ISSUES ASSOCIATED WITH THE IMPLEMENTATION OF THE DUTY TO CONSULT AND ACCOMMODATE ABORIGINAL PEOPLES: THREATENING THE GOALS OF RECONCILIATION AND MEANINGFUL CONSULTATION

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I. INTRODUCTION

Over time, Canadians have become more familiar with the unsettling history of Canada's Aboriginal peoples and their relationship with the federal and provincial governments.[1] While original interactions between Aboriginal peoples and the Crown were largely based upon co-operation, respect, and friendship, it was not long before the mutually beneficial, nation-to-nation relationship deteriorated into one largely characterized by colonial oppression, dispossession, and extreme marginalization. Any manifestations and/or expressions of Aboriginal rights, sovereignty, and self-government were significantly diminished as the Crown unilaterally asserted its own sovereignty.

The constitutional reform adopted in 1982, recognizing and affirming Aboriginal and treaty rights within subsection 35(1) of the *Constitution Act,*

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1 See e.g. Bruce Campion-Smith, "Harper officially apologizes for native residential schools", *Toronto Star* (11 June 2008) online: <http://www.thestar.com>; Angela Mulholland, "Idle no more: Understanding the growing aboriginal protest movement", *CTV News* (21 December 2012), online: <http://www.ctvnews.ca>.

1982,[2] sought to put an end to this colonial narrative. Shortly after this development, Canadian courts, and the Supreme Court of Canada (SCC) in particular, proceeded to release several monumental decisions pertaining to the "existing" rights of Aboriginal peoples in relation to lands and resources.

However, in 2004, the SCC released *Haida Nation v British Columbia (Minister of Forests)*.[3] *Haida* was the first in a series of judicial decisions marking a shift from a focus on "static constitutional rights" (whether or not a particular interest and/or activity could be recognized as an existing Aboriginal right within subsection 35(1)) to "a dynamic proceduralism"[4]—a new legal order that allows for the opportunity to recognize and protect asserted Aboriginal rights and interests from unilateral Crown action, even *before* they are proven to exist in a court of law.[5] This new legal order is known as the duty to consult—and potentially accommodate—Aboriginal peoples' claims and interests. While early expressions of the duty to consult can be found in pre-*Haida* jurisprudence,[6] these expressions were in the more limited context of rules regarding infringement of established Aboriginal rights.[7] It was not until *Haida* that the SCC explicitly enunciated the duty's foundational principles and outlined a framework for consultation activity.

On its face, the duty to consult appears to be a positive legal development outlining an optimistic vision for the future of Crown-Aboriginal relations. A legal doctrine now exists that prevents government from "cavalierly run[ning] roughshod over Aboriginal interests".[8] In the words of Justice

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2 Being Schedule B to the *Canada Act, 1982* (UK), c 11.

3 2004 SCC 73, [2004] 3 SCR 511 [*Haida*].

4 Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2009) 23:1 Can J Admin L & Prac 93 at 101.

5 *Ibid*, citing Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 Sup Ct L Rev (2d) 433 at 436–40.

6 See e.g. *R v Sparrow*, [1990] 1 SCR 1075 at 1119, 70 DLR (4th) 385 [*Sparrow*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168, 153 DLR (4th) 193 [*Delgamuukw*].

7 *Sparrow*, *supra* note 6 at 1111.

8 *Haida*, *supra* note 3 at para 27.

Tysoe of the British Columbia Supreme Court, the duty to consult is a "constitutional prerequisite" that must be satisfied in order for any Crown action and/or decision potentially impacting Aboriginal claims to be valid.[9] Not only does the duty allow for the protection of unproven Aboriginal rights and interests from Crown action, but it does so through a procedural framework that encourages dialogue and meaningful negotiation between the Crown and Aboriginal peoples. In fact, the duty to consult was created by the SCC with the hope that it would be able to fulfill the ambitious goal of advancing the potential for *reconciliation* between the Crown and Aboriginal peoples, by facilitating negotiation and allowing them to have a *meaningful* role and voice in decision making with respect to activities that might affect their present and future rights and interests.[10]

While the goals and ambitions supporting the duty are inspiring and, theoretically, have the potential to be realized, this raises the following question: are these goals being realized in practice? More specifically, what are the practical implications associated with the implementation of the consultation process, and how do those implications affect the initial vision of the duty to consult enunciated by the SCC in *Haida*? This paper will suggest that the practical reality surrounding the duty to consult appears to imply that these goals and objectives are threatened and/or challenged by issues associated with the implementation of this duty and by its operation in practice. This paper will identify and discuss three "areas of risk" that pose a threat to the realization of both meaningful consultation and the ultimate goal of reconciliation; these areas are delegation, capacity (resourcing consultation), and cumulative effects of consultation.

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9 *Gitxsan and other First Nations v British Columbia (Minister of Forests)*, 2002 BCSC 1701 at para 65, [2003] 2 CNLR 142.

