Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

RESEARCH MEMO

To: Canadian Environmental Law Association ("CELA") Counsel
From: Maria Lucas (LPP Candidate 2021)
Date: May 31st, 2021
Re: The Crown's Duty to Consult and Accommodate Indigenous Peoples

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INTRODUCTION

I was asked to draft a legal memorandum on the Crown's duty to consult and accommodate addressing the following research questions:

1. What is the legal framework of the duty to consult and accommodate?
2. Are there any notable recent legal developments in the duty to consult and accommodate framework?
3. How does Indigenous law influence the duty to consult and accommodate framework?

The research demonstrates that the duty to consult and accommodate has largely remained the same since the framework's inception, though there have been some notable recent legal developments. I conclude that the duty to consult is still lacking as a medium through which to achieve reconciliation. This is because the duty is Crown-centric and therefore dismissive of Indigenous law.

BRIEF ANSWERS

1. The Crown's duty to consult and accommodate is sourced in the honour of the Crown. The duty exists to fulfil the purpose of section 35 of the *Constitution Act, 1982*[1], which is the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown. The duty to consult arises when the Crown has knowledge, either real or constructive, of the potential existence of Aboriginal or treaty rights and contemplates conduct that may adversely affect these rights. Generally, the standard of review is reasonableness in assessing the adequacy of Crown consultation.

2. *Fort McKay First Nation* (*FMFN*)[2], *Redmond*[3] and *Gamlaxyeltxw*[4] and three cases that indicate some notable recent developments in the duty to consult and accommodate framework. *FMFN* holds that the honour of the Crown is a separate and distinct basis to challenge projects where there are significant cumulative impacts concerns, particularly

[1] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*CA, 1982*].
[2] *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163, 4 Alta LR (7th) 215 [*FMFN*].
[3] *Redmond v British Columbia (Forests, Lands Natural Resource Operations and Rural Development)*, 2020 BCSC 561, 462 CRR (2d) 190 [*Redmond*].
[4] *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2020 BCCA 215, [*Gamlaxyeltxw* BCCA].

with respect to treaty rights. *Redmond* holds that a reasonable form of accommodation is the prohibition of a project where the adverse effects on the Aboriginal interests in question outweigh the social benefits of the project. *Gamlaxyeltxw* holds that established treaty rights do not "trump" asserted Aboriginal rights, but they may affect the extent to which Aboriginal rights are accommodated.

3. Indigenous law was not considered in the construction of the duty to consult and accommodate framework. As a result, I argue that the duty has failed as an effective tool for achieving reconciliation, which is evidenced by the fact that the duty to consult has become the most litigated Aboriginal legal issue in recent years. However, through a discussion of the *Gitanyow Wilp Sustainability Assessment Process*[5], I demonstrate that Indigenous peoples are using their legal orders to influence the duty to consult and accommodate framework in the environmental assessment context.

ANALYSIS

Question 1: What is the legal framework of the duty to consult and accommodate?

1. Origin of the Duty to Consult and Accommodate

(a) Section 35 of the Constitution Act, 1982 and Reconciliation

The duty to consult and accommodate exists to give effect to the reconciliatory purpose underpinning section 35 of the *Constitution Act, 1982*.[6] Section 35(1) states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Aboriginal peoples of Canada "includes the Indian, Inuit and Métis peoples of Canada".[7] The purpose of section 35 is "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown".[8] To fulfill this purpose, a deep understanding of the centuries of neglect and disrespect toward Indigenous peoples must be developed.[9] Historically, decisions affecting Indigenous peoples were often made without regard for their interests, dignity, membership and belonging in Canadian society, with terrible neglect and damage to their lives, communities, cultures and ways of life.[10] Further, consistently there was no effort made to receive the views of Indigenous peoples and try to accommodate them – quite the opposite occurred.[11] The duty to consult and accommodate aims to reverse this historical wrong.[12] As a result, the duty to

[5] *Gitanyow Ayookxw for Wilp Sustainability Assessment* (2021), online: http://www.gitanyowchiefs.com/images/uploads/constitution/2020-11-12_Wilp_Sustainability_Assessment_Process_(pilot_phase).pdf
[6] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10, [2010] 3 SCR 103 [*Beckman*].
[7] *CA, 1982*, *supra* note 1, s 35(2). Please note that when using the term "Aboriginal" I am referring to Indigenous peoples as they are defined within section 35. I will endeavour to use the term "Indigenous" when discussing Indigenous peoples outside of the section 35 legal context.
[8] *R v Van der Peet*, [1996] 2 SCR 507 at para 31, 137 DLR (4th) 289.
[9] *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 48, 444 DLR (4th) 298 [*Coldwater*].
[10] *Ibid*.
[11] *Ibid*.
[12] *Ibid*.

consult and accommodate is animated by the concept of reconciliation and is grounded in the honour of the Crown.

(b) Honour of the Crown

The duty to consult flows directly from the honour of the Crown.[13] The honour of the Crown is always at stake in the Crown's dealings with Aboriginal peoples.[14] The honour of the Crown is not a mere incantation, but rather a core precept that finds its application in concrete practices.[15] The honour of the Crown gives rise to different duties in different circumstances.[16] In the context of the duty to consult, the honour of the Crown requires the Crown to act honourably in defining section 35 rights and in reconciling them with other rights and interests.[17]

2. When the Duty Arises

The duty to consult arises "when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it".[18] This test can be broken down into three elements: (a) the Crown's knowledge, actual or constructive, of a potential Aboriginal claim or right; (b) contemplated Crown conduct; and (c) the potential that the contemplated conduct may adversely affect an Aboriginal claim or right.[19]

(a) Real or Constructive Knowledge

Real or actual knowledge arises when a claim has been filed in court or advanced in the context of negotiations, or when a treaty right may be impacted.[20] Constructive knowledge arises when lands are known or reasonably suspected to have been traditionally occupied by an Aboriginal community or an impact on rights may reasonably be anticipated.[21] An Aboriginal group does not need to prove the existence of an Aboriginal or treaty right to prompt the Crown into consultation.[22] The Crown's knowledge of a credible but unproven claim will trigger a duty to consult and accommodate.[23] This flows from the fact that the purpose of consultation is to protect unproven or established rights from irreversible harm as settlement negotiations unfold.[24]

(b) Contemplated Crown Conduct

Conduct contemplated by the Crown, or conduct over which the Crown has control, that may adversely affect an Aboriginal claim or right includes:

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[13] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16, [2004] 3 SCR 511 [*Haida*].
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid* at para 18.
[17] *Ibid* at para 20.
[18] *Haida*, *supra* note 13 at para 35.
[19] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 31, [2010] 2 SCR 650 [*Rio Tinto*].
[20] *Ibid* at para 40.
[21] *Ibid*.
[22] *Ibid*.
[23] *Haida*, *supra* note 13 at para 37.
[24] *Rio Tinto*, *supra* note 19 at para 41.

i. designing an environmental assessment process for a natural resource development project;[25]
ii. various steps in the environmental assessment process itself (ie: stage at which scope of project is being determined);[26]
iii. issuing permits, for example, for winter road construction;[27]
iv. selling off Crown lands;[28]
v. creating or administering legislative or policy initiatives at the executive level of government, possibly including regulations, but not the process of creating legislation itself at the parliamentary level of government;[29]
vi. enforcing laws, particularly relating to regulatory restrictions;[30] and
vii. funding a project that could cause a potential adverse impact on the rights of Aboriginal peoples.[31]

