

ASSESSING THE DUTY TO CONSULT

Malcolm Lavoie



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Assessing the Duty to Consult

by Malcolm Lavoie

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Executive Summary

The duty to consult Indigenous peoples is a constitutional obligation that applies in relation to a wide range of government decisions that could affect constitutionally protected Aboriginal and treaty rights. It has come to play an important role in determining whether and under what conditions major resource development projects can be built in Canada. This study seeks to assess how the duty to consult has functioned in this role.

Part One—Reconciliation and Uncertainty

Part One begins by setting out the origins and purpose of the duty to consult, which seeks to reconcile the Crown governance authority with the rights of pre-existing Indigenous nations. While this is a vitally important purpose, the duty to consult has also given rise to significant legal uncertainty. There are several reasons for this, including the fact that the duty to consult is structured as an open-ended procedural standard, with specific requirements determined on a case-by-case basis.

The uncertainty associated with the duty to consult is exacerbated in cases involving major projects like pipelines. Where a project affects a large number of Indigenous communities, the likelihood that all parties will reach agreement is low. Moreover, in these cases the practical challenges associated with consultation are elevated, making meaningful two-way dialogue more difficult to achieve. Legal uncertainty and delay can in principle raise the cost of capital for private-sector project proponents to such a degree that a project will no longer be viable. In these cases, the threat of litigation over the duty to consult can give rise to a *de facto* veto power. A veto power of ill-defined scope, and with the potential to apply to projects that extend beyond a group's traditional territory, fails to affirm the Crown's authority to make policy decisions in the public interest. This is particularly troubling in the context of projects that are supported by some affected Indigenous communities but opposed by others. In these cases, the exercise of an effective veto systematically privileges the interests and views of communities opposed to development over those that support it.

Part Two—the Way Forward

Part Two seeks to help policy-makers find a way forward. The first section of Part Two provides legal context for the duty to consult. The duty to consult is only one mechanism by which the rights of Indigenous peoples are reconciled with Crown sovereignty. A range of substantive rights in resources, including Aboriginal rights,

Aboriginal title, treaty rights, and property interests in reserve lands can serve to delineate the authority of Indigenous communities and insulate Indigenous decision-making from unjustified outside interference. Substantive rights can provide greater legal certainty than a process-based standard like the duty to consult. Accordingly, one important way to address the legal uncertainty associated with the duty to consult is to encourage greater reliance on clearly defined substantive rights, including property rights, as an alternative means of reconciling Indigenous interests with the Crown's authority.

The second section of Part Two proposes a range of possible policy solutions. Several of the proposed solutions are based on defining substantive Indigenous rights with greater precision. First, modern treaties between Indigenous groups and the Crown can help resolve the uncertainty associated with outstanding land claims. In principle, these agreements can provide for clearly defined substantive rights while reducing the scope of the duty to consult. Second, governments and courts can find ways to facilitate litigation over substantive rights. Unlike litigation over the duty to consult, litigation over substantive Aboriginal rights and title generally results in a judicial decision that provides guidance going forward as to the applicable substantive rights in relation to resources. Third, the content of substantive rights can be defined with greater precision. One important point that should be clarified relates to the circumstances under which constitutionally protected Aboriginal rights in resources can be subject to expropriation with just compensation.

In addition to finding ways to encourage greater reliance on substantive rights, policy makers can also seek to provide greater clarity on how the duty to consult itself functions. The first way to do this is to pursue litigation strategies that lead the courts to resolve outstanding ambiguities in consultation jurisprudence. A second step policy makers could take would be to adopt government consultation policies or develop consultation protocols in conjunction with Indigenous groups. In principle, these policies and protocols can provide guidance to parties regarding the specific content of consultation obligations, as well as applicable timelines.

Part One

Reconciliation and Uncertainty

Introduction

The events of the past year have once again highlighted the growing significance of the Crown’s duty to consult Indigenous¹ peoples.² This doctrine now provides perhaps the principal legal framework through which Indigenous claims are asserted and contested in Canada. It is also fast becoming the most practically significant legal tool available for challenging resource development projects. Because the duty to consult is a constitutional obligation, litigation based on it can delay or possibly halt a project, even if that project is supported by a government with a legislative majority. Indigenous communities, environmental groups, resource companies, and governments across the country now know this all too well. The August 2018 decision quashing the approval of the Trans Mountain pipeline expansion is only the latest demonstration of just how important the duty to consult has become.³

The duty to consult applies in relation to a broad range of government decisions that could affect constitutionally protected Aboriginal rights, from those dealing with small-scale local projects all the way up to major projects with national implications, such as the Trans Mountain pipeline. The Trans Mountain decision marks the second time in recent years that the approval of a major pipeline project has been quashed due to inadequate consultation with Indigenous groups. The approval of the Northern Gateway pipeline was overturned in 2016 on similar

1. The words “indigenous” and “aboriginal” are synonyms. Both are words of Latin origin used to designate the original inhabitants of a place. The term “Indigenous” is increasingly preferred by Indigenous people and is the term used in the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (Sept. 13, 2007). However, the *Constitution Act, 1982* refers to rights of “aboriginal peoples”, which are defined to include “Indian, Inuit and Métis peoples”. The term “Indian” is used in Canadian constitutional instruments and in the *Indian Act*, RSC 1985, c I-5, but is no longer the preferred term. The term “First Nations” is generally used instead. In this study, I use the terms “Aboriginal” and “Indigenous” interchangeably to refer to First Nations, Inuit, and Métis peoples.

2. Major judicial decisions on the duty to consult from the past year include: *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (holding that the duty to consult does not apply to the development of legislation, but leaving open the possibility that other duties will be recognized in the future) and *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh*] (quashing the approval of the Trans Mountain pipeline expansion).

3. *Tsleil-Waututh*, *ibid.* The approval of the Trans Mountain pipeline expansion was quashed both on administrative law grounds and on the grounds of inadequate consultation with Indigenous communities.

grounds.⁴ Major projects like pipelines give rise to complex questions of policy involving a wide range of factors, including economic benefits, environmental risks, and impacts on the rights of existing communities and interest holders, including Indigenous communities. The duty to consult has come to play a major role in determining whether and under what conditions such projects can be built in Canada.⁵ Part One seeks to provide a framework for assessing how the duty to consult has functioned in this role.

4. *Gitxaala Nation v. Canada*, 2016 FCA 187. But see *Bigstone Cree Nation v. Nova Gas Transmission Ltd*, 2018 FCA 89 [*Bigstone Cree Nation*] (upholding the approval of a gas pipeline that was challenged on the basis of inadequate consultation).

5. For a detailed overview of the current state of the law in this area, see David V. Wright (2018), *Federal Linear Energy Infrastructure Projects and the Rights of Indigenous Peoples: Current Legal Landscape and Emerging Developments*, 23:1 *Review of Constitutional Studies* 175. See also Dwight G. Newman (2014), *Revisiting the Duty to Consult Aboriginal Peoples* (Purich) [Newman, *Revisiting the Duty to Consult*].

The Origin and Purposes of the Duty to Consult

The duty to consult is a constitutional doctrine that requires the Crown to consult with Indigenous groups and, if necessary, accommodate their concerns when the Crown contemplates conduct that could affect a constitutionally protected Aboriginal or treaty right. The duty to consult derives its status as a constitutional obligation from section 35(1) of the *Constitution Act, 1982*, which states simply: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”.⁶ This provision extends constitutional protection to rights provided for under treaties, rights to engage in culturally significant practices, and title to lands historically occupied and not previously surrendered.⁷

The duty to consult was initially developed as part of the test for whether a government infringement of an established s. 35 right could be justified. One of the steps a government must generally take if it violates one of these rights is to consult with affected Indigenous communities about its decision.⁸ The 2004 decision in *Haida Nation v. British Columbia* significantly expanded the scope of the duty to consult beyond cases of proven infringements of established rights.⁹ The Court held that the duty applies in cases where the government contemplates a decision that could adversely affect an Aboriginal right or title interest, even if the right in question has not yet been proven to exist.¹⁰ The following year, in *Mikisew Cree First Nation v. Canada*, the Court held that the duty to consult applies in relation to decisions that could affect a treaty right, even decisions that do not amount to an actual infringement of the treaty right.¹¹

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

7. See *R v. Van der Peet*, [1996] 2 SCR 507; *R v. Badger*, [1996] 1 SCR 771; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*].

8. *R v. Sparrow*, [1990] 1 SCR 1075 at 1119; *R v. Gladstone*, [1996] 2 SCR 723 at 768–769; *Delgamuukw*, *ibid.* at 1112–1113; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras 77–80 [*Tsilhqot'in*].

9. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*].

10. *Ibid.* at para 35.

11. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 59–69.

The Court’s basis for extending the duty to consult beyond cases of proven infringements of constitutionally protected rights was “the honour of the Crown”. Acting honourably requires the Crown to consider Aboriginal rights that could be affected by its decisions.¹² More broadly, the Court has situated the duty to consult as part of the project of reconciliation between the Crown and Indigenous peoples: The Crown, having unilaterally asserted a claim to sovereignty over pre-existing Indigenous nations, is under an obligation to consult with those nations on decisions that could potentially affect their rights.¹³ The duty to consult, then, affirms the Crown’s authority to act in the public interest, even in the presence of unresolved Aboriginal claims, but at the same time the duty tries to ensure that Indigenous interests are respected prior to a more comprehensive resolution through litigation or agreement.¹⁴

In terms of the specific requirements of the duty to consult, the Supreme Court has held that these will vary with the context. By way of guidance, the Court has relied on the metaphor of a “spectrum” of consultation, from relatively limited requirements at one end to more stringent requirements at the other:

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. ...

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. ...

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the

12. *Haida Nation*, *supra* note 9 at paras 26-27.

13. *Ibid.* at para 32.

14. *Ibid.* at para 27. Newman, *Revisiting the Duty to Consult*, *supra* note 5 at 31.

process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. ...¹⁵

Ideally, consultation will lead to agreement. The hope is that through “talking together for mutual understanding” a solution will be achieved that Indigenous groups find satisfactory.¹⁶ This happens more often than is commonly acknowledged, often in the form of “impact-benefit agreements” whereby Indigenous groups agree to support a project in exchange for benefits and accommodations.¹⁷ However, the courts have been clear that agreement is not a required outcome: The duty to consult does not amount to a veto.¹⁸ But where agreement is not reached, litigation based on the adequacy of consultation may ensue.

Indeed, since the expanded consultation obligation was introduced in 2004, it has been the subject of a significant amount of litigation. While judicial decisions dealing with the existence or alleged infringement of substantive Aboriginal or treaty rights are relatively rare, decisions dealing with the existence of consultation obligations or the adequacy of consultation efforts are more common.¹⁹ The reported decisions dealing with the duty to consult have helped to elaborate on the content and scope of the duty,²⁰ but there are limits to the degree of certainty and guidance that can be provided with respect to a relatively novel and open-ended procedural standard.

15. *Haida Nation*, *ibid.* at paras 43-45.

16. *Ibid.* at para 43, citing Thomas Isaac and Anthony Knox (2003), *The Crown’s Duty to Consult Aboriginal People*, 41 *Alberta Law Review* 49 at 61.

17. See Sandra Gogal, Richard Riegert and JoAnn Jamieson (2005), *Aboriginal Impact and Benefit Agreements: Practical Considerations*, 43 *Alta L Rev* 129.

18. *Haida Nation*, *supra* note 9 at para 48; *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 at para 59 [*Chippewas of the Thames*].

19. For instance, during the first six months of 2018, there were seven reported decisions that made a determination as to the existence of a duty to consult Aboriginal peoples or a determination regarding the adequacy of consultation efforts: *Gamlaxeyltxw v. British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440; *Athabasca Chipewyan First Nation v. Alberta (Minister of Aboriginal Relations, Aboriginal Consultation Office)*, 2018 ABQB 262; *Squamish Nation v. British Columbia (Minister of Environment)*, 2018 BCSC 844; *Mi’kmaq of Prince Edward Island v. Prince Edward Island*, 2018 PESC 20; *Pimicikamak v. Manitoba*, 2018 MBCA 49; *Bigstone Cree Nation*, *supra* note 4; *R v. Martin*, 2018 NSSC 141. During the same time period, there were only two reported decisions that made a determination as to the existence or infringement of substantive Aboriginal or treaty rights: *Ahousaht Indian Band v. Canada (Attorney General)*, 2018 BCSC 633; *R v. Pierone*, 2018 SKCA 30. The foregoing is based on a case law search conducted by the author on January 3, 2019.

20. See Wright, *supra* note 5 at 196-197; Newman, *Revisiting the Duty to Consult*, *supra* note 5.

Legal Uncertainty

The specific requirements of the duty to consult continue to be a matter of considerable uncertainty. For instance, in its 2016 decision quashing the approval of the Northern Gateway pipeline, one of the grounds on which the Federal Court of Appeal faulted the government’s consultation efforts was its failure to share information and views on the strength of the relevant asserted Aboriginal claims.²¹ Though this holding was supported by some lower-court case law, it seemed somewhat puzzling at the time because the strength of a claim is primarily relevant to assessing the level of consultation owed, and the government had conceded that “deep” consultation applied.²² Last year, in a separate case, the Supreme Court of Canada upheld a consultation process in the absence of any determination as to the strength of the claim or the level of consultation owed. The Court held that even taking the strength of the claim and the seriousness of the infringement at their highest and applying a “deep” consultation standard, the consultation in that case was adequate.²³ On the Supreme Court’s approach, it would seem to follow that the key question is the adequacy of the consultation regarding impacts on asserted rights. Sharing information and views on the strength of particular claims is arguably not necessary, especially where the government has conceded that deep consultation is required. The Northern Gateway approval was thus quashed partly on grounds that appear to be inconsistent with more recent Supreme Court of Canada jurisprudence. While the Federal Court of Appeal obviously cannot be faulted for failing to foresee how the Supreme Court would develop the law, this does serve to underscore the degree to which the law is unsettled. Indeed, this is just one example of a point on which there has been genuine legal uncertainty relating to the requirements and scope of the duty to consult.²⁴

21. *Gitxaala Nation v. Canada*, *supra* note 4 at paras 218–225, 288–309.

22. For a criticism of this aspect of the decision, see Malcolm Lavoie (2016), *The Northern Gateway Pipeline and the Purpose of “Duty to Consult”*, *Fraser Forum* (July 27), <<https://www.fraserinstitute.org/blogs/the-northern-gateway-pipeline-and-the-purpose-of-duty-to-consult>>.

23. *Chippewas of the Thames*, *supra* note 18 at paras 43, 47, 63.

24. For example, the question of whether the Crown owes a duty to consult with respect to the development of legislation was unsettled until the Supreme Court of Canada’s decision in *Mikisew Cree First Nation v. Canada (Governor General in Council)*, *supra* note 2. And indeed, even after the decision, uncertainty persists due to the holding from some members of the Court that new duties could be recognized in the future regarding the development of legislation. See Dwight Newman (2018), *The Supreme Court’s Duty to Consult Ruling Will Create*

The circumstances of the Northern Gateway and Trans Mountain pipeline cases, taken together, provide further suggestive evidence of this uncertainty. Twice in recent years a federal government has linked its policy agenda and political fortunes to a pipeline project. In both cases, the governments in question had every incentive to comply with constitutional consultation obligations in order to avoid delays to the projects.²⁵ Both governments devoted significant resources to consultation efforts. Yet in both cases, the governments were found not to have met their obligations. An inference one might draw is that the requirements of the duty to consult are simply not that clear, since even governments with a major stake in the consultation process apparently cannot reliably ensure compliance.²⁶

What is it about the duty to consult that has created so much uncertainty?²⁷ First of all, the duty to consult is structured as a “standard” rather than a “rule” or set of rules. A good way to understand the difference between standards and rules is as follows: The specific content of a rule is set out in advance, prior to the conduct governed by the law, whereas the content of a standard is only fully set out after the fact, when a court or other decision-maker assesses the conduct.²⁸ So, for instance, a law stating that the speed limit is 60 km/hour is a “rule”, whereas a law stating that a driver must drive at a reasonable speed is a “standard”. In the former case, the specific requirements are made known in advance. In the latter case, the specific requirements of the law are only fully determined after the fact when a decision-maker assesses whether a given speed was reasonable under the circumstances.²⁹ While standards have certain advantages, including flexibility, their chief disadvantage is that they give less guidance to parties as to what the law requires. The duty to consult is structured as a particularly open-ended standard, in the sense that many of the specific requirements of the duty are left open for courts to determine on a case-by-case basis.

Immense Uncertainty, *Globe and Mail* (October 18), <<https://www.theglobeandmail.com/opinion/article-the-supreme-courts-duty-to-consult-ruling-will-create-immense/>>.

25. Of course, the governments in question also had incentives to complete their consultations as quickly as possible, while still complying with their obligations. Yet it would appear that in both cases they miscalculated, which could be a reflection of the uncertainty associated with these obligations.

