggestions for facilitating shared interests on major resource projects, often with a view to decades of mutual involvement. Moreover, IBAs – if adequately drafted as *triggers* for continued relationships and dialogue rather than compensatory ‘trade-offs’ – seem to accord better with the Court’s vision of reconciliation than the formal energy project consultation process. Yet, IBAs present their own set of practical and conceptual challenges; as Newman cautions, only “an *appropriately developed* impact benefit agreement may provide gains for all.”⁹⁹ Indeed, if framed as confidential, compensatory contracts, IBAs seem to provide an opportunity for industry and the Crown to perniciously *avoid* the meaningful dialogue and relationship-building necessary, per the Court’s vision of Section 35, for reconciliation.

Indigenous Veto

A more transformative reform to the current consultation process may be a judicial or political recognition of an Indigenous veto against the Crown over major resource projects. While the Court has repeatedly emphasized that the duty to consult and accommodate does *not* contemplate a “duty to agree”¹⁰⁰ and thus does not provide Indigenous groups with a veto power,¹⁰¹ some have pointed to the broad language of Section 35, as well as the changing public discourse and emerging international norms on Indigenous rights, to argue that such a veto power *should* be recognized.

Before discussing the implementation of such a power, I note that the recognition and facilitation of an Indigenous veto or consent power seems to forward the Court’s underlying vision for reconciliation. Put plainly, an Indigenous veto would function as an ineluctable trigger for dialogue by *mandating* an equitable bargaining position between Indigenous peoples, the Crown, and industry proponents. This would also strengthen the robustness of their dialogue through the threat of breakdown in the absence of good faith. Namely, by providing a legal power to refuse consent for a project, Indigenous peoples are provided a unique bargaining tool that helps overcome the material and informational inequalities that hamper negotiations either in ‘official’ consultation processes or more informal processes like IBAs. As such, an Indigenous veto may not only trigger, but in fact compel the meaningful dialogue that the Court envisions for reconciliation. Should industry proponents or the Crown not be adequately and prospectively appreciating the relationships that proposed projects have to Indigenous rights, interests, and visions of the future, the threat of an indigenous veto may reinforce the significance and

⁹⁹ Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) at 82.

¹⁰⁰ *Haida*, *supra* note 20 at para 42; *Coldwater*, *supra* note 56 at para 119.

¹⁰¹ *Haida*, *supra* note 20 at para 48.

meaningfulness Indigenous-Crown and Indigenous-industry negotiations. In so doing, an Indigenous veto would necessitate “cooperative relations between extractive industry proponents, governments, and Aboriginal peoples.”¹⁰² As Ignatieff writes, “if we are to have genuinely shared benefits from resource development,” all parties must “meet as equals” and must “treat each other as equals.”¹⁰³

Importantly, the advent of an Indigenous veto would not necessarily require a constitutional amendment, which relies on an onerous amending formula that is unlikely to be successfully invoked.¹⁰⁴ Instead, an Indigenous veto could plausibly arise from a judicial reconceptualization of Section 35 since the content of Section 35 “has been primarily the creature of jurisprudence.”¹⁰⁵ Namely, the Court could mandate that an Indigenous veto power be included as part of the process of reconciling Indigenous rights and other Canadian interests. The plain language of Section 35 – which merely ‘affirms’ the existing Aboriginal and treaty rights of Indigenous peoples and makes no mention of balancing these rights – provides significant (albeit politically daunting) opportunity for the courts to affirm an Indigenous veto power. In fact, the Court’s express adoption of a ‘living tree’ approach to the interpretation of the Constitution – first theorized by Lord Sankey in *Edwards v Canada (AG)*¹⁰⁶ and clarified in *Reference re BC Motor Vehicle Act*¹⁰⁷ – seems to offer the Court a licence to adjust the implementation of Section 35 given the pressing issues plaguing the contemporary consultation regime.

However, the living tree doctrine of constitutional interpretation and development remains, admittedly, circumscribed by the common law’s general requirement for incremental and restrained innovation.¹⁰⁸ An undeniably substantial expansion of Section 35 to include the recognition of an Aboriginal veto right would therefore require considerable justification to be adopted by the Court. To that end, such an interpretation of Section 35 may be bolstered by the emerging international norm of Indigenous free, prior, and informed consent (“FPIC”), famously contemplated in Article 10 of the *United Nations Declaration on the Rights of Indigenous Peoples*.¹⁰⁹ In fact, echoing Borrows’

¹⁰² Roberta Rice, “The Right to Say ‘No:’ Why an Aboriginal Veto Power Over Resource Extraction is a Must,” *The Hill* (15 August 2016), online: <<https://www.hilltimes.com/2016/08/15/the-right-to-say-no-why-aboriginal-veto-power-over-resource-extraction-is-a-must/76353>>.