(c) Adverse Affect on Aboriginal Claims or Rights

The third part of the duty to consult is the possibility that Crown conduct may affect an Aboriginal claim or right.[32] The claimant must show a causal relationship between the proposed government conduct or decision and potential for adverse impacts on pending Aboriginal claims or rights.[33] Past wrongs, including previous breaches of the duty to consult, do not suffice.[34] Further, mere speculative impacts on an Aboriginal claim or right will not suffice.[35] There must

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[25] See *Dene Tha' First Nation v Canada (Minister of Environment)*, 2006 FC 1354, 303 FTR 106. This case was upheld on its facts in *Dene Tha' First Nation v Canada (Minister of Environment)*, 2008 FCA 20, 378 NR 251.
[26] See *Kwikwetlem First Nation v British Columbia (Utilities Commission*), 2009 BCCA 68, 89 BCLR (4th) 273, where the Court suggested the duty to consult may arise before the request for a certificate of public convenience and necessity which is the first regulatory step in approving the scope, design, and cost estimates of the most cost-effective project. The Court noted at para 70 that for consultation to be meaningful, it must take place when the project is being defined and continue until the project is completed.
[27] See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*MCFN* 2005].
[28] See *Musqueam Indian Band v Canada,* 2008 FCA 214, 378 NR 335, leave to appeal refused [2008] SCCA No. 374 (SCC) and see *Brokenhead First Nation v Canada (Attorney General)*, 2009 FC 982, [2009] 4 CNLR 30, reversed in *Brokenhead First Nation v Canada (Attorney General)*, 2011 FCA 148, 419 NR 289, where the Court stated that Canada had an obligation to consult with two of the applicant First Nations in its decision-making with respect to the disposition of a large and valuable tract of "surplus" land it owned. The Crown's failure to consult rendered its decision-making with respect to the land invalid.
[29] See *Little Salmon/Carmacks First Nation v Yukon (Minister of Energy, Mines and Resources),* 2008 YKCA 13, 296 DLR (4th) 99, affirmed at *Beckman*, *supra* note 6 (SCC), where a final agreement is challenged; and see *Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 379 NR 297, which involved a fishing policy. However, also see *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765, holding (at para 2) that "the duty to consult doctrine is ill-suited to the law-making process; the law-making process does not constitute 'Crown conduct' that triggers the duty to consult". Regarding regulations, see (in obiter) at para 51: "Finally, my conclusions respecting the duty to consult do not apply to the process by which subordinate legislation (such as regulations and rules) is adopted, as such conduct is clearly executive rather than parliamentary".
[30] See, for example, *R v Douglas*, 2007 BCCA 265, 278 DLR (4th) 653, leave to appeal refused [2007] SCCA No. 352 (SCC) involving a decision to open fishing to non-aboriginal groups, which required consultation.
[31] *Nova Scotia (Aboriginal Affairs) v Pictou Landing First Nation*, 2019 NSCA 75.
[32] *Rio Tinto*, *supra* note 19 at para 45.
[33] *Ibid*.
[34] *Ibid*.
[35] *Ibid* at para 46.

be an appreciable adverse effect on the Indigenous community's ability to exercise their Aboriginal right.[36]

3. Who Owes the Duty

(a) The Crown

The duty to consult rests with the Crown.[37] The Crown may delegate procedural aspects of the duty to other actors.[38] However, the ultimate legal responsibility for consultation and accommodation rests with the Crown because the honour of the Crown cannot be delegated.[39] The Crown in right of Canada and the Crown in right of a particular province both owe a duty to consult when the subject matter of consultation falls within their respective jurisdictions.[40] Municipalities are not the Crown, but creatures of statute and do not in general have the authority to consult with and if indicated, accommodate Aboriginal peoples in making day-to-day operational decisions.[41] However, some provinces have enacted statutory provisions requiring municipalities to consult, and individual municipal initiatives meant to foster collaborative relationships with Indigenous peoples are taking place across Canada.[42]

(b) Administrative Tribunals

A legislature may choose to delegate to a tribunal the Crown's duty to consult.[43] Therefore, whether an administrative tribunal owes a duty to consult will depend on the duties and powers contained in the tribunals enabling legislation.[44] Alternatively, the legislature may choose to confine a tribunal's power to deciding on the adequacy of consultation.[45] In this case, the tribunal is not actually engaged in the consultation process but is reviewing whether the Crown has

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[36] *Ibid*.
[37] *Haida*, *supra* note 13 at para 53.
[38] *Haida*, *supra* note 13 at paras 51, 53.
[39] *Ibid* at para 53.
[40] See *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation* [2007] 3 CNLR 221, 29 CELR (3d) 191 (Ont. SCJ), where the Court ruled that it was the provincial Crown which bore the responsibility of consulting with the First Nation concerning a project for which provincial approvals were required. See also *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at paras 33, 50-52, [2014] 2 SCR 447.
[41] See *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379, 327 BCAC 276 [*Neskonlith*], where the Court held that municipalities, as creatures of statute, did not in general have the authority to consult with and accommodate First Nations as a specific group in making day-to-day operational decisions. Municipal governments lack the practical resources to consult and accommodate. The "push-down" of the Crown's duty to consult from the Crown to local governments, such that consultation and accommodation would be thrashed out in the context of the mundane decisions regarding licences, permits, zoning restrictions and local by-laws, would be completely impractical (see *Neskonlith* at paras 70-72).
[42] Angela D'Elia Decembrini and Shin Imai, "Supreme Court of Canada Cases Strengthen Argument for Municipal Obligation to Discharge Duty to Consult: Time to Put Neskonlith to Rest" (2019) 56:3 Alta L Rev 935 at 935. See this article for further discussion on how *Neskonlith* was arguably wrongly decided in law.
[43] *Rio Tinto*, *supra* note 19 at para 56.
[44] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 32, [2017] 1 SCR 1099 [*Chippewas of the Thames First Nation*]; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 30, [2017] 1 SCR 1069 [*Clyde River*]; *Rio Tinto*, *supra* note 19 at para 60.
[45] *Rio Tinto*, *supra* note 19 at para 57.

discharged its duty to consult.[46] Tribunals may have neither of these duties, one of these duties or both, depending on what responsibilities the legislature has conferred on them through the enabling statute.[47] However, while the Crown may rely on the procedures of an administrative tribunal in discharging its duty to consult, it is still the responsibility of the Crown rather than the tribunal to determine the necessity for and adequacy of consultation.[48]

(c) Third Parties

The Crown cannot delegate its overall responsibility to fulfil the duty to consult and accommodate to third parties, but it is able to delegate procedural aspects of the process of consultation.[49] For example, administrative tribunals may require that a proponent seeking to develop a project that may have an adverse impact on Aboriginal rights engage with an Aboriginal group to accommodate their interest before granting any approvals.[50] Industry proponent accommodation may come in the form of an Impact Benefit Agreement ("IBA"). IBAs are privately negotiated, legally enforceable agreements that establish formal relationships between Indigenous communities and industry proponents.[51] Generally, IBAs serve two purposes: (1) they seek to address the potentially adverse effects of development activities on Indigenous communities, with a view to providing some compensation for these activities; and (2) IBAs help to ensure that Indigenous communities acquire benefits from resource development activities occurring on their traditional territories.[52]