26. See Malcolm Lavoie and Moira Lavoie (2018), Trans Mountain and the Problem with Pipeline Consultation in Canada, *Fraser Forum* (September 4), <<https://www.fraserinstitute.org/blogs/trans-mountain-and-the-problem-with-pipeline-consultation-in-canada>>.

27. For a fuller discussion of some of the ideas in this section, see Malcolm Lavoie [forthcoming], Aboriginal Rights and the Rule of Law, *Supreme Court Law Review*.

28. See Louis Kaplow (1992), Rules Versus Standards: An Economic Analysis, 42 *Duke Law Journal* 557 at 559–560.

29. Of course, there are important differences between Aboriginal rights and speed limits. This example is only meant to illustrate the general theoretical distinction between rules and standards.

“Standards” are actually quite common in modern legal systems, and the uncertainty associated with the use of standards is usually relatively manageable. In many cases, uncertainty is mitigated by the fact that a standard relates to existing customs, norms, and practices, which parties can look to in order to get a better sense of what the standard requires. For instance, the tort of negligence requires parties to act with due care according to the standard of a reasonable person.³⁰ This general standard of conduct governs the full range of human activities, from driving a car to shoveling snow in front of one’s house. While this is certainly an open-ended standard, its content is often informed by existing customs and practices (as well as by many decades of case law).³¹ Parties can usually get a good sense of what is required of them by looking to the norms of their community. If you want to avoid being held liable in negligence, a good place to start is to adopt customary precautions, including, for example, keeping the path to your front door free of ice.³²

With respect to the duty to consult, however, parties have generally not been able to look to existing customs, norms, and practices for guidance. In establishing the duty to consult, the Supreme Court sought to create *new* customs, norms, and practices. Since there was little prior case law when *Haida Nation* was decided, parties were left only with the very general and open-ended language used by the court, without any associated existing practices or legal authorities to refer to. The fact that the duty to consult was set out as an open-ended standard not rooted in existing customs, norms, and practices goes a long way to understanding why there has been so much uncertainty associated with it. After *Haida Nation*, parties simply had to wait and see what courts would say about what the duty required in different contexts. While some uncertainty is inevitable when any new legal obligation is set out, the uncertainty has been particularly acute with respect to the duty to consult because it was structured as an open-ended standard not grounded in existing customs, norms, and practices.

A final feature of the duty to consult that has contributed to uncertainty is that it has encouraged litigation over procedure rather than substantive rights to resources. It appears that the intention of the Court in developing the duty

30. See Allen M. Linden and Bruce Feldthusen (2011), *Canadian Tort Law*, 9th ed. (LexisNexis) at 144.

31. *Ibid.* at 201–202, 205–208. In most jurisdictions, the duty of care owed to visitors is now based on statute, rather than the common law tort of negligence, but the standard of care is framed in the same terms. See, e.g., *Occupiers’ Liability Act*, RSA 2000, c O-4, s 5.

32. While custom is an influential factor in setting the required standard of conduct, it is important to note that custom alone is not conclusive. Linden and Feldthusen, *ibid.* at 205–208, 211–217.

to consult was to encourage negotiation rather than litigation.³³ The intention was apparently not to provide an indirect means of litigating substantive rights. However, litigation over the duty to consult has become quite common. Where parties litigate over the existence or alleged infringement of Aboriginal or treaty rights, the result is generally a court decision that definitively determines what rights exist in relation to which resources. For instance, in the *Tsilhqot'in* case, the Supreme Court held that the Tsilhqot'in Nation held Aboriginal title to land in the clearly delineated "proven title area".³⁴ Judicial decisions of this nature generate greater certainty for the parties going forward by indicating what entitlements exist in relation to the resources in question. By contrast, litigation over consultation does not have this effect. In cases of this nature, a court issues a decision on whether the procedures adopted in a particular case were adequate, without actually clarifying the parties' rights to the resources going forward. The same parties can have multiple disputes over the same resources, without ever definitively resolving their respective entitlements. To the extent that the duty to consult has channeled disputes into litigation over procedure rather than substantive rights, then, it may have exacerbated the ongoing legal uncertainty that exists in relation to Indigenous claims.³⁵

33. *Haida Nation*, *supra* note 9 at paras 14, 20, 25–27, and 38.

34. *Tsilhqot'in*, *supra* note 8 at para 153.

35. Lavoie, *Aboriginal Rights and the Rule of Law*, *supra* note 27.

Special Problems with Large-Scale Linear Projects

Large-scale, linear projects like pipelines compound some of the problems associated with the duty to consult.³⁶ Much of the jurisprudence that initially developed the requirements of the duty to consult dealt with government decisions that primarily affected one or a small number of Indigenous groups.³⁷ The dispute in *Haida Nation*, for instance, concerned forestry licenses on land over which the Haida asserted a claim to Aboriginal title. In contexts where only a small number of Indigenous communities is affected, there is often a good chance that consultation and negotiation will lead to mutually beneficial agreements. Indeed, the duty to consult has likely played a major role in the proliferation of impact-benefit agreements between project proponents and Indigenous communities.³⁸ These agreements are duty-to-consult success stories. They are tangible examples of forward-looking reconciliation that provide economic benefits while respecting Indigenous claims.

However, where dozens or hundreds of Indigenous communities are affected by a decision, as can occur with respect to pipeline approvals, the likelihood that all affected parties will consent to a project is low. In economic terms, transaction costs increase with the number of parties to the transaction, making an agreement less likely.³⁹ Some Indigenous groups could have values and preferences that make them resolutely opposed to a project. Others that might be willing to support the project in exchange for benefits might also be tempted to hold out for a greater share of the benefits, threatening the project even if there is a hypothetical arrangement that could make all parties better off.⁴⁰ Even where many Indigenous

36. Some of these special problems have previously been highlighted. See Dwight Newman (2014), *The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector* (Macdonald-Laurier Institute) at 16–17, <<https://www.macdonaldlaurier.ca/files/pdf/dutytoconsult-final.pdf>> [Newman, *The Rule and Role of Law*]; Tom Flanagan (2018), Only Parliament Can Fix Canada’s Pipeline Impasse, *Globe and Mail* (September 10), <<https://www.theglobeandmail.com/opinion/article-only-parliament-can-fix-canadas-pipeline-impasse/>>.

37. *Haida Nation*, *supra* note 9. See Newman, *The Rule and Role of Law*, *ibid.* at 16–17.

38. Newman, *Revisiting the Duty to Consult*, *supra* note 5 at 82–84.

39. See Steven Shavell (2004), *Foundations of Economic Analysis of Law* (Harvard University Press) at 124–125.

40. *Ibid.* See also Flanagan, *supra* note 36.

communities support a pipeline project—as was the case with both Northern Gateway and the Trans Mountain expansion—the agreement of *all* affected communities is highly unlikely. This dynamic makes it more likely that approvals of large-scale linear projects will lead to litigation over the duty to consult.

In addition to these structural factors that make agreement less likely, there are also practical challenges associated with consulting on large-scale projects. These challenges make it more difficult for governments to meet consultation standards that were initially developed in the context of projects with more localized effects.⁴¹ The ideal of two-way dialogue between government decision-makers and Indigenous groups is easier to achieve for a project that mostly affects one group than it is for a project that affects dozens or hundreds of groups. For instance, an accommodation measure offered to one Indigenous group could have direct effects on other groups, or could mean fewer resources are available for other kinds of accommodation measures. In consultation processes with many moving parts, a decision-maker may not want to make a firm commitment to particular accommodation measures prior to a final decision, when all relevant information can be considered. In these cases, governments may devote efforts to collecting information from the many interested parties at one stage and only later acting upon it in a decision, rather than simultaneously engaging in a back-and-forth discussion or negotiation with each party. However, as the decision in the Trans Mountain case demonstrates, there is a risk that this kind of approach will be found to be inadequate for failing to achieve a “meaningful two-way dialogue”.⁴²

The added challenges associated with large-scale linear projects exacerbate the underlying uncertainty associated with the duty to consult. For these projects, as compared to projects with more localized effects, litigation is more likely to ensue and there is a greater risk that the consultation will be found to be inadequate. The result may be that, in some cases, the duty to consult can amount to a *de facto* veto for Indigenous communities that oppose a project. The Supreme Court of Canada has been clear that the duty to consult does not give Indigenous communities a formal right to veto a project. The legal standard is one of consultation and potential accommodation rather than consent.⁴³ However, the cost, legal uncertainty, and potential delay associated with litigation over the duty to consult can raise the cost of capital for projects, potentially to the point where a project proponent will no longer view a project as viable. Indeed, empirical evidence exists for the proposition that legal uncertainty associated with Aboriginal rights has an impact

41. Newman, *The Rule and Role of Law*, *supra* note 36 at 16–17.

42. See *Tsleil-Waututh*, *supra* note 2 at paras 564–574, 649–763; Lavoie and Lavoie, *supra* note 26.

43. *Haida Nation*, *supra* note 9 at para 48; *Chippewas of the Thames*, *supra* note 18 at para 59.

on investor perceptions of risk.⁴⁴ Perceived risk in turn affects a project's ability to attract investment. With respect to capital-intensive projects pursued by private-sector proponents, the power to delay and generate legal uncertainty is potentially just as effective as a formal veto power. Even in the absence of a formal veto right, then, the duty to consult can potentially operate as a *de facto* veto. This is most likely to occur with respect to large-scale linear projects, where the agreement of all affected parties is unlikely, and where the practical challenges associated with consultation are most significant.