¹⁰³ Ignatieff, *supra* note 68 at 511.

¹⁰⁴ Emmett Macfarlane, “Conclusion: The Future of Canadian Constitutional Amendment,” in Emmett Macfarlane, ed, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016) at 294.

¹⁰⁵ Bryant, *supra* note 10 at 225.

¹⁰⁶ *Edwards v Canada (AG)*, [1930] 1 DLR 98 at 106 (PC).

¹⁰⁷ [1985] 2 SCR 486.

¹⁰⁸ Wil Waluchow, “Constitutions as Living Trees: An Idiot Defends,” (2005) 18 Can J of L and Jurisprudence 2 at 246.

¹⁰⁹ UNGA, *United Nations Declaration on the Rights of Indigenous People*, 2 October 2007, A/RES/61/295 [UNDRIP].

finding that UNDRIP “should cause... the courts to reject constitutional distinctions [per *Van Der Peet*] based on pre- and post-contact,”¹¹⁰ UNDRIP’s anticipated federal implementation¹¹¹ may similarly require the courts to recognize broader discursive powers emanating from assertions or proof of Aboriginal rights and title.

What may reassure the Court were it to look to international norms of Indigenous consent as inspiration for any reform of Section 35 jurisprudence is the growing consensus in international jurisprudence that FPIC does *not* provide Indigenous peoples a veto *per se*. Instead, international courts and commentators have increasingly adopted a view of FPIC as establishing a “sliding scale approach to participatory rights.”¹¹² According to Barelli, this approach provides that Indigenous peoples do *not* have a “right to veto in relation to all matters,” but instead that states may only need to *obtain* the consent (i.e. a true veto) of Indigenous peoples “when a development project is likely to have a serious (negative) impact on [their] cultures and lives.”¹¹³ This sliding scale approach may assuage fears expressed by political leaders that an Indigenous veto power, if left unconstrained, will unduly harm Canada’s economic development.¹¹⁴ Moreover, a sliding scale also seemingly mirrors the Court’s own approach to Aboriginal rights as expressed in decisions like *Haida*. The similarities between the approach as characterized by Barelli in the international context and the “spectrum” of consultation contemplated in *Haida*¹¹⁵ are readily apparent, making the adoption of a flexible approach to Indigenous veto or consent more palatable for the evidently cautious courts, particularly in all contexts where Indigenous interests may be seriously negatively affected by development.

Indeed, drawing once more from Nedelsky’s work on the relational approach to rights, the Court may wish to mirror the *Charter*’s justificatory ‘veto’ mechanisms in implementing a modified sliding scale Indigenous veto. As discussed above, the *Charter*’s notwithstanding and reasonable limits clauses are similar to the duty to consult and accommodate to the extent that they, as intended, act as *triggers for dialogue* on the

¹¹⁰ John Borrows, “Revitalizing Canada’s Indigenous Constitution: Two Challenges,” in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, Ont: Centre for International Governance Innovation, 2019) 20 at 30.

¹¹¹ Ryan Jones, “Liberals Introduce Bill to Implement UN Indigenous Rights Declaration,” *CBC* (3 December 2020), online: <<https://www.cbc.ca/news/politics/liberals-introduce-undrip-legislation-1.5826523>>.

¹¹² Mauro Barelli, “Free, Prior, and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead,” (2012) 16:1 Intl JHR at 27.

¹¹³ *Ibid* at 32.

¹¹⁴ E.g. Presse Canadian, “Legault Says He Doesn’t Want to Give Indigenous Peoples a Veto Over the Economy,” *Montreal Gazette* (15 August 2020), online: <<https://montrealgazette.com/news/quebec/legault-says-he-doesnt-want-to-give-indigenous-peoples-a-veto-over-economy>>.

¹¹⁵ *Haida*, *supra* note 20 at para 43.

nature of rights. Importantly, both of these clauses empower the federal or provincial Crown to *infringe* on the rights of other parties – in other words, to veto their exercise of such rights. Yet, in both instances, such infringements must be justified – either through the test established in *R v Oakes*¹¹⁶ or through the ballot box,¹¹⁷ respectively.