4. <u>To Whom the Duty May Be Owed</u>

a) Aboriginal Collectives

The duty to consult and accommodate is owed to the holders of Aboriginal or treaty rights.[53] The duty is not owed to individuals, but to a group or community that possesses the rights because Aboriginal and treaty rights are understood to be collectively held.[54] As a result, consultation with elected members of an Indigenous community is deemed sufficient consultation.[55] However, the conflict over the development of the Coastal GasLink pipeline in Wet'suwet'en territory in early 2020 demonstrated that consultation with elected Indigenous leadership may not always be deemed sufficient consultation.[56] To avoid such conflict, the duty to consult should be discharged

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[46] *Ibid*.
[47] *Rio Tinto*, *supra* note 19 at paras 55-58.
[48] *Clyde River*, *supra* note 44 at paras 22, 30; *Chippewas of the Thames First Nation*, *supra* note 44 at paras 32, 37.
[49] *Haida*, *supra* note 13 at para 53.
[50] *Clyde River*, *supra* note 44 at paras 31-32; *Chippewas of the Thames First Nation*, *supra* note 44 at para 60.
[51] Norah Kielland, "Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements" *Library of Parliament* (5 May 2015) at 1, online: https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2015-29-e.pdf
[52] *Ibid*.
[53] *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 30, [2013] 2 SCR 227.
[54] *Ibid*.
[55] *Red Chris Development Co. v. Quock*, 2006 BCSC 1472 at para 16, 152 ACWS (3d) 706.
[56] Betsy Trumpener, "A year after Wet'suwet'en blockades, Coastal GasLink pipeline pushes on through pandemic" *CBC News* (5 Feb 2021), online: https://www.cbc.ca/news/canada/british-columbia/coastal-gaslink-pipeline-bc-wet-suwet-en-pandemic-1.5898219

by taking reasonable steps to ensure that all points of view within an Indigenous community are given appropriate consideration.[57]

Canadian legally defined Indigenous identity also impacts Métis peoples in terms of their entitlement to section 35 rights and subsequently to the duty to consult. To be entitled to section 35 rights, Métis must satisfy the following criteria: (a) self-identify as Métis; (b) demonstrate an ancestral connection to a historic Métis community; and (c) be accepted by the modern Métis community ("*Powley* criteria").[58] If Métis do not satisfy this criterion, they are not entitled to section 35 rights.[59] This suggest that non-*Powley* compliant Métis would also not be entitled to a duty to consult, which exists to protect section 35 rights.

Recently, the Supreme Court of Canada recognized that the phrase "aboriginal peoples of Canada" in section 35(1) of the *Constitution Act, 1982* also encompasses non-Canadian and non-resident Indigenous peoples who are descendants of the Aboriginal societies that occupied Canadian territory at the time of European contact.[60] This holding will not change the current duty to consult doctrine because in order for the duty to arise, the Crown must have knowledge, whether "real or constructive", that it's contemplated conduct will adversely affect an Aboriginal or treaty right.[61] Given this requirement, the Crown is free to act if it lacks knowledge, whether real or constructive, of a potential impact on the rights of Aboriginal peoples situated outside Canada.[62]

The Crown is not responsible for seeking out Aboriginal groups, including those outside Canada, in the absence of actual or constructive knowledge of a potential impact on their rights.[63] It is for the potentially impacted Aboriginal peoples to put the Crown on notice of their claims.[64] Once the Crown is put on notice, it has to determine whether a duty to consult arises and, if so, what the scope of the duty is.[65] This determination may differ for Aboriginal groups located outside Canada because they are not implicated in the consultation process to the same degree as those Aboriginal groups within Canada.[66] The Court recognized that integrating groups outside Canada into consultations by the Crown with groups inside Canada may prove challenging.[67] However, the difficulty of identifying members of Aboriginal communities must not be exaggerated as a basis for defeating their rights under the Constitution of Canada.[68]

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[57] *Nlaka'pamux Nation Tribal Council v British Columbia (Project Assessment Officer, Environmental Assessment Office)*, 2009 BCSC 1275 at para 73, [2009] 4 CNLR 213. This case was reversed on other grounds in *Nlaka'pamux Nation Tribal Council v British Columbia (Project Assessment Director, Environmental Assessment Office)*, 2011 BCCA 78, 16 BCLR (5th) 197.
[58] *R v Powley*, 2003 SCC 43 at paras 30-34, [2003] 2 SCR 207 [*Powley*].
[59] *L'Hirondelle v Alberta (Minister of Sustainable Resource Development)*, 2013 ABCA 12, 81 Alta LR (5th) 371.
[60] *R v Desautel*, 2021 SCC 17. Note that at para 32, the Court added that this criterion will need to be modified in the case of the Métis because Métis communities arose after European contact. The Court left this question for another day because *Desautel* was not about Métis section 35(1) rights.
[61] *Ibid* at para 72.
[62] *Ibid* at paras 74-75.
[63] *Ibid* at para 75.
[64] *Ibid*.
[65] *Ibid* at para 76.
[66] *Ibid*.
[67] *Ibid*.
[68] *Powley*, *supra* note 58 at para 49.

b) Aboriginal Organizations

Aboriginal organizations may or may not adequately represent the rights holders for the purposes of consultation of section 35 rights.[69] If an Aboriginal organization is properly constituted so as to adequately represent the rights holders, the Crown may fulfil its duty by consulting with the group if it takes the necessary precautions to ensure the organization has the appropriate mandate.[70] If the group is not the chosen representative of rights holders, or it is made up of persons otherwise represented by more clearly defined Aboriginal groups (such as bands who have already been consulted), then the Crown does not have a duty to consult with such groups.[71] However, when rights holders come together to form an organization to represent their interests, consultation with that organization can be sufficient even if some of the individuals who belonged to the bands involved refuse to participate.[72]

5. Spectrum of the Duty to Consult

Consultation exists on a spectrum. At one end of the spectrum are cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor.[73] At the other end of the spectrum are 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.[74] In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.[75] This may involve obtaining the consent of the Aboriginal titleholders for actions that will be taken with respect to their title lands.[76]

a. Aboriginal Consent and Infringement/Justification Framework

Canadian jurisprudence makes clear that Aboriginal consent does not constitute a veto in the duty to consult context.[77] Aboriginal consent arises in the context of proven Aboriginal title and is subject to infringement and justification. Once Aboriginal title is established, the Crown cannot proceed with development of title land *not* consented to by the title-holding group unless it has

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[69] *Native Council of Nova Scotia v Canada (Attorney General)*, 2007 FC 45, 306 FTR 294. This case was affirmed in 2008 FCA 113, 377 NR 247, where the Court considered the ability of the Native Council of Nova Scotia to represent the rights holders and found that not every individual member of the Native Council of Nova Scotia had a right to fish for food and there is no duty to consult with and accommodate individuals who do not have an Aboriginal right to fish. In this case, at issue was specifically a Mi'kmaq right to fish.
[70] *Labrador Métis Nation v Newfoundland and Labrador (Minister of Transportation and Works)*, 2007 NLCA 75, 272 Nfld & PEIR 178.
[71] *Kaska Dena Council v Yukon*, 2019 YKSC 13, [2019] 3 CNLR 93, where the Court found that a society that did not claim to be a rights holder but stated that its members were rights holders was not, on the evidence, the rights holder owed a duty of consultation.
[72] *Hiawatha First Nation v Ontario (Minister of Environment)*, 221 OAC 113, [2007] 2 CNLR 186.
[73] *Haida*, *supra* note 13 at para 43.
[74] *Ibid* at para 44.
[75] *Ibid*.
[76] *Haida*, *supra* note 13 at paras 24, 40; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at para 168, 153 DLR (4th) 193 [*Delgamuukw*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 91, [2014] 2 SCR 257 [*Tsilhqot'in*].
[77] *Haida*, *supra* note 13 at para 48; *Beckman*, *supra* note 6 at para 14; *Chippewas of the Thames First Nation*, *supra* note 44 at para 59; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras 80, 83, [2017] 2 SCR 386 [*Ktunaxa*].