There are grounds to suspect that, in the pipeline context, the duty to consult has come to operate as something approaching a *de facto* veto. The judicial decisions quashing the Northern Gateway and Trans Mountain projects did indicate that the government could try to address consultation defects and approve the pipelines again, subject to potential further litigation over the adequacy of the new consultation efforts.⁴⁵ However, delay and uncertainty of this nature give rise to costs that private-sector project proponents are unwilling to bear.⁴⁶ The current dearth of private-sector investors pursuing proposals to address the ongoing pipeline capacity shortage is noteworthy in this regard.⁴⁷

44. Malcolm Lavoie & Dwight Newman (2015), *Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence* (Fraser Institute), <<https://www.fraserinstitute.org/sites/default/files/mining-and-aboriginal-rights-in-yukon-how-certainty-affects-investor-confidence.pdf>> (finding increased perceptions of risk in surveys of mining executives in response to legal changes relating to the duty to consult); Cherie Metcalf (2018), Market Reactions to Aboriginal Rights: A Look at Canada's Resource Industries, in Dwight Newman, ed., *Business Implications of Aboriginal Law* (LexisNexis): 107 (finding negative market reactions to some major Aboriginal rights decisions but not to others).

45. *Tsleil-Waututh Nation*, *supra* note 2 at paras 764–774; *Gitxaala Nation v. Canada*, *supra* note 4 at paras 333–334.

46. See generally Lavoie and Newman, *supra* note 44 at 16–23; Bernard J. Roth (2018), Reconciling the Irreconcilable: Major Project Development in an Era of Evolving Section 35 Jurisprudence, in Dwight Newman, ed., *Business Implications of Aboriginal Law* (LexisNexis): 169 at 181.

47. The Trans Mountain pipeline is now owned by the federal government. Katharine Starr (2019), *Feds Likely to Hold On to Pipeline past 2019 Election, says Morneau* (January 19) *CBC News*, <<https://www.cbc.ca/news/politics/first-nations-purchase-trans-mountain-pipeline-feds-1.4982807>>.

Conclusion

The duty to consult is grounded in the honour of the Crown and the underlying objective of reconciliation. The jurisprudence affirms Crown sovereignty, including the Crown's authority to make governance decisions in the public interest. At the same time, however, by requiring that the Crown act honourably in its dealings with Indigenous peoples, the duty to consult seeks to reconcile Crown authority with the prior existence and ongoing rights of Indigenous communities.

While the duty to consult has given rise to significant legal uncertainty, its objective of promoting reconciliation is both noble and critically important for our country. However, it is not clear that this degree of legal uncertainty is actually required in order to achieve this objective.⁴⁸ Moreover, if the duty to consult has come to operate in some cases as an effective veto over certain large-scale projects, then this is at odds with reconciliation as the Supreme Court has conceived it. A veto power of ill-defined scope, and with the potential to apply to projects that extend beyond a group's traditional territory, fails to affirm the Crown's authority to make policy decisions in the public interest, including in the interest of Indigenous communities. This is particularly troubling when it comes to projects that are supported by some affected Indigenous communities but opposed by others. In these cases, the exercise of an effective veto systematically privileges the interests and views of communities opposed to development over those that support it.

In Part Two, I will set out alternative approaches to reconciling the rights of Indigenous peoples with Crown sovereignty and seek to propose policy solutions to some of the issues identified in Part One.

48. See Lavoie, *Aboriginal Rights and the Rule of Law*, *supra* note 27.

Part Two

The Way Forward

Introduction

In Part One, I set out to assess the role of the duty to consult Indigenous peoples in Canadian law, particularly as it relates to major resource development projects. I argued that in at least some cases this area of law has come to operate in a manner that is inconsistent with its underlying purposes, which include the reconciliation of Crown sovereignty with Indigenous claims. In Part Two, I seek to help policy-makers find a way forward.¹ I begin in the first section by providing legal context on the alternative approaches that are available for reconciling the rights of Indigenous peoples with Crown sovereignty.² In the second section, I propose policies that may be able to achieve this reconciliation in a manner that provides greater legal certainty, respects the rights of Indigenous groups, and promotes the efficient use of resources.

1. The scope of this essay is mostly limited to the body of law that defines Indigenous legal interests *vis-à-vis* the Crown. Indigenous peoples of course have their own systems of law that pre-date European settlement. The emphasis in this paper, however, is on the body of law that sets the interface between Indigenous communities and the Crown (and those holding rights under the Crown).

2. In what follows, I use the terms “Indigenous rights” and “Aboriginal rights” to refer to the rights of Indigenous peoples. The words “Indigenous” and “Aboriginal” are synonyms. Both are words of Latin origin used to designate the original inhabitants of a place. The term “Indigenous” is increasingly preferred by Indigenous people and is the term used in the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (Sept. 13, 2007). However, the *Constitution Act, 1982* refers to rights of “aboriginal peoples”, which are defined to include “Indian, Inuit and Métis peoples”. The term “Indian” is used in Canadian constitutional instruments and in the *Indian Act*, RSC 1985, c I-5, but is no longer the preferred term. The term “First Nations” is generally used instead. In this essay, I use the terms “Aboriginal” and “Indigenous” interchangeably to refer to First Nations, Inuit, and Métis peoples.

Procedural Standards and Substantive Rights

The duty to consult is too often considered in isolation, when it is only one legal mechanism through which the interests of Indigenous groups are protected and reconciled with Crown sovereignty. The duty to consult is a procedural obligation that exists alongside a range of substantive rights that define Indigenous interests under the Canadian legal system. These substantive rights include interests in reserve lands and rights provided for under historic and modern treaties, as well as common-law interests recognized by Canadian courts, including Aboriginal rights to use resources and Aboriginal title to land.

The duty to consult protects Indigenous substantive rights only indirectly—by requiring fair and honourable procedures for government decision-making. However, there are other, more direct ways in which Indigenous rights can be asserted and enforced. First, an Indigenous group with uncertain rights can bring an action seeking a declaration of rights or title in a specific location.³ Once these rights have been definitively established, governments and private parties are generally expected to respect the rights, as they would any established property right. Government actions that do infringe these rights must be justified according to a test that assesses the proportionality of the infringement.⁴ In addition to meeting its duty to consult and, if necessary, accommodate, a government must establish that an infringement of an established right furthers a compelling and substantial objective, that the infringement is necessary in order to achieve the objective and minimally impairs the right, and that the benefits of the infringement outweigh the adverse effects.⁵ Proportionality tests like this are commonly used to assess infringements of constitutionally protected rights, both in Canada and around the world.⁶ In principle, a proportionality analysis can be quite rigorous

3. See, e.g., *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*].

4. *Ibid.* at paras 77–88; *R v. Sparrow*, [1990] 1 SCR 1075 at 1113–1119.

5. *Tsilhqot'in*, *ibid.* at para 87.

6. The most significant example of a proportionality test in Canadian law is the *Oakes* test for assessing the justification of infringements under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. *R v. Oakes*, [1986] 1 SCR 103. For an overview of the use of proportionality analysis across different countries' legal systems, see Grant Huscroft, Bradley W. Miller and Grégoire Webber (2016), eds., *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge

and demanding. A law or regulatory decision that infringes an established, constitutionally protected Aboriginal or treaty right and cannot be justified may be declared by a court to be of no force or effect.⁷

In addition to constitutional remedies, Indigenous groups whose established rights are infringed by public or private actors can also avail themselves of the remedies typically available to property owners, including seeking an injunction, declaration or order for the recovery of land,⁸ suing for damages,⁹ or bringing trespass charges.¹⁰ Depending on the scope of an Indigenous group's recognized self-government authority, a group can also implement and enforce its own rules of land tenure, including distinctive remedies for the violation of property rights.¹¹

The direct assertion and enforcement of substantive rights has certain advantages over reliance on a procedural standard like the duty to consult. Substantive rights can generally be defined with greater precision than the duty to consult. For instance, ownership-like entitlements such as Aboriginal title or interests in reserve lands have recognized incidents, including the exclusive right to the use and possession of land with well-defined boundaries.¹² While an Indigenous group relying on the assertion of a right to consultation may sometimes have the effective power to scuttle a project through the threat of litigation, depending on the circumstances, a group asserting a substantive property right has a much more certain power to grant or withhold consent. Beyond that, however, the group is empowered to actively manage the resource and derive benefits from it. This allows an Indigenous group to make plans according to its own values and priorities, including maintaining the land base as a locus for its distinctive culture and way of life, as well as engaging in economic development for the benefit of its members.