10 *Delgamuukw*, *supra* note 6 at para 168.

A. THE THREE AREAS OF RISK EXPLAINED

The first area of risk that will be examined is that of delegation (see Part III). Over the last decade or so there has been an identifiable trend by both federal and provincial governments of delegating ever more responsibility and jurisdiction to lower levels of government and government departments. In the context of the duty to consult, while delegation does carry with it certain benefits, it also generates challenging issues. Delegation can result in the deterioration of the nation-to-nation relationship between the Crown and Aboriginal peoples, which the duty to consult was meant to repair; it can result in a reduction in the potential scope of consultation and accommodations that can be made with whomever may be charged with fulfilling the duty; and, lastly, delegation can cause confusion as to who carries the obligation to consult in the first place (this is a current issue in the context of municipalities, as will be discussed later in the paper).

The second area of risk pertains to resourcing (including funding) the consultation process (see Part IV). The act of consulting requires capacity and resources, both financial and human—something that, oftentimes, First Nation communities lack. While there is some case law to support an obligation to fund consultation, and while there is increasing recognition at the political level that funding is a necessary requirement for the duty to be fulfilled, at present there is no clear legal obligation on the part of the Crown to fund the consultation process, and programs that do exist to assist with consultation capacity are usually inadequate. As a result, First Nation communities who choose to participate in the consultation process are left with the onerous task of resourcing their own participation, which all too often carries significant financial and social costs.

The third, and arguably most concerning, area of risk is associated with the cumulative effects of consultation: the risk that, over time, Aboriginal participation in consultation and accommodation processes will lead to the erosion of the Aboriginal and treaty rights that are exercised on the land (see Part V).

While the duty to consult may have virtues, a closer look at the mechanics of the duty reveals a significant power imbalance implicit within the duty's framework: there is no veto power on the part of First Nations, there is no obligation to reach an agreement, and the duty does not preclude hard bargaining on the part of the Crown. Thus, First Nations are at a clear

disadvantage even before any consultation and negotiation takes place. What this means is that, more often than not, it will be First Nations who are obligated to make the most significant compromises: more consultations will lead to more development, more development will lead to a reduced land base, and a reduced land base will result in a reduced ability for First Nations to exercise their traditional rights and practices that are *tied to* their land. The result is that, over time, First Nations will be consulting and accommodating themselves out of their rights.

These issues carry the risk that the effectiveness and value of the duty to consult with respect to the preservation and promotion of Aboriginal rights, interests, and decision-making power and authority will be substantially diminished. In other words, these areas of risk reduce the meaningfulness of the consultation process and undermine the potential for reconciliation between the Crown and Canada's Aboriginal peoples. It is important to identify the slippery slopes so that precautions can be taken to ensure that the duty to consult is preserved as a tool to protect Aboriginal rights and interests, rather than contribute to their destruction.

Before delving into a discussion of these three areas of risk and an illustration of how they serve to challenge the aspirational vision that formed the impetus for the creation of the duty to consult, it is useful to understand on a deeper level what that initial vision was, and the objectives that it was hoped the duty would achieve. Part II will therefore discuss the articulation of this initial version by the SCC in *Haida* and the elaboration of the principles enunciated in subsequent jurisprudence.

II. THE GOALS BEHIND THE DUTY TO CONSULT AND THE ESSENCE OF "MEANINGFUL" CONSULTATION

The foundational principles of the modern duty-to-consult doctrine arise out of what is commonly referred to as the *Haida Nation* trilogy—a series of

cases decided in 2004 and 2005 consisting of *Haida Nation*, *Taku River*,[11] and *Mikisew Cree*.[12]

The duty to consult and accommodate is triggered "when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it".[13] The content and scope of the duty vary with the circumstances and lie along a spectrum. When the breach is minor, the duty may be no more than a duty to discuss important decisions that will be taken with respect to Aboriginal interests.[14] When the breach is significant, "deep consultation, aimed at finding a satisfactory interim solution, may be required."[15] In *all* cases, however, consultation must be *meaningful* and done in *good faith*, with the intention of *substantially addressing the concerns* of the affected First Nation.[16] The duty to consult also applies in the context of treaty rights, although the content and scope of consultation may be on the lower end of the spectrum, as a treaty itself is the product of negotiation.[17]

It is therefore clear that the duty is primarily concerned with protecting Aboriginal rights and interests even before they are proven to "exist." However, the duty is also really about governing the relationship between Aboriginal parties and the Crown (and to some extent, third parties). The courts, by casting the "shadow of the law", have structured a framework that strives to encourage and facilitate negotiation.[18] In turn, it is hoped that this negotiation will achieve two objectives: first, that the duty will function as a

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11 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

12 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*].

13 *Haida*, *supra* note 3 at para 35.

14 *Ibid* at para 43.

15 *Ibid* at para 44.