discharged its duty to consult and the development is justified pursuant to section 35 of the *Constitution Act, 1982*.[78] To justify infringement of title lands, the Crown must, in addition to discharging the duty to consult, demonstrate: (i) its actions were backed by a compelling and substantial objective; and (ii) that the action is consistent with the Crown's fiduciary obligation to the Aboriginal group.[79]

i. Compelling and Substantial Objective

To constitute a compelling and substantial objective, the broader public interest asserted by the Crown must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.[80] A compelling and substantial objective includes development of agriculture, forestry, mining, hydroelectric power, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.[81] If a compelling and substantial objective is established, the Crown must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal peoples.[82]

ii. Crown's Fiduciary Duty

The Crown's underlying title to Aboriginal title lands is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group.[83] This impacts the justification process in two ways.[84]

First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that benefits present and future generations.[85] This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.[86]

Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process.[87] Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion be necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).[88]

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[78] *Tsilhqot'in*, *supra* note 76 at para 91.
[79] *Tsilhqot'in*, *supra* note 76 at para 77; *R v Sparrow* [1990] 1 SCR 1075 at 1113-1114, 70 DLR (4th) 385.
[80] *Tsilhqot'in*, *supra* note 76 at para 82.
[81] *Delgamuukw*, *supra* note 76 at para 165.
[82] *Tsilhqot'in*, *supra* note 76 at para 84.
[83] *Ibid* at para 85.
[84] *Ibid*.
[85] *Ibid* at para 86.
[86] *Ibid*.
[87] *Ibid* at para 87.
[88] *Ibid*.

The requirement of proportionality in the justification process is reflective of the Crown's duty to consult and accommodate at the claims stage. At this stage, the extent of the Crown's consultation and accommodation is based on the strength of the case supporting the existence of the Aboriginal right or title and the seriousness of the potentially adverse effect upon the right or title claimed.[89]

b. *United Nations Declaration on the Rights of Indigenous Peoples and Free, Prior and Informed Consent*

The *United Nations Declaration on the Rights of Indigenous Peoples* ("*UNDRIP*")[90] contains various articles that reference Indigenous peoples' right to free, prior and informed consent ("FPIC"). Article 32(2) relates to the development of resources and often arises in the duty to consult context. Article 32(2) states:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[91]

UNDRIP's FPIC provisions initially kept Canada from endorsing the UNDRIP.[92] The Government of Canada was concerned that the adoption of UNDRIP and it's FPIC provisions would lead to providing Indigenous peoples with a veto over development projects.[93] However, in 2016, the Government of Canada endorsed UNDRIP "without qualification" and recently introduced Bill C-15[94] that, if passed into law, will facilitate the implementation of UNDRIP into Canadian law.[95]

c. *Bill C-15: An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples, FPIC and the Duty to Consult*

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[89] *Ibid*.
[90] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (Vol. III) (2007) 15 [*UNDRIP*].
[91] *Ibid*, art 32(2) [emphasis added].
[92] Kevin Hille, Roger Townshend & Jaclyn McNamara, "Bill C-15 (UNDRIP Act) Commentary" *Olthuis Kleer Townshend LLP* (23 March 2021) at 9, online: https://i4b251yqxbh32mme4165ebzu-wpengine.netdna-ssl.com/wp-content/uploads/2021/01/OKT-Bill-C-15-UNDRIP-Commentary-2.pdf [Hille et al.].
[93] *Ibid*.
[94] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2020, (as introduced in the House of Commons 3 December 2020). Note that the Government of British Columbia has passed a similar bill that has resulted in the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.
[95] Government of Canada, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html; Department of Justice Canada, "Bill C-15: United Nations Declaration on the Rights of Indigenous Peoples Act" (12 April 2021) at 1-2, online: https://www.justice.gc.ca/eng/declaration/un_declaration_EN.pdf [Department of Justice Canada]; Hille et al., *supra* note 92 at 4.

Bill C-15 is meant to affirm the UNDRIP as a universal international human rights instrument with application in Canadian law and provide a framework for the Government of Canada's implementation of the UNDRIP.[96]

The Government of Canada has characterized UNDRIP's FPIC provisions as being about "working together in partnership and respect" and "striving to achieve consensus".[97] FPIC *is not* about having a veto over government decision-making.[98] Rather, FPIC is about ensuring that there is effective and meaningful participation of Indigenous peoples in decisions that affect them, their communities and territories.[99]

If passed, Bill C-15 would not change the Crown's duty to consult Indigenous peoples, or other consultation and participation requirements set out in other legislation like the *Impact Assessment Act*[100].[101] However, Bill C-15 is expected to inform how the Government of Canada approaches the implementation of its legal duties, including the duty to consult, going forward.[102]

d. Neither Canada's Duty to Consult and Accommodate Framework or UNDRIP Provide for an Indigenous Veto

The resource industry is concerned that UNDRIP's FPIC provisions and Canada's endorsement of these provisions through the passage of Bill C-15 have the potential to create an Indigenous veto (or an expectation thereof) over resource development projects.[103] However, such interpretations misunderstand both the content of Canadian law and of UNDRIP.[104] Neither Canadian law nor UNDRIP provide for a sweeping Indigenous veto, but both do require Indigenous consent in some circumstances.[105]

Currently Canadian law requires Aboriginal consent in the duty to consult context where Aboriginal title is established. This Aboriginal consent does not provide Indigenous peoples with a sweeping veto power, as the Crown still has recourse to the *Sparrow* infringement and justification framework should an Aboriginal title-holding group withhold consent. However, the Crown must ensure it fulfills its duty to consult prior to justifying infringement of Aboriginal title lands in instances where an Aboriginal title-holding group withholds consent. Similarly, UNDRIP's FPIC requires governments to seek consent, but this consent is not an absolute veto, as Article 46 of UNDRIP provides for qualifications and limitations for the rights set out in the UNDRIP.[106]

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[96] Department of Justice Canada, *supra* note 95 at 1.
[97] *Ibid* at 4.
[98] *Ibid* [emphasis added].
[99] *Ibid*.
[100] *Impact Assessment Act*, SC 2019, c 28 [*IAA*].
[101] Department of Justice Canada, *supra* note 95 at 5.
[102] *Ibid*.
[103] Hille et al., *supra* note 92 at 9.
[104] *Ibid*.
[105] *Ibid*.
[106] *Ibid* at 10.