University Press); Aharon Barak (2012), *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press).

7. *Constitution Act, 1982*, *ibid.*, s 52. This appears to be the assumption made in the analysis in *Tsilhqot'in*, *supra* note 3 at paras 77–88. But see *Ahousaht Indian Band v Canada (Attorney General)*, 2009 BCSC 1494 at para 909, affirmed by 2011 BCCA 235.

8. *Tsilhqot'in*, *ibid.* at para 90. Injunctions are available against private parties but are generally not available against the Crown. See *Crown Liability and Proceedings Act*, RSC 1985, c C-50, s 22; *Crown Proceeding Act*, RSBC 1996, c 89, s 11(2). The alternative remedy of a declaration is typically sought in litigation against the Crown and is usually just as effective at restraining violations of established rights.

9. See, e.g., *Shewish v. MacMillan Bloedel Ltd* (1990), 48 BCLR (2d) 290, 74 DLR (4th) 345 (CA).

10. *Indian Act*, *supra* note 2 at s 30.

11. See, e.g., *K'omoks First Nation Land Code* (2016), s 31.1, <<https://labrc.com/wp-content/uploads/2017/03/Komoks-Lan-Code.pdf>>; applied in *K'omoks First Nation v. Thordarson and Sorbie*, 2018 BCPC 114. On the recognition of Indigenous self-government powers, see Crown-Indigenous Relations and Northern Affairs Canada (2018), *Self-Government* (July 12), <<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>>.

12. *Tsilhqot'in*, *supra* note 3 at paras 73–74; *Guerin v. The Queen*, [1984] 2 SCR 335 at 379–382.

Indigenous groups are not the only parties that benefit from clearly defined Indigenous rights. Clarity about who owns what facilitates transactions and provides an incentive for the optimal use of resources. Parties can undertake negotiations knowing who has the authority to say “yes” to a project. This lowers transaction costs, so that mutually beneficial transactions are more likely to occur.¹³ Moreover, parties holding resource entitlements have an incentive to use the resources in an efficient manner.¹⁴ They can undertake a project secure in the knowledge that they will be able to reap the benefits of the project. This is partly why well-defined, formal property rights are an important part of a set of institutions that are recognized to facilitate economic growth.¹⁵ In principle, all Canadians would benefit from better defined Indigenous resource rights. To the extent that the duty to consult operates as an effective veto in some cases, it is possible to think of it as an ill-defined and uncertain kind of property right.¹⁶ A shift from

13. See generally, R.H. Coase (1960), *The Problem of Social Cost*, 3 *Journal of Law & Economics* 1. Transaction costs can inhibit mutually beneficial exchanges. Whether a proposed transaction is “beneficial” to an Indigenous community will be for each community to determine for itself based on the community members’ own values and priorities. A range of considerations can be expected to inform the preferences of Indigenous groups in negotiations over land rights, including a special connection a community may have with particular lands. It should be emphasized that it is not necessary to view land as merely a fungible commodity in order to apply an economic framework of this nature, which is based on deference to the subjective preferences of the rights holder, whatever those preferences may be.

14. Richard Posner (2011), *Economic Analysis of Law*, 8th ed. (Aspen) at 40.

15. See Dani Rodrik, Arvind Subramanian, and Francesco Trebbi (2004), *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 9 *J Economic Growth* 131; Daron Acemoglu, Simon Johnson & James A Robinson (2001), *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91:5 *American Economic Rev* 1369; Daron Acemoglu and Simon Johnson (2005), *Unbundling Institutions*, 113:5 *J Political Economy* 949; Timothy Besley and Maitreesh Ghatak (2009), *Property Rights and Economic Development*, in Dani Rodrik and M.R. Rosenzweig, eds., *Handbook of Development Economics*, vol. 5 (Elsevier), 4525 at 4552–4559; Hernando de Soto (2000), *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books). But see Ha-Joon Chang (2011), *Institutions and Economic Development: Theory, Policy and History*, 7:4 *J Institutional Economics* 473 (cautioning against concluding that the strongest possible property rights are always best); Daron Acemoglu and James A. Robinson (2012), *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Business) (emphasizing the importance of “inclusive” political institutions, which include but are not limited to a stable property rights regime at 428–462); Jamie Baxter and Michael Trebilcock (2009), “Formalizing” Land Tenure in First Nations: Evaluating the Case for Reserve Tenure Reform, 7 *Indigenous Law Journal* 45 (arguing that economic outcomes relating to land tenure formalization will depend on the particular circumstances of Indigenous communities).

16. See Tom Flanagan (2019), *The Wealth of First Nations* (Fraser Institute), at 117–129, <<https://www.fraserinstitute.org/sites/default/files/wealth-of-first-nations-2019.pdf>>

reliance on the duty to consult towards the recognition of well-defined substantive rights would in principle empower proactive Indigenous decision-making while at the same time promoting legal certainty and investment.

There are some obvious challenges to moving away from the duty to consult and towards the direct assertion of substantive rights. In many cases, there is uncertainty as to the existence and content of the substantive rights. For instance, the Crown did not conclude historic treaties with First Nations in most of British Columbia. As a result, there are many Indigenous groups with asserted but unproven claims to Aboriginal rights and title.¹⁷ The duty to consult provides an important interim means of protecting Indigenous interests pending the resolution of these claims through litigation or a modern treaty. Resolving a claim generally improves legal certainty by moving away from a vaguely defined procedural duty applying over a wide and sometimes uncertain geographic area towards substantive rights applying over a more narrowly and precisely defined geographic area. While the test for justifying an infringement of a substantive Aboriginal or treaty right does actually include a requirement of consultation, it is expected that outright infringements of established rights will be relatively infrequent as a result of the guidance these rights can provide.¹⁸ Well-defined rights with clear boundaries can encourage transactions and streamline decision-making by Indigenous groups, governments, and private parties alike, such that potential infringements of rights become less common.

The duty to consult can play an important role in ensuring Indigenous perspectives are taken into account in government decisions, particularly in cases where substantive rights are uncertain. But it is a poor long-term substitute for clearly defined property rights. For that reason, the uncertainty associated with the duty to consult cannot properly be addressed without also considering ways in which better-defined substantive rights can emerge.¹⁹

17. Eight First Nations in British Columbia have concluded a comprehensive land-claims agreement, also known as a modern treaty. Thirty-one First Nations with potential land claims are at various stages of negotiation of a treaty. Twenty-seven First Nations with potential land claims are not currently negotiating a treaty. BC Treaty Commission (2018), *Annual Report 2018* at 28–29, <<http://www.bctreaty.ca/sites/default/files/BCTC-AR2018.pdf>>.

18. *Tsilhqot'in*, *supra* note 3 at paras 77–79, 90.

19. It might be objected that placing such an emphasis on clearly defined rights reflects only a Western, non-Indigenous perspective on the law. However, frameworks that provide certainty and predictability to parties are seen as an important component of Indigenous-led economic growth. See Harvard Project on American Indian Economic Development (2008), *The State of the Native Nations: Conditions under US Policies of Self-Determination* (Oxford University Press), at 122–123; Tulo Centre of Indigenous Economics (2014), *Building a Competitive First Nation Investment Climate*, at 11–34, <<http://www.tulo.ca/textbook/>>.

The Way Forward

This section seeks to outline ways that policy-makers can mitigate the problems associated with the duty to consult that have been identified in these essays. The suggested solutions fall under two broad headings. First, there are measures that can be taken to define substantive rights more clearly, so that disputes will less often hinge on the adequacy of consultation procedures. Second, there are ways to limit the uncertainty associated with the duty to consult in the cases in which it does apply.