16 *Ibid* at para 42.

17 *Mikisew Cree*, *supra* note 12 at paras 63–64.

18 Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009) at 18 [Newman, *Duty to Consult*].

vehicle to allow Aboriginal peoples to play a meaningful role in decisions that will affect their future (meaningful consultation and negotiation),[19] and second, that this meaningful participation in and negotiation of decisions affecting Aboriginal rights and interests will in turn advance the potential for reconciliation between Aboriginal peoples and the Crown.[20] These two objectives are rooted in Chief Justice McLachlin's judgment in the *Haida* decision.

A. "MEANINGFUL" NEGOTIATION AND CONSULTATION

The first objective within the duty-to-consult framework is that negotiation and consultation between the Crown and Aboriginal peoples must be *meaningful*. Early in the *Haida* judgment, Chief Justice McLachlin makes the first of many references to the fact that "consultation must be meaningful."[21] In the text surrounding this statement we are given some indication of what exactly "meaningful" means.

First, *Haida* provides that meaningful consultation prohibits the Crown from engaging in "sharp dealing" and requires the Crown to act "in good faith."[22] In the most basic sense this means that the Crown must act fairly in its negotiations with Aboriginal peoples regarding their rights and interests and ensure, to the greatest extent possible, that negotiations are the product of a balanced conversation. This is guided by the doctrine of the honour of the Crown, which is the source of the duty to consult.[23] This is the idea that in all its dealings with Aboriginal people, the Crown must consistently act in accordance with the virtue of "honour".[24] In the broader context of the duty to consult, this means that the Crown must consult with Aboriginal peoples

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19 *Delgamuukw*, *supra* note 6 at para 168.

20 Sossin, *supra* note 4 at 98.

21 *Supra* note 3 at paras 10, 41, 42, 46, 55, 76, 79.

22 *Ibid* at paras 41–42.

23 *Ibid* at para 16.

24 Newman, *Duty to Consult*, *supra* note 18 at 16–17.

regarding unproven interests, because the prospect of undermining an Aboriginal right prior to the resolution of a claim would be *dishonourable*.[25]

The second indication *Haida* provides is that meaningful consultation requires that negotiations be initiated at an early stage in the process—at the time when "strategic planning decisions" are being made—as decisions at this level may have potentially significant impacts on Aboriginal rights and interests.[26] In *Haida*, the Court held that the duty to consult applied to the transfer of tree-farm licences that would have permitted the cutting of old-growth forests within the traditional territory of the Haida Nation. Other examples of strategic, higher-level decisions triggering the duty to consult include the approval of a multi-year forest management plan for a large geographic area[27] and the establishment of a review process for a major gas pipeline.[28]

The third insight into the content of "meaningful consultation" that *Haida* provides is that it may require the Crown to "make changes to its proposed action based on information obtained through consultations."[29] Case law has elaborated on this point, suggesting that meaningful consultation obliges the Crown to take the interests and concerns voiced by the affected First Nation seriously, ensure they are considered, and, wherever possible, ensure they are integrated into the proposed plan of action.[30]

The extent of the "meaningfulness" that the consultation process requires is dependent upon where along the spectrum the duty lies in a particular case. If the duty is at the lower end of the spectrum, meaningful consultation might only require notification and informed discussion; if the duty is at the higher end, "something significantly deeper than mere consultation" may be

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25 *Ibid* at 17.

26 *Supra* note 3 at para 76.

27 *Klahoose First Nation v Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 CNLR 110.

28 *Dene Tha' First Nation v Canada (Minister of Environment)*, 2008 FCA 20, 35 CELR (3d) 1.

29 *Supra* note 3 at para 46.

30 *Halfway River First Nation v British Columbia (Minister of Forests)* (1999), 178 DLR (4th) 666, 64 BCLR (3d) 206 (CA), aff'g (1997), 39 BCLR (3d) 227 (SC).

required.[31] However, subsequent case law has noted that even when the duty is at the lower end, meaningful consultation, at a minimum, requires the Crown to provide notice, engage directly with the First Nation by providing them with information about the project, address what it knows to be the First Nation's interests and what it anticipates to be the adverse effects on those interests, listen carefully to the First Nation's concerns, attempt to minimize adverse impacts,[32] and, where possible, integrate the concerns and views of the First Nation into its plan of action.[33]

While not discussed in *Haida*, some case law has suggested that meaningful consultation also requires the capacity to fully participate in the consultation process, and thus may include an obligation on the part of the Crown to provide capacity funding and/or other resources to the First Nation[34]—referred to as "economic accommodation."[35] While not yet an existing legal obligation, courts have, on occasion, ordered that certain aspects of the consultation process be funded at the Crown's expense.[36]

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31 *Haida*, *supra* note 3 at paras 78–79.