Further, the UN Handbook for Parliamentarians on implementing UNDRIP distinguishes between when FPIC requires a government to seek consent and when it requires that consent be obtained.[107] FPIC should be sought in relation to resource development projects, legislation affecting Indigenous peoples, and administrative measures related to Indigenous lands, territories, natural resources and sacred sites in accordance with the UNDRIP and the jurisprudence of international human rights treaty bodies.[108] FPIC should be obtained when Indigenous peoples are subject to relocation and in cases of storage or disposal of toxic waste on Indigenous lands or territories.[109]

The requirement for Indigenous consent exists in UNDRIP and the duty to consult and accommodate framework and it does not always amount to an absolute veto.[110] What UNDRIP does is substantially widen the requirement for governments to seek to obtain Indigenous consent in good faith, to include all situations where the rights of Indigenous peoples may be affected.[111] This is wider than the duty to consult and accommodate, which only requires Indigenous consent in situations where there are established rights, particularly Aboriginal title. Courts will need to address the broader legal "access" to Indigenous consent through the implementation of UNDRIP as the law concerning section 35 develops.[112]

6. Content of the Duty to Consult

The duty to consult and accommodate is a right to a process, not to a particular outcome.[113] Therefore, procedural safeguards of natural justice mandated by administrative law infuses the duty and will determine the content in each case.[114] This content is dependent upon which part of the duty to consult spectrum an Aboriginal claim lies. On the end of the spectrum where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.[115] On the end of the spectrum where a strong *prima facie* case for the claim is established, the duty to consult 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.[116] This list is neither exhaustive, nor mandatory for every case.[117]

Good faith on both sides is required at all stages of the duty to consult process.[118] Sharp dealing is not permitted.[119] The Crown must have the intention of substantially addressing Aboriginal

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[107] United Nations et al, *Implementing the UN Declaration on the Rights of Indigenous Peoples Handbook for Parliamentarians N° 23* (2014) at 27-30, online: https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf
[108] *Ibid* at 28.
[109] *Ibid* at 29.
[110] Hille et al., *supra* note 92 at 10.
[111] *Ibid*.
[112] *Ibid*.
[113] *Ktunaxa*, *supra* note 77 at para 83.
[114] *Haida*, *supra* note 13 at para 41.
[115] *Ibid* at para 43.
[116] *Ibid* at para 44.
[117] *Ibid*.
[118] *Ibid* at para 42.
[119] *Ibid*.

concerns as they are raised.[120] As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.[121] There is no duty to agree; rather, the commitment is to a meaningful process of consultation.[122] However, mere hard bargaining will not offend an Aboriginal people's right to be consulted.[123]

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 in the consultation process.[124] Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims.[125] This "balancing" occurs at the accommodation stage of the duty to consult.

7. Duty to Accommodate

The duty to accommodate requires the Crown to balance "competing societal interests" with potential impacts on Aboriginal or treaty rights.[126] The purposes of accommodation include seeking compromise, harmonizing conflicting interests, and avoiding irreparable harm to rights.[127] Just as with consultation, accommodation will vary with the circumstances of each case.[128] However, in all cases, the duty to consult and, if appropriate, accommodate is a "two-way street".[129]

The key to effective consultation and accommodation is responsiveness on the part of Aboriginal peoples and the Crown.[130] Aboriginal peoples must delineate the nature and extent of their rights (if not yet proven),[131] clearly express their concerns about the adverse effects of an activity on these rights, and work with government to find accommodation measures where appropriate.[132] The Crown must listen to, understand, and consider the Aboriginal peoples' points of view with

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[120] *Delgamuukw*, *supra* note 76 at para 168.
[121] *Haida*, *supra* note 13 at para 42.
[122] *Ibid*.
[123] *Ibid*.
[124] *Ibid* at para 45.
[125] *Ibid*.
[126] *Haida*, *supra* note 13 at para 50; *Chippewas of the Thames First Nation*, *supra* note 44 at paras 59-60.
[127] *Haida*, *supra* note 13 at paras 47-50.
[128] *Haida*, *supra* note 13 at para 39.
[129] *Ktunaxa*, *supra* note 77 at para 80.
[130] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 25, [2004] 3 SCR 550 [*Taku River*].
[131] *Haida*, *supra* note 13 at para 36.
[132] See *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470, 64 BCLR (3d) 206, where the Court stated at paras 160-61: The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. There is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them. They cannot frustrate the consultation process by refusing to meet or participate, or by imposing unreasonable conditions (citations omitted).

genuine concern and an open mind.[133] Only then can the process of consultation lead to accommodations that respond to the concerns of the Aboriginal peoples.[134]

Any consultation process that excludes the concept of accommodation will be meaningless.[135] However, "meaningful" consultation may not always translate into Aboriginal peoples obtaining the accommodation they seek, such as the complete cancellation of a project.[136] Like consultation, accommodation does not guarantee substantive outcomes.[137] While this may prove unsatisfactory to Aboriginal peoples asserting particularly unproven claims, in the difficult period between claim assertion and claim resolution, consultation and accommodation, imperfect as they may be, are the best available legal tools in the reconciliation basket.[138]

8. Summary of Consultation and Accommodation Process

   a. Initiation of the consultation process, triggered when the Crown has knowledge, whether real or constructive, of the potential existence of an Aboriginal or treaty right and contemplates conduct that might adversely affect it;
   b. Determination of the level of consultation required, by reference to the strength of the prima facie claim and the significance of the potential adverse impact on the Aboriginal interest;
   c. Consultation at the appropriate level; and
   d. If the consultation shows it is appropriate, accommodation of the Aboriginal interest, pending final resolution of the underlying claim.[139]

9. Standard of Review: Reasonableness

If the scope of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982* are in question, this requires a final and determinate answer from the courts and therefore must be reviewed on a standard of correctness.[140] However, if the scope of Aboriginal and treaty rights are not in question, then the standard of review is reasonableness.[141]

In the duty to consult context, it has been said that to satisfy the duty, consultation must be "reasonable".[142] Reasonable consultation means the Crown must show that it has considered and

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[133] *Coldwater*, *supra* note 9 at para 56.
[134] *Ibid*.
[135] *MCFN* 2005, *supra* note 27 at para 54.
[136] This was the case in *Ktunaxa*, *supra* note 77. Though see *Redmond*, *supra* note 3. *Redmond* demonstrates that depending on the competing interests, the consultation process may lead to accommodation in the form of complete cancellation of a project to protect the Aboriginal interests at stake.
[137] *Coldwater*, *supra* note 9 at para 58.
[138] *Ktunaxa*, *supra* note 77 at para 86.
[139] *Ibid* at para 81.
[140] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 55, 441 DLR (4th) 1.
[141] *Coldwater*, *supra* note 9 at para 27.
[142] *Haida*, *supra* note 13 at paras 62-63; *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 8, 179, 182-85, 1 CELR (4th) 183 [*Gitxaala Nation*]; *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at paras 226, 508-09, [2018] 3 CNLR 205 [*TWN* 2018]; *Squamish First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 216 at para 31, 436 DLR (4th) 596 [*SFN*]; *Coldwater*, *supra* note 9 at para 40.

addressed the rights claimed by Indigenous peoples in a meaningful way.[143] "Meaningful" is a standard that also appears in the case law.[144]

The case law contains a lot of indicia as to what constitutes "reasonable" and "meaningful" in the context of the duty to consult such as:

a. consultation is more than "blowing off steam";[145]
b. the Crown possessing a state of open-mindedness about accommodation;[146]
c. the Crown exercising "good faith";[147]
d. the existence of two-way dialogue;[148]
e. the process being more than "a process for exchanging and discussing information";[149]
f. the conducting of dialogue that leads to a demonstrably serious consideration of accommodation;[150]
g. the Crown grappling with the real concerns of the Aboriginal applicants so as to explore possible accommodation of those concerns;[151] and
h. Crown representatives whom Aboriginal claimants consult with must not be mere note takers, but they should have the ability to respond meaningfully to the concerns raised by Aboriginal claimants.[152]

As previously mentioned, the duty to consult and accommodate is a right to a process, not a particular outcome.[153] While reaching an agreement is desirable, it may not always be possible.[154] The duty to consult and accommodate does not require that agreement be reached, but that the Crown consult in a meaningful manner with Indigenous peoples and come to a reasonable conclusion before taking action that could adversely affect their rights.[155] In the view of Canadian courts, this process of consultation, based on a relationship of mutual respect, advances reconciliation regardless of the outcome.[156]

Question 2: Are there any notable recent legal developments in the duty to consult and accommodate framework?