This is an area in which courts have come to occupy a central policy-making role because of the constitutionally entrenched nature of the interests involved. Accordingly, the proposals below contain a mix of measures governments could adopt on their own, along with suggestions for ways in which the courts could develop the jurisprudence. While governments of course cannot unilaterally alter courts' interpretation of constitutional rights, they can seek to persuade courts to adopt particular positions as part of their litigation strategies. In what follows, I try to sketch out in broad terms the direction that government policies and litigation efforts might take in order to address the uncertainty associated with the duty to consult.

Defining substantive rights

Negotiating modern treaties

One of the most significant steps that governments can take to define substantive rights more clearly is to resolve outstanding land claims through comprehensive land-claims agreements, also known as modern treaties. Under such agreements, an Indigenous group generally surrenders or undertakes not to assert its common-law Aboriginal rights and title.²⁰ In exchange, the group is recognized to hold well-defined property rights and governance jurisdiction over land with clearly delineated boundaries, along with other forms of consideration.²¹ This gives greater guidance going forward as to who has the power to make decisions with respect to which resources. It can also in principle significantly reduce the scope of application of the duty to consult, at least to the extent that a group will no longer be asserting claims outside of well-defined settlement lands.²²

20. See, e.g., *Nisga'a Final Agreement*, 27 April 1999, c 2, arts 23-28, <<http://www.nnkn.ca/files/u28/nis-eng.pdf>>.

21. *Ibid.*, c 3, 11.

22. *Ibid.*, c 2, art 28.

Governments have generally prioritized the goal of legal certainty in modern treaty negotiations.²³ Courts, in turn, should be reluctant to introduce new and uncertain obligations not provided for in the text of these modern agreements, which are generally negotiated by well-informed parties from a position of relative equality of bargaining power.²⁴

While a number of modern treaties have been concluded in recent decades, especially in the North, the BC treaty process has had disappointing results. The large majority of claims there remain unresolved.²⁵ Resolving outstanding land claims is crucial to creating greater certainty about substantive rights and to moving away from reliance on the duty to consult as a means of indirectly asserting rights. It is to be hoped that the federal government's forthcoming rights recognition measures will lead to progress on land claims in British Columbia.²⁶ However, there are reasons to be pessimistic.²⁷ For one thing, the ability for Indigenous groups to leverage the duty to consult in order to derive economic benefits from their traditional territories has arguably lessened the incentive to reach a settlement.²⁸

Fiscal issues are sometimes among the impediments to concluding modern agreements. Governments may be understandably concerned about the direct costs of financial transfers and the potential diminishment of the federal and provincial tax base. However, governments should also take account of the indirect costs of ongoing legal uncertainty in assessing proposals to resolve claims. It may be that in some cases the fiscal costs of a proposed deal are well worth incurring when weighed against the ongoing societal costs of legal uncertainty.

23. See, e.g., Crown-Indigenous Relations and Northern Affairs Canada (2014), *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*, <<https://www.rcaanc-cirnac.gc.ca/eng/1408631807053/1544123449934?wbdisable=true#subp>>.

24. Malcolm Lavoie and Dwight Newman (2015), *Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence* (Fraser Institute), at 26, <<https://www.fraserinstitute.org/sites/default/files/mining-and-aboriginal-rights-in-yukon-how-certainty-affects-investor-confidence.pdf>>. On the interpretation of modern treaties, see *First Nation of Nacho Nyak Dun v. Yukon*, 2017 SCC 58; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53.

25. BC Treaty Commission, *supra* note 17 at 28–29.

26. Crown-Indigenous Relations and Northern Affairs Canada (2018), *Overview of a Recognition and Implementation of Indigenous Rights Framework*, <<https://www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708>>.

27. For a critical take on the process, see Hayden King and Shiri Pasternak (2018), *Canada's Emerging Indigenous Rights Framework: A Critical Analysis* (Yellowhead Institute), <<https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf>>.

28. Bernard J. Roth (2018), Reconciling the Irreconcilable: Major Project Development in an Era of Evolving Section 35 Jurisprudence, in Dwight Newman, ed., *Business Implications of Aboriginal Law* (LexisNexis), 169 at 180.

Facilitating litigation over substantive claims

Besides negotiated agreements, the other principal mechanism by which well-defined substantive rights can be recognized in cases of uncertainty is through litigation. When an Indigenous group brings an action seeking a declaration of Aboriginal rights or title, the court’s ultimate holding will generally provide guidance going forward as to the existence and scope of the rights in question. The court will either hold that the asserted rights have not been established, or, if they have been, the court will set out the content and geographic scope of the rights.²⁹ Either way, under the principles of *res judicata*, the result of the litigation will generally be treated as the definitive resolution of the issue among the parties.³⁰

While litigation over substantive rights is preferable to litigation over consultation in terms of the legal guidance it can provide, it is also notoriously time-consuming and costly. For instance, the trial in the *Tsilhqot’in* Aboriginal title case did not begin until 14 years after the statement of claim was amended to include an Aboriginal title claim.³¹ The trial itself lasted for five years, with subsequent appeals taking a further seven years.³² It is true that this was a complex and path-breaking case in many ways. However, this example helps demonstrate just how slow the process of litigating substantive rights and title claims can be. This may deter Indigenous parties from bringing such claims—even if they receive government funding for the litigation process.³³ Moreover, drawn-out litigation over substantive claims is likely to look even less desirable if Indigenous groups are able to rely instead on the duty to consult as an alternative way to assert claims and leverage economic benefits.³⁴

The question of how to streamline the process of resolving Aboriginal rights and title claims is a complex one, and is intertwined with the broader problem of delays and inefficiencies in the civil justice system in Canada.³⁵ One possible approach would be to establish a specialized administrative tribunal with a

29. *Tsilhqot’in*, *supra* note 3 at para 153, declaring Aboriginal title held by the Tsilhqot’in Nation over the “proven title area”, defined by the trial judge in *Tsilhqot’in Nation v. British Columbia*, 2007 BCSC 1700 at paras 959–960.

30. *Bear Island Foundation v. Ontario* (1999), 126 OAC 385 (CA) at para 51.

31. *Tsilhqot’in*, *supra* note 3 at paras 5–8.

32. *Ibid.*

33. See *William et al. v. HMTQ et al.*, 2004 BCSC 610; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371.

34. Roth, *supra* note 28 at 180; Dwight G Newman (2014), *Revisiting the Duty to Consult Aboriginal Peoples* (Purich) at 82–84.

35. See generally, Action Committee on Access to Justice in Civil and Family Matters (2013), *Access to Civil and Family Justice: A Roadmap for Change* (October), <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>.

mandate to resolve comprehensive land claims in an expeditious manner.³⁶ Australia’s National Native Title Tribunal, for instance, could provide a model. That tribunal has made a total of 448 determinations regarding the existence and scope of native title since it was first established in 1993³⁷—an impressive record when compared with the relatively small number of modern treaties and judicial decisions relating to Aboriginal rights and title in British Columbia over the past several decades.³⁸ A specialized tribunal with adequate resources and sufficient buy-in from Indigenous groups may be worth exploring as one way to resolve land claims more quickly.

Expropriation as justified infringement

In addition to processes aimed at the resolution of land claims, the content of substantive Aboriginal rights, Aboriginal title, and treaty rights can also be defined with greater precision in order to provide greater guidance to parties.³⁹ In this regard, there is one incident of Aboriginal interests that has especially significant implications for legal certainty in relation to major projects: the liability of these interests to expropriation.⁴⁰ If more substantive rights are definitively recognized as a means of mitigating the uncertainty associated with the duty to consult, as recommended above, the question of liability to expropriation will become even more significant.

36. While Canada already has a specialized tribunal dealing with “specific claims” such as monetary claims relating to the administration of First Nation assets and historic treaty obligations, the tribunal does not have the jurisdiction to consider Aboriginal rights and title claims. *Specific Claims Tribunal Act*, SC 2008 c 22, ss 14, 15. The establishment of an “Aboriginal Lands and Treaties Tribunal” was recommended by the *Report of the Royal Commission on Aboriginal Peoples*, vol. 2 (Canada Communications Group, 1996), though the jurisdiction of the proposed tribunal would not have included making determinations of Aboriginal rights or title.

37. This is according to a search of native title determinations conducted by the author on January 22, 2019. National Native Title Tribunal, *Native Title Applications, Registration Decisions and Determinations*, <<http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx>>.

38. There has only ever been a single judicial declaration of Aboriginal title in British Columbia: *Tsilhqot’in*, *supra* note 3. Modern treaties have been concluded with eight First Nations in British Columbia: BC Treaty Commission, *supra* note 17 at 28–29. While there have also been a number of judicial determinations of non-exclusive Aboriginal rights, most potential land claims remain unresolved.