As such, the advent of an Indigenous veto need not be absolute in the sense that such a power must not *per se* extend to all circumstances where Indigenous persons or communities substantively disagree with a contemplated Crown action. Instead, I argue that the Court may, in taking inspiration from the sliding scale approach being developed internationally for Indigenous consent, adopt what I term a ‘qualified’ veto. Namely, such a veto would only be validly exercised when *justified* by the Indigenous actor with reference, for instance, to the competing interests of other stakeholders balanced against the severity of the impact of the proposed Crown conduct on the engaged Indigenous interest. I do acknowledge that, were such a position adopted by the courts, it would likely require Indigenous actors to justify their veto through litigation, further perpetuating the adversarial tendencies of consultations and problematically requiring the courts to assume an active role in consultations that it clearly wants to avoid. Yet, in my view, such an approach also offers two notable advantages. For one, the adoption of a ‘qualified’ veto would perhaps appease the salient concerns expressed across the political sphere about the stifling effects of a robust Indigenous veto. More importantly, such an approach would also seemingly align with the principles articulated in the Court’s Section 35 jurisprudence – namely, by requiring Indigenous actors to actively *contribute* to the meaningful dialogue necessary to effect reconciliation by outwardly and explicitly justifying their most comprehensive expressions of opposition to proposed Crown conduct.

These conceptual benefits aside, an Indigenous veto, whether absolute or qualified, also brings greater certainty to the process of certifying and developing major energy projects in Canada than the contemporary consultation regime. Prominently, an Indigenous veto power would provide certainty in the major project context by *demystifying* the requirements of consultation. Indeed, were such a reform implemented, the ‘goal’ for both the Crown and industry proponents would be to obtain Indigenous consent rather than to discharge a vague duty to consult and then to potentially litigate (on opaque standards of review) whether that duty has been met. Indeed, the adoption of an Indigenous veto may provide particular clarity and certainty in litigation since a ‘reasonableness’ standard of review seems incongruous with an assessment of whether clear consent (i.e., a binary, substantive outcome) has been given by Indigenous peoples.

¹¹⁶ [1986] 1 SCR 103.

¹¹⁷ The Honourable Mr. Justice Michel Bastarache, “Section 33 and the Relationship Between Legislatures and the Courts,” (2005) 14:3 Const Forum Const at 3.

This assessment certainly contrasts with the prevailing task of the courts in the duty to consult context. Specifically, it conflicts with the courts' obligation to determine whether the Crown has *reasonably assessed* whether it has sufficiently (and honourably) discharged its (largely procedural) duty to meaningfully engage in dialogue and negotiate in good faith.

Conclusions

Canada's prevailing framework for the duty to consult and accommodate Indigenous peoples, at least in the energy sector, is clearly not working. A vision for reconciliation expressed by the courts that is meant to encourage a relational dialogue between Canada's various peoples has increasingly pushed parties to adversarial litigation on weakened standards of review over the myriad of uncertainties arising from Indigenous consultations. In fact, Indigenous peoples, industry proponents, and the Crown have all expressed frustration at the pitfalls, uncertainties, inefficiencies, and harms that a supposedly reconciliatory and productive process has inadvertently generated.

Yet, the principles animating the duty to consult and accommodate as articulated in the jurisprudence on Section 35 remain compelling. Namely, the courts – echoing the works of relational rights theorists like Nedelsky – have rightly identified reconciliation as an *unfixable* objective requiring meaningful, good-faith dialogue outside of the courtroom to be effected. The question of ameliorating Canada's ailing reconciliation framework, rather encouragingly, thus becomes one of *implementation* rather than theory. To that end, I have argued that a recognition of an Indigenous veto is the most likely reform to effect considerable positive change. While IBAs do provide tangible benefits to communities and introduce some certainty to an otherwise uncertain process, they too often amount to tools by which the industry and the Crown may avoid the very dialogue the Court has emphasized as necessary for reconciliation. Meanwhile, an Indigenous veto, while presenting its own considerable political challenges, seems capable of re-introducing similar certainty to the consultation process while doing so on more equitable and conceptually coherent terms.

Whatever solutions arise for the issues within the current Indigenous consultation regime, the discourse must first acknowledge and reckon with the deficiencies of that regime, and all parties involved must recognize the harms that the regime has caused not only to them and other affected parties, but to the project of reconciliation itself. To quote once more the enduring words of Chief Justice Lamer, “we are all here to stay”;¹¹⁸ but how we dialogue, produce, and reconcile with one another on this land need not stay as

¹¹⁸ Delgamuukw, *supra* note 6 at para 186.

it is. A more equitable, informed, and mutually beneficial future is certainly possible if all sides are willing to work towards it.