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[143] *Clyde River*, *supra* note 44 at para 41; *SFN*, *supra* note 142 at para 37; *Haida*, *supra* note 13 at para 42; *Coldwater*, *supra* note 9 at para 40.
[144] *Gitxaala Nation*, *supra* note 142 at paras 179, 181, 231-34; *TWN* 2018, *supra* note 142 at paras 6, 494-501, 762; *Haida*, *supra* note 13 at paras 10, 36, 42; *Taku River*, *supra* note 130 at paras 2, 29; *Chippewas of the Thames First Nation*, *supra* note 44 at paras 32, 44; *Coldwater*, *supra* note 9 at para 40.
[145] *MCFN* 2005, *supra* note 27 at para 54.
[146] *Gitxaala Nation*, *supra* note 142 at para 233.
[147] *Haida*, *supra* note 13 at para 41; *Clyde River*, *supra* note 44 at paras 23-24; *Chippewas of the Thames First Nation*, *supra* note 44 at para 44.
[148] *Gitxaala Nation*, *supra* note 142 at para 279.
[149] *TWN* 2018, *supra* note 142 at paras 500-02.
[150] *Ibid* at para 501.
[151] *Ibid* at para 6.
[152] *Gitxaala Nation*, *supra* note 142 at para 279.
[153] *Ktunaxa*, *supra* note 77 at para 83.
[154] *Ibid*.
[155] *Haida*, *supra* note 13 at paras 42, 62; *Ktunaxa*, *supra* note 77 at paras 82-83.
[156] *Coldwater*, *supra* note 9 at para 52.

1) *Fort McKay First Nation v Prosper Petroleum Ltd* (*FMFN*): The Honour of the Crown is an Independent Basis Upon Which to Challenge Resource Projects

FMFN highlights the risks of unaddressed cumulative effects of resource development and the honour of the Crown as a separate and distinct basis to challenge projects where there are significant cumulative impacts concerns, particularly with respect to established rights.[157]

In *FMFN*, Fort McKay First Nation ("FMFN") appealed a decision of the Alberta Energy Regulator (AER) to approve an application by Prosper Petroleum Ltd. ("Prosper") in June 2018 for the Rigel bitumen recovery project ("Project").[158] This Project would be located within five kilometers of the FMFN's Moose Lake Reserves.[159]

FMFN's appeal of the AER's decision arose out of it's negotiations with the Government of Albera, which began in 2003, regarding the development of the Moose Lake Access Management Plan ("MLAMP").[160] The purpose of the MLAMP is to address the cumulative effects of oil sands development on FMFN's Treaty 8 rights.[161] The MLAMP had not been finalized at the time the AER granted approval of Prosper's Project.[162]

The question that came before the Alberta Court of Appeal ("the Court") was whether the AER erred by failing to consider the honour of the Crown and refusing to delay approval of Prosper's Project until the FMFN's negotiations with Alberta on the MLAMP were completed.[163]

The Court allowed FMFN's appeal because it found that while the AER's constituent legislative scheme did not permit it to consider issues related to the adequacy of Crown consultation, the AER was granted a broad mandate to determine whether a project is in the public interest.[164] The "public interest" includes adherence to constitutional principles like the honour of the Crown, which can give rise to duties beyond the duty to consult.[165] The duty to consult is only one of four situations recognized "thus far" where the honour of the Crown arises:

1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest;
2) The honour of the Crown informs the purposive interpretation of section 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest;

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[157] Bryn Gray & Selina Lee-Andersen, "Canadian Power - Aboriginal Law" *McCarthy Tétrault* (18 March 2021), online: https://www.mccarthy.ca/en/insights/blogs/canadian-energy-perspectives/canadian-power-aboriginal-law [Gray & Lee-Andersen].
[158] *FMFN*, *supra* note 2 at paras 1-3.
[159] *Ibid* at para 2.
[160] *Ibid* at para 1.
[161] *Ibid*.
[162] *Ibid*.
[163] *Ibid* at para 3.
[164] *Ibid* at paras 57, 65.
[165] *Ibid* at paras 40, 53, 65.

3) The honour of the Crown governs treaty-making and implementation, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing; and
4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples.[166]

In *FMFN*, FMFN asserted that the honour of the Crown was implicated through treaty implementation.[167] FMFN noted that the honour of the Crown infuses the performance of every treaty obligation and stressed the ongoing relationship between the Crown and First Nations brought on by the need to balance the exercise of treaty rights with development under Treaty 8.[168] The AER's enabling legislation did not preclude it from considering these issues in determining whether approval of Prosper's Project was in the public interest.[169]

The Court found that the AER's enabling legislation removed from the AER's jurisdiction consideration of the adequacy of Crown consultation, but the issues raised in *FMFN* were not so limited because they included the Crown's relationship with the FMFN and matters of reconciliation.[170] These issues engaged the public interest and their consideration was not precluded by the language of the AER's enabling legislation.[171]

The Court held that the AER erred in concluding that its enabling legislation prevented it from considering if the MLAMP process was relevant to assessing whether Prosper's Project was in the public interest.[172] The AER was under a statutory duty to consider the extent to which the MLAMP negotiations implicated the honour of the Crown and therefore needed to be considered as part of the "public interest" before approval of Prosper's Project was granted.[173] The AER's public interest mandate can and should encompass considerations of the effect of a project on Aboriginal peoples, which in this case included the state of negotiations between the FMFN and the Crown.[174] To preclude such considerations entirely takes an unreasonably narrow view of what comprises the public interest, particularly given the direction to all government actors to foster reconciliation.[175]

2) *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*: Accommodation Can Mean the Cancellation of a Project

Redmond demonstrates that the duty to consult process can result in an accommodation measure that prohibits a project from proceeding entirely. In *Redmond*, Mr. Redmond wanted to build an independently owned and operated, small run-of-river hydro-electric generation plant (the

[166] *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at para 73, [2013] 1 SCR 623.
[167] *FMFN*, *supra* note 2 at para 54.
[168] *Ibid*.
[169] *Ibid* at para 57.
[170] *Ibid* at paras 57-58.
[171] *Ibid* at para 57.
[172] *Ibid* at para 58.
[173] *Ibid* at para 65.
[174] *Ibid* at para 68.
[175] *Ibid*.

"Project") in Wahleach Creek.[176] The Project would have had significant adverse effects on the Cheam's spiritual bathing practices, which require unaltered flows and absolute privacy.[177] The accommodation measures proposed by Mr. Redmond did not adequately mitigate the adverse impacts of the Project on the Cheam's spiritual bathing practices.[178] Further, the Project would yield little benefits in terms of power generation.[179] As a result, the Director of Authorizations for the British Columbia Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Director") disallowed Mr. Redmond's application for a Crown land tenure under section 11 of the *Land Act*[180] ("the Decision").[181] This meant that Mr. Redmond could not proceed with his Project.