39. For a discussion of how incidents of Aboriginal property interests can be developed so as to provide greater legal certainty, see Malcolm Lavoie [forthcoming], *Aboriginal Rights and the Rule of Law*, *Supreme Court Law Review*. See also Dwight Newman (2016), *The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study*, 95:2 *Neb L Rev* 432.

40. Liability to expropriation has long been recognized as an “incident” of property ownership. See Tony Honoré (1987), *Ownership*, in *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press), 161. See also Larissa Katz (2017), *Property’s Sovereignty*, 18 *Theoretical Inquiries in Law* 299 at 301–303.

Well-defined property rights are not necessarily absolute. In most systems of government, property owners are liable to expropriation for projects that are in the public interest, generally with a requirement that fair compensation be paid.⁴¹ The core case in which expropriation of property rights is seen to be justified is for linear transportation and communication projects, such as roads, railways, transmission lines, and pipelines. These projects often require the acquisition of interests from a large number of owners. If the consent of every owner along the route were required, it would be possible for a single owner to hold out for a high price that could imperil the project. The transaction costs associated with hold-outs could potentially stop a project even if transfers could in theory make every owner better off.⁴² Expropriation is a way to ensure that linear projects can be built even if unanimous consent cannot be achieved. In contrast to large-scale linear projects, expropriation will less often be necessary for smaller-scale projects. This is because there are often several alternative sites for such projects, and bilateral negotiations are reasonably likely to lead to an agreement with at least one of the owners of a suitable site.

Similar reasoning applies in relation to the authority of local governments. Local governments should generally not have the power to veto a project that crosses the jurisdictional boundaries of several governments. This helps explain why interprovincial transportation and communication projects are under federal jurisdiction.⁴³ If a province or municipality ought not to be able to hold up an interprovincial project, it would seem that similar reasoning should apply to the jurisdiction of Indigenous governments. The alternative is to potentially allow governments representing local interests to hold up projects that provide net benefits to Canadians, including Indigenous Canadians. Indeed, the federal government exists in no small part in order to make decisions on policies that transcend local interests in this way.⁴⁴ While Indigenous governments are distinct from provincial or municipal governments in many ways, the same functional arguments against a veto power over linear projects would seem to apply.

All of this has implications for how courts should approach the justification of infringements of established Aboriginal and treaty rights. In most cases

41. See, e.g., *Expropriation Act*, RSBC 1996, c 125, ss 30-33; *National Energy Board Act*, RSC 1985, c N-7, ss 78, 78.1, 85-103 (provisions dealing with the expropriation of land, including First Nations reserve lands, for a pipeline).

42. Steven Shavell (2004), *Foundations of Economic Analysis of Law* (Harvard University Press), at 124–125.

43. *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 92(10)(a).

44. Dwight Newman (2018), *Pipelines and the Constitution: Canadian Dreams and Canadian Nightmares* (Macdonald-Laurier Institute), at 3-4, <https://macdonaldlaurier.ca/files/pdf/MLICommentary_April2018_Newman_FWeb.pdf>, [Newman, *Pipelines and the Constitution*].

involving small-scale projects, an established reserve or Aboriginal title interest should mean that the Indigenous group in question has the power to veto projects on that land. Expropriation in these cases should be difficult to justify under the test for infringement of constitutionally protected Aboriginal and treaty rights, since the expropriation of a particular group's interest may not actually be necessary to achieve the government objective in question.⁴⁵ For instance, a government may wish to promote forestry, but it does not follow that it is necessary to expropriate the timber rights on a particular community's Aboriginal title lands in order to achieve this objective.⁴⁶ Other potential sites will likely be available where forestry can take place. However, the situation will often be quite different for linear projects. Alternative routes that do not cross Indigenous lands may not be available, such that the expropriation of part of an Indigenous group's interest may indeed be reasonably necessary in order to achieve the objectives served by the project. The infringement test for Aboriginal rights, title, and treaty rights should be developed so as to affirm legislative authority to expropriate in the public interest for linear projects where this is necessary, subject to the payment of fair compensation. In principle, this power could also be used pre-emptively, in relation to asserted but unproven Aboriginal title interests in the path of a linear project.⁴⁷

While the Supreme Court in the past hinted that expropriation with compensation would generally be a justified infringement of Aboriginal rights or title, there is language in the *Tsilhqot'in* decision that casts some doubt on this.⁴⁸ It is important that the Crown's expropriation authority on linear projects be re-affirmed as part of a more precise definition of Indigenous property interests. If compensated expropriation is indeed necessary in order to achieve important transportation and communications objectives, then it should be able to satisfy even a stringent justification test for the infringement of a constitutionally protected right.⁴⁹

45. *Tsilhqot'in*, *supra* note 3 at para 87.

46. *Ibid.* at paras 124–127.

47. See Tom Flanagan (2018), Only Parliament Can Fix Canada's Pipeline Impasse, *Globe and Mail* (September 10), <<https://www.theglobeandmail.com/opinion/article-only-parliament-can-fix-canadas-pipeline-impasse/>>.

48. *R v. Sparrow*, *supra* note 4 at 1119; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at 1113–1114, 1133–1334. But see *Tsilhqot'in*, *supra* note 3 at para 86 (“... incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land”).

49. Under the current test, in addition to meeting its duty to consult and, if necessary, accommodate, a government must establish that an infringement of an established right furthers a compelling and substantial objective, that the infringement is necessary in order to achieve the objective and minimally impairs the right, and that the benefits of the infringement outweigh the adverse effects. See *Tsilhqot'in*, *ibid.* at para 87.

Developing the duty to consult

In addition to measures aimed at resolving claims and recognizing well defined substantive rights, there are also steps that can be taken to reduce the uncertainty associated with the application of the duty to consult. These measures fall into two broad categories: developing consultation jurisprudence, and developing government consultation policies and protocols.

Developing consultation jurisprudence

For reasons outlined in my previous essay, there are limits to how much legal certainty can be provided with respect to an open-ended procedural standard like the duty to consult. However, there are nevertheless ways in which courts can develop the jurisprudence so as to provide greater guidance about the consultation measures required in particular circumstances. This is a process that has already started to occur in the consultation jurisprudence since the 2004 *Haida Nation* decision.⁵⁰ For instance, courts have held that while past infringements of rights are not properly the subject of consultation obligations, the cumulative impact of a series of measures may have to be taken into account as part of the context for a present-day decision.⁵¹ This clarified a point on which there was initially some ambiguity. More recently, the Supreme Court of Canada held that consultation efforts had been adequate on a “deep consultation” standard in a case where there had been no determination of the strength of the Aboriginal claim.⁵² That decision correctly placed the emphasis on the adequacy of consultation relating to the impacts of the decision on asserted rights, rather than on the more peripheral issue of the strength of the claim, which is only potentially relevant to determining the *standard* by which consultation efforts are to be assessed. This clarified an issue on which lower courts had taken different approaches.⁵³

Governments can encourage the productive development of consultation jurisprudence by strategically appealing decisions on issues where a clearer resolution is needed. One such issue is how the adequacy of consultation should be assessed in relation to large-scale linear projects like pipelines. As argued in Part One, there are special challenges associated with consultation on projects that

50. *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

51. See *Rio Tinto Alcan Inc v. Carrier Sekani Tribal Council*, 2010 SCC 43 at para 49, [2010] 2 SCR 650 [*Rio Tinto*]; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at paras 117, 119, endorsed by *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*, 2017 SCC 41 at paras 41-42, [2017] 1 SCR 1099 [*Chippewas of the Thames*].

52. *Chippewas of the Thames*, *ibid.* at paras 43, 47, 63.

53. See *Gitxaala Nation v. Canada*, 2016 FCA 187 at paras 218-225, 288-309; *Adams Lake Indian Band v. British Columbia (Lieutenant Governor in Council)*, 2012 BCCA 333 at paras 74-78.

affect the interests of many Indigenous groups. The standard developed by the Federal Court of Appeal has proven to be a difficult one for governments to meet on these kinds of projects, as demonstrated by the Northern Gateway and Trans Mountain cases. The inquiry as to what consultation requires in particular cases should be contextual, taking account of the nature of the decision.⁵⁴ The Federal Court of Appeal's insistence on a particular vision of "two-way dialogue" between decision-makers and particular groups may not be realistic in cases where the interests of many different Indigenous groups have to be considered and balanced through a single decision.⁵⁵ The risk is that consultation may function as a *de facto* veto power in these cases, when the Supreme Court has been clear that the duty does not amount to a formal veto. It may be helpful to have an appeal go to the Supreme Court of Canada in the near future on the adequacy of consultation on a large-scale linear projects affecting a large number of Indigenous groups.⁵⁶

In an appeal of this nature, it would be worth emphasizing the ways in which constitutionally protected Aboriginal rights can be adversely affected by policies and legal frameworks that prevent economic development.⁵⁷ Aboriginal title, for instance, has an economic component that entitles an Indigenous group to profit from the development of its land.⁵⁸ Where Indigenous groups with Aboriginal title claims support a project on the basis of benefits they anticipate receiving from the project, their constitutionally protected rights are arguably engaged. Accordingly, it would be inappropriate for duty-to-consult jurisprudence to be developed in a way that systematically privileges the views of Indigenous groups that oppose a project over those that support it. This provides an argument for a consultation standard that is not so onerous or uncertain as to effectively deter large-scale projects from proceeding, especially where such projects have the support of some of the affected Indigenous communities.