32 *Mikisew Cree*, *supra* note 12 at para 64. See Maria Morellato, "The Crown's Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights" (Paper delivered at the National Centre for First Nations Governance, February 2008) at 38, online: <http://www.fngovernance.org> [Morellato, "Crown's Constitutional Duty"].

33 *Hupacasath First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 1712 at para 274, 51 BCLR (4th) 133 [*Hupacasath*].

34 See e.g. *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128, 251 DLR (4th) 717; *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation* (2007), 29 CELR (3d) 191, [2007] 3 CNLR 221 (Ont Sup Ct J) [*Platinex* cited to CELR]; *Wii'litswx v British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 CLNR 315 [*Wii'litswx*]; *Taseko Mines v Phillips*, 2011 BCSC 1675, [2012] 3 CNLR 298 [*Taseko Mines*].

35 Newman, *Duty to Consult*, *supra* note 18 at 61.

36 See *Hupacasath*, *supra* note 33 at paras 321–25.

B. RECONCILIATION

The second objective embedded within the duty to consult flows directly from the first. It is the idea that truly meaningful consultation and negotiation will result in a restructuring of the Crown-Aboriginal relationship in such a way as to advance the potential for reconciliation. Reconciliation is itself a complex and contested concept in Aboriginal law, and it is beyond the scope of this paper to delve too deeply into a full discussion of its meaning and implications.[37] However, a basic understanding of its role in the context of the duty to consult and accommodate is helpful.

In general terms, reconciliation attempts to address historical wrongs suffered by Aboriginal peoples as a result of colonial imposition of sovereignty by developing a consensus for future action.[38] Reconciliation recognizes the lack of respect inherent in the historical indifference toward Aboriginal peoples' rights and that this lack of respect has been destructive to the Aboriginal–Crown relationship. The doctrine of the duty to consult was judicially manufactured to facilitate and address this purpose, as seen within the *Haida* judgment itself.

The Court in *Haida* explicitly states that the objective or "aim" of the duty to consult is "reconciliation ... of Crown-Aboriginal relations."[39] More specifically, the duty to consult is conceptualized in *Haida* as a doctrine seeking to promote reconciliation of the pre-existing (and, for Aboriginal peoples, still existing) sovereignty of unconquered Aboriginal peoples with the sovereignty of the Crown[40] through a restructuring of the rules of governance regarding the relationship between Aboriginal parties and the Crown (and, to some extent, third parties). By restructuring how decisions

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37 See Dwight G Newman, "Reconciliation: Legal Conception(s) and Faces of Justice" in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich, 2008) 80 [Newman, "Reconciliation"].

38 See Jennifer Dalton, "Constitutional Reconciliation and Land Negotiations: Improving the Relationship between the Aboriginal Peoples and the Government of Ontario" (2010) 3 Journal of Parliamentary and Political Law 277 at 277.

39 *Supra* note 3 at para 14.

40 *Ibid* at para 20.

will be made (i.e., in a way that generally prevents unilateral Crown action),[41] how control over decisions regarding land and resources will be exercised, and thus how the relationship between the Crown and Aboriginal peoples will be governed, it is the hope that the goal of reconciliation will be furthered by the duty to consult.

In this light, the SCC is suggesting that consultation is not a one-sided affair—rather, it is based on the goal of forging new government-to-government relationships between the Crown and Aboriginal peoples,[42] more akin to the relationships that existed prior to colonization. Unilateral Crown action and decision making run contrary to this idea of reconciliation, and, as the SCC stated in *Haida,* are not honourable.[43]

The Court in *Haida* also notes that reconciliation, rather than a final goal to be achieved, is conceptualized as a constant duty in an ongoing relationship or "process":

> [T]he duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather it is a process flowing from rights guaranteed by s. 35(1)...[44]

The duty to consult is therefore concerned with "an ethic of ongoing relationships" and seeks to improve Aboriginal–Crown relations indefinitely through a framework that facilitates and promotes "ongoing negotiations" rather than finality.[45]

While these objectives of the duty to consult are undoubtedly both admirable and desirable, issues arise with the operation of this duty in practice that threaten these objectives. As suggested above, these issues most clearly manifest themselves in three areas: (1) in the context of delegation,

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41 *Mikisew Cree, supra* note 12 at para 49.

42 Morellato, "Crown's Constitutional Duty", *supra* note 32 at 57.

43 *Haida, supra* note 3 at para 27.

44 *Ibid* at para 32.

45 Newman, *Duty to Consult, supra* note 18 at 21.

(2) in the context of capacity and resourcing, and (3) with respect to the protection of Aboriginal and treaty rights generally (cumulative effects of consultation). The paper will now proceed to discuss each of these three areas of risk. These areas of risk, it will be shown, pose a threat to the realization of the extent to which consultation can be meaningful and thus the extent to which consultation can advance the potential for reconciliation.