Mr. Redmond sought to have the Director's Decision quashed because he was of the view that it effectively provided the Cheam with a veto over his Project, which the duty to consult does not allow for.[182] However, the British Columbia Supreme Court ("the Court") found that the Director did not provide the Cheam with a veto over Mr. Redmond's Project in declining his application for a land tenure.[183] Rather, the Court found that the Director fulfilled the duty to consult by appropriately weighing the benefits of the Project against the adverse impact on the Cheam's Aboriginal interests and reasonably concluded that the Project should not proceed.[184] This did not amount to providing the Cheam with a veto, but demonstrates that the Director refused to grant the land tenure to Mr. Redmond on a full consideration of his statutory mandate, the relevant facts and the existing law.[185] If the Director had granted the Cheam a veto, there would have been no need for the Director to engage in a balancing and weighing of competing interests; it would have been sufficient for the Director's Decision to simply state that the Cheam did not support the Project.[186]

The Court noted that *Redmond* was distinguishable from *Ktunaxa* because the social benefits of the project in *Ktunaxa* (a large ski hill development) outweighed the adverse impacts on the Ktunaxa spiritual interest in the area where the project was to be constructed. In *Ktunaxa*, the Court highlighted the following: (a) the Ktunaxa's spiritual interest in the project area was not known amongst the general Ktunaxa population; (b) concerns about the impact on the Ktunaxa's spiritual interest were not raised until much later in the consultation process; and (c) the Court concluded that the decision maker had reasonably balanced the large social benefits of the project ($900 million in capital investment and 750 to 800 permanent, direct jobs) with the impacts of the project on the Ktunaxa's spiritual interest under the circumstances.[187]

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[176] *Redmond*, *supra* note 3 at paras 1, 4.
[177] *Ibid* at para 9.
[178] *Ibid* at paras 9-10, 59.
[179] *Ibid* at para 58.
[180] RSBC 1996, c 245.
[181] *Redmond*, *supra* note 3 at para 1.
[182] *Ibid* at paras 15, 49.
[183] *Ibid* at para 49.
[184] *Ibid* at paras 46-48.
[185] *Ibid* at para 52.
[186] *Ibid* at para 51.
[187] *Ibid* at para 58.

In contrast, the factual record before the Director in *Redmond* indicated: (a) Mr. Redmond's Project was a small hydro-electric project that would power eight homes at maximum load; (b) there was early and consistent communications from the Cheam indicating the spiritual significance of Wahleach Creek; and (c) the Cheam's spiritual bathing practice is engaged in by many community members.[188] Therefore, the Court found that the Director's approach to weighing the social benefits from Mr. Redmond's Project with the adverse impacts on the Cheam's spiritual interest was consistent with the approach taken by the administrative decision maker in *Ktunaxa*.[189] The difference is that in *Redmond*, it fell within the range of reasonable decision making for the Director to conclude that the Project should be disallowed based on an ultimate balancing of the Project's adverse impacts and social benefits.[190]

The Court concluded that the constitutional project of reconciliation is a "shared responsibility" of all Canadians involving "complex and competing interests," and will sometimes require administrative decision makers to make difficult decisions that impact the interests of proponents such as Mr. Redmond.[191] *Redmond* also suggests that if a development project yields significant social benefits (as it did *Ktunaxa*), then Indigenous interests (spiritual or otherwise) can be justifiably infringed upon for the sake of serving the "public interest". In developing legal arguments in a similar context, it will be important to recall that any project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest.[192]

3) *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*: Established Treaty Rights May Affect the Extent to Which Asserted Aboriginal Rights are Accommodated

In *Gamlaxyeltxw*, the British Columbia Court of Appeal ("BCCA") rejected the British Columbia Supreme Court's ("BCSC's") prior modification of the *Haida* duty to consult test to address a conflict between asserted and established rights in consultation.[193]

In this case, the Gitanyow's traditional territory overlapped with lands subject to the Nisg a'a Treaty. The Gitanyow have an outstanding claim for section 35 Aboriginal rights in an area described as the Gitanyow Lax'yip.[194] The Gitanyow Lax'yip overlaps with the Nass Wildlife Area; an area established by the Nisga Treaty where the Nisg a'a have non-exclusive rights to hunt.[195]

The Gitanyow's appeal concerned two decisions of the Minister of Forests, Lands and Natural Resource Operations ("the Minister") made in October 2016 approving the total allowable harvest of moose and the annual management plan for the 2016-2017 hunting season in the Nass

[188] *Ibid*.
[189] *Ibid*.
[190] *Ibid*.
[191] *Ibid* at para 42.
[192] *Clyde River*, *supra* note 44 at para 40.
[193] Gray & Lee-Andersen, *supra* note 157.
[194] *Gamlaxyeltxw* BCCA, *supra* note 4 at para 3.
[195] *Ibid* at para 2.

Wildlife Area.[196] Prior to making these decisions, the Minister had consulted with the Gitanyow concerning the total allowable harvest ("TAH"), but not concerning the annual management plan ("AMP") because the Minister determined that the AMP did not have the potential to adversely affect the Gitanyow's Aboriginal rights.[197] The Gitanyow had taken the position that the Minister should accommodate their interests by reducing the allocation of moose to Nisg a'a hunters in a manner inconsistent with the Nisg a'a Treaty.[198] The Minister declined to do so.[199]

The Chambers Judge at the BCSC suggested modifying the *Haida* test to address the conflict between the overlapping claims of the Nisg a'a and the Gitanyow in the Nass Wildlife Area by adding a fourth question to the duty to consult analysis.[200] In deciding whether a duty to consult the Gitanyow exists, the Chambers Judge proposed asking "would recognizing that the Crown owes a duty to consult the Gitanyow about to the TAH decision, be *inconsistent* with the Minister's duties and responsibilities under the Treaty, or the Crown's fiduciary duties to the Nisga'a Nation *in a way that may negatively impact the Nisga'a Nation's rights*?"[201] If the answer to this question is yes, then the Chamber's Judge found that the treaty right must prevail over the duty to consult.[202]

Essentially, the Chambers Judge modified the duty to consult in away that made established Treaty rights superior to asserted Aboriginal rights. The BCCA found that the Chambers Judge's modification to the *Haida* test was not necessary and that the existing test was sufficiently flexible to resolve the questions before the Court.[203] The BCCA found that the conflict between the overlapping claims of the Nisg a'a and the Gitanyow could be resolved at the accommodation stage of the duty to consult framework.[204] The existence of treaty rights does not negate the Crown's duty to consult Indigenous peoples with asserted Aboriginal rights.[205] However, the existence of treaty rights may limit the degree to which asserted Aboriginal rights are accommodated because the Crown cannot be required to breach a treaty in order to preserve a right whose scope has not yet been determined.[206]

Question 3: How does Indigenous law influence the duty to consult and accommodate framework?

1. <u>The Crown-centric Nature of the Duty to Consult and Accommodate has Stifled the Influence of Indigenous Law on the Development of the Duty</u>

[196] *Ibid* at para 6.
[197] *Ibid*.
[198] *Ibid*.
[199] *Ibid*.
[200] *Gamlaxyeltxw v British Columbia (Minister of Forests, Lands & Natural Resource Operations)*, 2018 BCSC 440 at para 222 [*Gamlaxyeltxw* BCSC]; *Gamlaxyeltxw* BCCA, *supra* note 4 at para 64.
[201] *Gamlaxyeltxw* BCSC, *supra* note 200 at para 224 (emphasis in original).
[202] *Ibid* at para 225.
[203] *Gamlaxyeltxw* BCCA, *supra* note 4 at para 70.
[204] *Ibid* at para 72.
[205] *Ibid* at para 73.
[206] *Ibid* at para 13.