Developing consultation policies and protocols

While the constitutional standard for assessing the adequacy of consultation is set by the courts, governments have significant leeway in determining the structures

54. The majority in *Gitxaala Nation v. Canada*, *ibid.*, at para 182 does acknowledge the special difficulties associated with consultation on such a complex project.

55. See Malcolm Lavoie and Moira Lavoie (2018), Trans Mountain and the Problem with Pipeline Consultation in Canada, *Fraser Forum* (September 4), <<https://www.fraserinstitute.org/blogs/trans-mountain-and-the-problem-with-pipeline-consultation-in-canada>>.

56. *Chippewas of the Thames*, *supra* note 51, involved a pipeline project but only a relatively small number of Indigenous groups were affected, and so the special challenges of deep consultation with a large number of communities were not brought to the fore.

57. See Newman, *Pipelines and the Constitution*, *supra* note 44 at 16.

58. *Tsilhqot'in*, *supra* note 3 at paras 70, 73.

and processes through which consultation will take place.⁵⁹ The specific stages of a regulatory decision and the authority of different decision-makers are usually prescribed by statute. In addition, the federal government and provincial governments have policies in place to guide Crown consultation efforts.⁶⁰ In principle, these policies can help provide greater certainty about consultation obligations, assuming the policies themselves are constitutionally compliant.

The Government of Alberta’s approach to consultation policies may provide a useful model for other governments. Under the current policy and guidelines, consultation obligations are prescribed according to distinct consultation “levels”. Each level has distinct requirements and timelines.⁶¹ This approach provides proponents and government with guidance as to the time that consultation is likely to take. It also places specified obligations on project proponents and affected Indigenous communities that can be ascertained early in the approval process.⁶² By contrast, under current federal policy, consultation requirements and timelines are determined on a case-by-case basis.⁶³ Adopting a more prescriptive approach to consultation modeled on Alberta’s guidelines could in principle help mitigate some of the uncertainty associated with consultation at the federal level.

In addition to providing for prescribed timelines and obligations, consultation policies can also be used to achieve greater certainty on other issues. For instance, in some cases there is ambiguity regarding which institutions represent an Indigenous community for consultation purposes. An Indigenous group may be represented by both *Indian Act* band governments and the traditional governance authorities of the Indigenous nation. Where these institutions are at odds, this

59. *Rio Tinto*, *supra* note 51 at paras 60–63; *Chippewas of the Thames*, *supra* note 51 at para 32.

60. Government of Canada (2011), *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, <https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf> [Canada, *Updated Guidelines*]; Government of Alberta (2013), *The Government of Alberta’s Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*, <<http://indigenous.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf?0.6161963123482936>> [Alberta, *Alberta First Nations Consultation Policy*]; Government of Alberta (2014), *The Government of Alberta’s Guidelines on Consultation with First Nations on Land and Natural Resource Management, July 28, 2014*, <http://www.indigenous.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf.pdf?0.3202182164684684> [Alberta, *First Nations Consultation Guidelines*]; Government of British Columbia (2010), *Updated Procedures for Meeting Legal Obligations When Consulting First Nations*, <<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations>>.

61. Alberta, *First Nations Consultation Guidelines*, *ibid.* at 11–14.

62. *Ibid.* at 11–17.

63. Canada, *Updated Guidelines*, *supra* note 60 at 48.

may contribute to uncertainty.⁶⁴ A constitutionally compliant policy providing a mechanism for Indigenous groups to choose who speaks for them for consultation purposes could thus contribute to greater certainty.⁶⁵

In addition to policies adopted by the federal and provincial governments, Indigenous communities can also adopt consultation protocols in order to make their interests and expectations clear.⁶⁶ Such protocols can be co-developed with other orders of government in order to provide a consistent set of expectations to private-sector actors. While there are few publicly available examples of consultation protocols, in principle they are a promising avenue for getting greater clarity with respect to consultation obligations.⁶⁷

64. On a recent controversy engaging this question, see Justine Hunter, Brent Jang, Wendy Stueck, and Shawn McCarthy (2019), *This Pipeline Is Challenging Indigenous Law and Western Law. Who Really Owns the Land?* *Globe and Mail* (January 12), <<https://www.theglobeandmail.com/canada/british-columbia/article-a-contested-pipeline-tests-the-landscape-of-indigenous-law-who/>>.

65. See Newman, *Pipelines and the Constitution*, *supra* note 44 at 15.

66. See Crown-Indigenous and Northern Affairs Canada (2014), *Strengthening Partnerships: Consultation Protocols* (May 14), <<https://www.aadnc-aandc.gc.ca/eng/1400073250630/1400074531009>>. Consultation protocols are also discussed in Douglas R. Eyford (2014), *A New Direction: Advancing Aboriginal and Treaty Rights* (Government of Canada), <<https://kaskadenacouncil.com/wp-content/uploads/2018/03/Eyford2015ANewDirection-AdvancingAboriginalAndTreatyRights.pdf>>.

67. For instance, the Mikisew Cree First Nation has adopted a consultation protocol. The text of the protocol states that citation of the protocol is only permitted with the consent of the Mikisew Cree First Nation. The author has chosen to respect the wishes of the authors of the protocol and not cite directly to it.

Conclusion

The duty to consult serves a noble purpose in seeking to reconcile Crown sovereignty with the claims of pre-existing Indigenous societies. However, it has developed in ways that are sometimes at odds with this purpose. In particular, the degree of uncertainty associated with the duty to consult can work to undermine the Crown's authority to make policy decisions in the public interest. Moreover, this level of uncertainty is arguably not necessary in order to provide robust protection to Indigenous interests. Well-defined substantive rights also serve to reconcile Indigenous interests with Crown authority and can in principle do so while providing greater legal certainty. This benefits all parties, not least the Indigenous groups who are able to make reliable plans for their own lands according to their own priorities. In other words, legal certainty in relation to Indigenous rights reinforces Indigenous self-determination, an important aspect of meaningful reconciliation.

The proposals laid out above can be summarized under two broad headings. First, governments should work to provide greater certainty with respect to the definition and scope of substantive Indigenous rights, so that less reliance is placed on the duty to consult as a means of asserting rights. Second, duty-to-consult jurisprudence and policies should be developed so that it can more effectively guide the conduct of governments, Indigenous communities, and private parties. It is hoped that these proposals provide the beginnings of a blueprint for how the law can better serve the important purposes that underlie the duty to consult.

About the Author

Malcolm Lavoie

Malcolm Lavoie is an Assistant Professor at the University of Alberta Faculty of Law. His research deals primarily with property law, Aboriginal law, and the intersection between private law and constitutional law. Prof. Lavoie holds a B.A. (Hons.) in Economics from the University of British Columbia; an M.Sc. (Distinction) in Political Theory from the London School of Economics; B.C.L. and LL.B. degrees from the McGill University Faculty of Law; and an LL.M. from Harvard Law School. He served as a law clerk for the Hon. Justice Frans Slatter of the Alberta Court of Appeal (2012–2013) and later for the Hon. Justice Rosalie Abella of the Supreme Court of Canada (2013–2014). Prof. Lavoie is currently a candidate for the Doctor of Juridical Science (S.J.D.) degree at Harvard, where he has been a Frank Knox Memorial Fellow, Fulbright Scholar, Weatherhead Center Graduate Research Fellow, and Project on the Foundations of Private Law Fellow. He is a member of the Bar of Alberta and has argued before the Supreme Court of Canada. Prof. Lavoie was a recipient of the 2017 Canadian Association of Law Teachers (CALT) Scholarly Paper Award, as well as the 2015 Harvard Project on the Foundations of Private Law Writing Prize. His research has appeared in numerous publications and has been cited by the Supreme Court of Canada.



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