III. DELEGATION AS A RISK TO MEANINGFUL CONSULTATION[46]

Delegation is a government power that this country could not function without: it serves as an invaluable tool that allows governments to efficiently administer various programs, policies, and services to citizens. In some respects, the same may be said about delegation in the context of the duty to consult. Delegation of certain aspects of the duty may enhance the quality of consultations that occur and may result in the duty being carried out more efficiently and effectively.

However, while bringing about certain practical virtues, delegation also introduces an element of complexity into the duty to consult. This complexity in turn creates issues that present themselves more clearly when one considers how the duty to consult operates in practice. As mentioned above, delegating particular aspects of the duty to consult to other entities—in other words, dividing the duty—contributes to the deterioration of the nation-to-nation relationship between the Crown and Aboriginal peoples, rather than helping to repair it. In addition, delegation of the duty can reduce the quality of consultation and accommodation achieved by reducing the potential scope of consultations and accommodations that can be made with whomever may be charged with fulfilling the duty. Finally, delegation may also cause confusion as to who carries the obligation to

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[46] There is another complexity in the delegation context: the authority of delegated decision makers to assess the *adequacy* of consultation in relation to an application before them. See *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 (while this is an issue, the discussion on delegation in this paper will focus only on the issues associated with delegation of the duty to consult (or aspects of it) *itself*, and the consequences of this delegation).

consult in the first place, which in turn can result in the duty becoming "lost", leading to the possibility that it remains unfulfilled. These issues inevitably compromise the goals of meaningful consultation and the advancement of reconciliation.

A. THE ORIGINS OF THE ISSUES ASSOCIATED WITH DELEGATION

The issues associated with delegation stem primarily from one overarching practical effect of the duty to consult. While the constitutional duty is in a sense owed by an "undivided Crown",[47] in reality there are many occasions where the duty to consult is carried out (and, in some occasions, must be met) by a variety of actors—some "Crown actors", some not, and some who fall somewhere in between (i.e., entities that are created by the Crown via legislation and thus are "public" bodies, but are not the federal or provincial Crown).

This practical effect is symptomatic of three realities. The first is that the law permits certain components of the duty to consult to be delegated to industry stakeholders. In *Haida*, the SCC held that while the duty to consult ultimately rests with the federal and provincial Crown, the Crown can delegate procedural aspects of consultation "to industry proponents seeking a particular development".[48] Although appearing as a simple letter of permission, industry consultation has become the practical norm. While some provinces have decided that consultation is to be carried out solely by governments,[49] more often than not the Crown "informally delegate[s] [the] substantive execution of its duty"[50] to the industry proposing a project on traditional lands. As Dwight G. Newman states, "corporate consultation with Aboriginal communities [has become] a non-optional practice".[51]

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47 Newman, *Duty to Consult*, *supra* note 18 at 36.

48 *Supra* note 3 at para 53.

49 The government of Saskatchewan decided that consultation would be carried out solely by governments, without any aspects being delegated to proponents. See Newman, *Duty to Consult*, *supra* note 18 at 36.

50 Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003–04) 41 Alta L Rev 49 at 73 [Isaac & Knox, "The Crown's Duty"].

51 Newman, *Duty to Consult*, *supra* note 18 at 36.

The second reality emerges from the SCC's most recent decision pertaining to the duty to consult. In *Rio Tinto Alcan v Carrier Sekani Tribal Council* (*Carrier Sekani*),[52] the SCC articulates the possibility of public entities beyond the federal and provincial Crown (e.g., independent administrative tribunals and regulatory bodies) having a number of possible roles in respect of the duty to consult—provided, of course, they have the potential to affect Aboriginal rights or interests.[53] While the Court in *Carrier Sekani* is speaking specifically of tribunals, the principles it establishes can equally apply to any public body that has delegated statutory powers via legislation.

The SCC in *Carrier Sekani* states that the role of the particular public body in relation to consultation is dependent upon the duties and powers that have been conferred on it by the legislature.[54] For example, the legislature may have delegated the Crown's consultation role,[55] which the Court states consists of the ability to enter into consultations with a First Nation, as well as the "remedial powers necessary to do what it is asked to do in connection with the consultation".[56] In this case, the role of the particular public body would be considerable. Alternatively, the legislature may have only delegated the authority to determine whether adequate consultation has taken place (i.e., to assess whether the Crown has properly discharged its duty to consult),[57] in which case the role of the public body would be much more limited. The Court holds that the adjudicative or regulatory body "may

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52 2010 SCC 43, 325 DLR (4th) 1 [*Carrier Sekani*].

53 See *ibid* at paras 57–60. See also Dwight G Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (28 February 2011), online: Updates—February 2011<http://www.purichpublishing.com/showContent.php?id=66&type=updates>.

54 *Carrier Sekani*, *supra* note 52 at para 56.

55 The Court refers to this as "the Crown's duty to consult": *ibid* at para 56.

56 *Ibid* at para 60.