Indigenous law has not informed the development of the duty to consult and accommodate. Recall that the source of the duty is the honour of the Crown.[207] Consequently, the duty's framework is Crown-centric[208], as "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".[209] Further, the Crown-centric nature of the duty to consult is illustrated by the questions that are asked in the *Sparrow* infringement/justification analysis: "is the Crown infringing Aboriginal rights? Is the Crown consulting? Is the Crown acting honourably?".[210] This Crown-centric model of the duty to consult and accommodate raises questions about the framework's utility in effecting reconciliation. If reconciliation is "an ongoing process of establishing and maintaining respectful relationships",[211] then reciprocity needs to imbue the duty to consult in terms of the application of Indigenous law. The two legal systems (Indigenous law and settler law) must operate in collaboration in the duty to consult framework if the duty is to fulfill its purpose in effecting reconciliation.

However, as currently constructed, the duty to consult framework is Crown-centric and therefore dismissive of Indigenous law. When Indigenous peoples are considered within the duty to consult context, courts will assess whether they have acted in "bad faith". Recall that the duty to consult requires that Indigenous peoples "not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached".[212] This not only imposes an obligation on Indigenous peoples to corporate when the Crown conducts its duty to consult, but it "also suggests that positions put forward by Indigenous peoples, based on their own legal traditions, will be considered unlawful if they hinder the government from making decisions".[213] This indicates that Indigenous law has no role to play in the duty to consult framework because it will threaten and impede government from making decisions. As a result, the duty has failed as a robust mechanism for reconciliation. This is evidenced by the fact that the duty to consult has become the most litigated Aboriginal law issue in recent years.[214] This has subsequently hindered attempts at reconciliation, as the adversarial nature of the litigation process is not conducive to achieving reconciliation.[215]

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[207] *Haida*, *supra* note 13 at para 16.
[208] Shin Imai, "Consult, Consent, and Veto: International Norms and Canadian Treaties" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 370 at 391-92 [Imai].
[209] *Haida*, *supra* note 13 at para 45.
[210] Imai, *supra* note 208 at 391-92.
[211] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation*, Vol 6 (Montreal & Kingston: McGill-Queen's University Press, 2015) at 11, online: http://www.trc.ca/assets/pdf/Volume_6_Reconciliation_English_Web.pdf
[212] *Haida*, *supra* note 13 at para 42.
[213] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, 63 at 67-68, online: https://www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf
[214] Malcolm M Lavoie, "Aboriginal Rights and the Rule of Law" (2019), 92 SCLR (2d) at para 32 (QL); Jamie D Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich Publishing Ltd, 2015) at 45.
[215] *Delgamuukw*, *supra* note 76 at para 168; *Clyde River*, *supra* note 44 at para 24.

2. Braiding Indigenous Law and the Duty to Consult: The Environmental Assessment Process

Despite Indigenous law having been largely excluded from the legal construction and operation of the duty to consult, Indigenous peoples have used their laws to influence the duty to consult in the environmental assessment (EA) context. The duty to consult is often carried out through EAs because EAs evaluate local environmental impacts of proposed development projects and operate to mitigate these impacts on Indigenous communities who already disproportionately bare the burden of industrial development.[216] Widespread industry control of EAs and the inequity in project outcomes that this control generates has led Indigenous communities to distrust the EA process.[217] In this context, some Indigenous communities have developed their own EA processes that are grounded in their legal systems and have required project proponents to adhere to these processes before allowing a project to proceed.

For example, at the start of 2021, the Gitanyow publicly released the *Gitanyow Wilp Sustainability Assessment Process* ("*GWSAP*").[218] The *GWSAP* is an innovative Indigenous legal instrument setting out requirements for fully Indigenous-led assessment of projects in Gitanyow Lax'yip (territory) based on the Gitanyow's own laws.[219] The *GWSAP* aims to protect and restore the Gitanyow Lax'yip for present and future generations, and upholds the decision-making authority of each Wilp (House Group)[220] to determine what activities are permitted in their respective Lax'yip.[221] The *GWSAP* requires all actors (e.g. companies, Crown governments) to follow Gitanyow strategic direction, such as the *Gitanyow Lax'yip Land Use Plan,* and prohibits proposed projects from accessing the Lax'yip without the consent of the impacted Wilp.[222]

The *GWSAP* will parallel provincial and federal environmental assessment processes.[223] Both levels of government were consulted during the development of the *GWSAP*.[224] Furthermore, both levels of government have recently acknowledged Indigenous-led environmental assessment processes in their new environmental assessment legislation. In British Columbia, where the Gitanyow Nation is located, the provincial government has legislated that Indigenous consent in the environmental assessment context maybe required pursuant to the terms of Indigenous-Crown treaties or agreements.[225] Similarly, the federal *Impact Assessment Act* requires that Indigenous-

[216] Rachel Arsenault et al, "Including Indigenous Knowledge Systems in Environmental Assessments: Restructuring the Process" (2019) 19:3 Global Environmental Politics 120 at 120-21.
[217] *Ibid* at 121.
[218] "Gitanyow Hereditary Chiefs Launch One-Year Pilot of Wilp Sustainability Assessment Process" (5 Feb 2021), online: http://www.gitanyowchiefs.com/news/gitanyow-hereditary-chiefs-launch-one-year-pilot-of-wilp-sustainability-ass
[219] Tara Marsden/Naxginkw & Gavin Smith, "Indigenous law in action: Gitanyow launches its groundbreaking Wilp Sustainability Assessment Process" *West Coast Environmental Law* (20 April 2021), online: https://www.wcel.org/blog/indigenous-law-in-action-gitanyow-launches-its-groundbreaking-wilp-sustainability-assessment [Marsden & Smith].
[220] Marsden & Smith, *supra* note 219; "Wilp System", online: http://www.gitanyowchiefs.com/wilp-system/. The Wilp (plural: Huwilp) are the primary social, political and economic unit in Gitanyow society.
[221] Marsden & Smith, *supra* note 219.
[222] *Ibid*.
[223] "Gitanyow Hereditary Chiefs Launch One-Year Pilot of Wilp Sustainability Assessment Process", *supra* note 218.
[224] *Ibid*.
[225] *Environmental Assessment Act*, SBC 2018, c 51, s 7. Please note that there is currently no comparable Indigenous consent provision in Ontario's *Environmental Assessment Act*, RSO 1990, c E.18.

led environmental assessments be considered in assessing the impacts of designated projects.[226] These provisions signal positive steps in the work of braiding Indigenous law into the duty to consult framework as it applies to environmental assessments. However, recall that the Crown has recourse to the *Sparrow* infringement/justification framework should the Crown determine to override the requirement for Indigenous consent if it is withheld.

CONCLUSION

This legal memorandum on the Crown's duty to consult and accommodate addressed the following research questions:

1. What is the legal framework of the duty to consult and accommodate?
2. Are there any notable recent legal developments in the duty to consult and accommodate framework?
3. How does Indigenous law influence the duty to consult and accommodate framework?

The research indicates that while there have been notable recent developments in the duty to consult and accommodate, the duty as a legal doctrine has largely remained the same since its inception into Canadian law. I conclude that the duty to consult is lacking as a medium through which to achieve reconciliation due to the Crown-centric nature of the duty. The duty to consult does not require that settler law and Indigenous law operate in collaboration to achieve reconciliation. As a result, the very purpose for which the duty to consult exists has become frustrated as evidenced by the fact that it has become the most litigated Aboriginal law issue in recent years.

[226] *IAA*, *supra* note 100, s 22(1)(q-r).