57 See *ibid* at paras 56–57 (This authority, the Court states, is rooted in the *Haida* judgment, where it is noted that it is open to governments to set up regulatory schemes to address the procedural requirements of consultation at different stages of the decision-making process with respect to a resource).

have neither of these duties, one of these duties, or both", depending on the terms of its enabling statute.[58]

Given that the duty to consult is often triggered by the launch of a development or resource project, and given the fact that many of those projects will need to go through multiple, distinct processes of approval by separate and independent decision makers, this effectively means that, for any one project, the duty to consult is likely owed by multiple, distinct regulatory and adjudicative decision makers.[59] *Carrier Sekani* tells us that whether this is or is not the case is dependent upon the enabling statute of each public administrative decision-making body.[60]

A third reality is found in the context of municipalities. Municipalities, like adjudicative tribunals and regulatory boards, are creatures of statute. They have a wide range of statutory powers delegated to them by provincial legislatures. In exercising their delegated powers, it is possible that municipalities will make decisions that have the potential to impact Aboriginal rights and interests. For example, a municipality might authorize a land-use planning or development project that affects a sacred cultural site, burial ground, or traditional harvesting rights, either directly (access, zoning, etc.) or indirectly (environmental impacts on habitat, etc.). This is even more likely to be the case in provinces where municipalities have particularly broad spheres of jurisdiction.[61]

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58 *Ibid* at para 58.

59 Sossin, *supra* note 4 at 111. See e.g. *Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68, 308 DLR (4th) 285, where a hydro transmission line project required both a Certificate of Public Convenience and Necessity (CPCN) from the BC Utilities Commission and an Environmental Assessment Certificate under the *Environmental Assessment Act*. The British Columbia Court of Appeal held that the granting of the CPCN is discrete from the granting of the Environmental Assessment Certificate, and thus the BC Utilities Commission was obligated to assess the adequacy of the Crown's consultation when deciding whether or not to issue the CPCN, rather than leaving that assessment to the Minister granting the Environmental Assessment Certificate.

60 *Carrier Sekani*, *supra* note 52 at para 60.

61 E.g. in Ontario, where the 2001 amendments to its *Municipal Act* have resulted in significant expansion of the jurisdiction within which municipalities in Ontario can act. See e.g. David Siegel, "Recent Changes in Provincial-Municipal Relations in Ontario: A

The question of whether municipal governments possess a legal duty to consult Aboriginal peoples has been deliberated by courts to varying degrees, and has, for a significant period of time, remained unanswered.[62] However, in September 2012, the British Columbia Court of Appeal dismissed an appeal brought by the Neskonlith Indian Band, confirming that the City of Salmon Arm, a municipality, *did not* owe the Band a constitutional duty to consult.[63] Central to the Court's decision was its finding that municipalities do not have the remedial powers necessary to ensure that any consultation sought would be meaningful: "local governments lack the authority to engage in the nuanced and complex constitutional process involving 'facts, law, policy and compromise'".[64]

However, the Court *did* leave open the possibility that municipalities *could*, in certain circumstances, be subject to the duty to consult. While the Court rejected the Band's argument that the duty to consult "automatically" vests in any entity that has the power to make decisions that can affect Aboriginal rights or interests, it did so on the basis that any duty (or aspects of the duty), if one were to exist, would have to attach to the municipality by virtue of *delegation*.[65] Thus, aspects of the duty to consult could, at least in theory, be *delegated* to municipalities as per *Carrier Sekani*, so long as the power was expressly or impliedly conferred by statute. So, although

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New Era or a Missed Opportunity?" in Robert Young & Christian Leuprecht, eds, *Municipal-Federal-Provincial Relations in Canada* (Montreal: McGill-Queen's University Press, 2006) 181.

62 Some judges have held that the municipality does have a duty to consult. See *John Voortman & Associates v Haudenosaunee Confederacy Chiefs Counci*, [2009] 3 CNLR 117, 176 ACWS (3d) 831, (Ont Sup Ct J); *Kane v Lac Pelletier (Rural Municipality No 107)*, 2009 SKQB 348 at paras 51–59, [2009] 4 CNLR 108 (SKQB). Other judges have held the reverse. See *City of Brantford v Montour*, 2010 ONSC 6253 at para 58, 104 OR (3d) 429; *Gardner v Williams Lake (City)*, 2006 BCCA 307, 54 BCLR (4th) 225.

63 *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 at para 66, [2012] CNLR 218 [*Neskonlith*].

64 *Ibid* at para 68.

65 *Ibid.*

municipalities do not have a constitutional duty to consult First Nations, it is possible that they may, in some circumstances, have a *delegated* duty.

All that being said, in reality, many municipalities are already performing consultative duties when engaging in activities that are likely to have an impact upon the rights and interests of First Nations.[66] Even in *Neskonlith*, the City of Salmon Arm did engage in consultations with and accommodations of the Neskonlith Band, the Band was provided with copies of all relevant materials, they were heard at various meetings, their expert reports were reviewed and taken seriously, and their objections lead to material modifications to the development.[67]

What this means is that the duty to consult, while ultimately a legal responsibility of "an undivided Crown",[68] is often the practical responsibility of various entities. Due to delegation, the federal Crown, the provincial Crown, adjudicative tribunals, regulatory boards, proponents, and perhaps even municipal governments might all play a role in fulfilling the duty to consult, where it is found to exist. Which of these entities play a role, and precisely what role they play, is dependent upon several factors: the particular project, the enabling statute of each public decision-making body, and the individual choices of the members of these institutions. As such, this will have to be determined on a case-by-case basis.

B. DELEGATION: THE POSITIVE

There are indeed certain advantages to the delegation described above. For instance, since the duty to consult often arises in the context of a

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66 E.g. in Ontario, the Ministry of Municipal Affairs and Housing published an article citing several examples where municipalities have taken it upon themselves and consulted with First Nations and other Aboriginal parties whose rights or claims stand to be affected by their actions or decisions. See Ontario Ministry of Municipal Affairs and Housing, *Municipal-Aboriginal Relationships: Case Studies* (Toronto: Queen's Printer for Ontario, 2009).

67 *Neskonlith*, *supra* note 63 at 89.

68 See Michelle Mann, *Summary of Input from Aboriginal Communities and Organizations on Consultation and Accommodation*, online: Aboriginal Affairs and Northern Development Canada <http://www.aadnc-aandc.gc.ca/eng/1308577845455/1308578030248>.

development project, delegating aspects of the duty to the proponents of that project may enhance the quality of consultations that occur. Project proponents are closer to the project and as a result are more knowledgeable about the project itself, including its scope and impact. They will therefore be able to articulate more clearly the likely and potential impacts of the project and communicate these impacts to the affected First Nation. This may provide the First Nation with a deeper level of understanding of the project's risks and benefits, and may allow the First Nation to more acutely articulate its concerns and requests for particular forms of accommodation in response. Proponents will likely also have a very clear sense of the different options for accommodation in a particular circumstance,[69] some of which may be particularly desirable for First Nations. While accommodations sought by First Nations will inevitably vary depending on the community, some might welcome accommodations in the form of training and employment opportunities or revenue-sharing agreements.

On a higher level, one could argue that delegation may create more opportunity for more consultations with various public bodies,[70] and thus aid in building positive relationships—one of the chief goals implicit within the duty to consult.[71]

However, despite these benefits, delegation is also responsible for the creation of certain practical effects that threaten the objectives that the duty to consult was originally intended to achieve. The effects associated with delegation challenge the extent to which meaningful consultation can be realized, and, in so doing, threaten the potential of the duty's ability to advance reconciliation between the Crown and Aboriginal peoples.

C. DELEGATION: THE NEGATIVE

The first concern is that delegation results in the loss of nation-to-nation negotiation. While delegation does create opportunity for more consultations with public bodies beyond the federal and provincial Crown,

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[69] Newman, *Duty to Consult*, *supra* note 18 at 36.

[70] Including independent regulatory agencies, tribunals, and municipalities.

[71] Morellato, "Crown's Constitutional Duty", *supra* note 32 at 57. See also Newman, *Duty to Consult*, *supra* note 18 at 21.

and thus promotes the building of relationships with those bodies, at the same time it creates a disconnect between Aboriginal peoples and the Crown.

As explained above, increasing numbers of consultation negotiations are taking place between First Nations and another entity that is *not* the federal or provincial Crown. A particular project will likely attract multiple regulatory approval processes along the way. If the enabling statutes of the entities charged with granting those approvals meet the requirements for consultation enunciated by the SCC in *Carrier Sekani*, then First Nations affected by those approval processes will be consulting with those entities, rather than with the federal or provincial Crown.

The same can be said with respect to project proponents. As noted above, project proponents often play a considerable role in Aboriginal consultations because the Crown has delegated to them aspects of the duty to consult. In many resource-development situations, this is done informally; federal and provincial governments leave the proponent to explain the effects of the project and to negotiate agreements between it and the affected First Nation in terms of access to resources, revenue sharing, and so on.[72] However, some provinces have formally delegated aspects of the duty. The province of Alberta, for example, has delegated the vast majority of its consultation duties to project proponents in its Aboriginal consultation policy.[73] As such, Alberta appears to have adopted a detached, "neutral arbiter" role toward consultation and accommodation, rather than a more involved one that promotes reconciliation.[74]

The reality is clear: the more that consultation occurs between First Nations and non-Crown entities, the less it occurs between First Nations and

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72 Isaac & Knox, "The Crown's Duty", *supra* note 50 at 73.

73 This is evidenced in Alberta's consultation policy, *First Nations Consultation Policy on Land Management and Resource Development*, and its related Consultation Guidelines. See Ministry of Aboriginal Relations, *Aboriginal Consultation*, online: Alberta Ministry of Aboriginal Relations <http://www.aboriginal.alberta.ca/1.cfm>.

74 Monique Passelac-Ross & Verónica Potes, "Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal?" (2007) 19 Canadian Institute of Resources Law Occasional Paper at 43.

the Crown. The duty to consult was intended to advance the goal of reconciliation between the Crown and Aboriginal people—to move forward in a renewed relationship that is more representative of the "nation-to-nation relationship" that once governed Aboriginal–Crown relations, "rooted in the *two-row wampum* tradition of autonomy, mutual respect, and friendship".[75]

However, with the duty to consult being executed largely by entities other than the Crown, the opportunities to bring Aboriginal peoples and the Crown together in the form of negotiation are substantially reduced. This results in missed opportunities for the Crown and Aboriginal peoples to experience meaningful consultations and to advance the potential for reconciliation. As Chief Kahgee of the Saugeen Ojibway Nation states, this is "a cost to the First Nation and it's a cost to the Crown . . . [Y]ou move no closer or no further along the road to reaffirming or strengthening that relationship or achieving reconciliation".[76]

The second issue associated with delegation is the potential reduction in the scope and range of accommodations that can be made in response to consultations with First Nations. When aspects of the duty to consult are delegated to non-Crown entities, those entities may consider themselves to be limited by their own capacity to act when it comes to their ability to make accommodations in respect of requests made by affected Aboriginal groups.

For example, regulatory boards, adjudicative tribunals, and municipalities, being creatures of statute, only have as much power to act as has been delegated to them in that statute. In the context of the duty to consult, if they are found to play a role in the consultation process (i.e., they meet the requirements set out in *Carrier Sekani*), they may consider themselves only able to consult and accommodate to the extent that their enabling legislation allows.

The court in *Huu-Ay-Aht*[77] recognized this issue. This case involved a dispute over negotiations pertaining to logging operations on Huu-Ay-Aht

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[75] Dalton, *supra* note 38 at 277.

[76] Interview of Chief Kahgee, Saugeen Ojibway Nation, by Promise Holmes Skinner (8 August 2011) transcripts with author.

[77] *Huu-Ay-Aht First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 697, [2005] 3 CLNR 74 [*Huu-Ay-Aht*].

First Nation's (HFN) traditional lands. With respect to accommodation, the British Columbia Supreme Court found that Crown efforts to consult could not be considered meaningful because only a single accommodation option was presented to HFN.[78] What is more, the Court noted that those negotiating on behalf of the Crown with the First Nation did not have the authority to grant any form of accommodation other than what was available under the particular legislation.[79] The British Columbia Court of Appeal expressed a similar sentiment in *West Moberly*. The Court noted that government officials are not limited by statutory mandate when it comes to fulfilling the duty to consult; rather, "[t]he Crown's duty to consult lies upstream of the statutory mandate of decision makers."[80]

This is positive in the sense that it suggests courts will consider the impacts of delegation when assessing the adequacy of consultation, and that they will likely not tolerate reliance on statutory mandate as an excuse for offering limited accommodation options. However, these cases also confirm that, in practice, those carrying out consultative duties may (and sometimes do) view their accommodative role as being limited by their enabling statute, which, in turn, results in less meaningful consultation. Where this does occur, litigation or requests for judicial review can serve First Nations as a legal remedy. However, such cases can significantly lengthen the process of consultation, create excessive delays, and place demands on what are already limited resources.

This may also be the case when proponents are charged with fulfilling consultative duties. While proponents can offer certain accommodations that government cannot, such as employment and training opportunities, they are otherwise quite limited by their nature and capacity as development corporations. Alberta, a province that, as stated above, has formally delegated the majority of its consultative duties to proponents, has been criticized for doing so because of this result. As Passelac-Ross and Potes state:

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78 Sossin, *supra* note 4 at 108.

79 *Huu-Ay-Aht*, *supra* note 77 at para 52.

80 *West Moberly First Nations v British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, 2011 BCCA 247 at para 106, [2011] 333 DLR (4th) 31 [*West Moberly*].

> A practical implication of this over-reliance on the industry is that available accommodation measures that may satisfy the legitimate concerns of the Aboriginal peoples are significantly limited. . . . [C]onsultations . . . usually bring up issues beyond the capacity, ability or nature of the project proponents; issues that the Crown . . . should be able to address.[81]

Employment and training opportunities and revenue-sharing options may be desirable, but it is unlikely that these types of accommodations will be the only accommodations necessary to address the concerns of affected First Nations. As Passelac-Ross and Potes note, in many instances the accommodation that needs to be made in order to address the issues that arise in consultation negotiations will go beyond the capacity of proponents.[82] The meaningfulness of both the consultation and the accommodation is compromised by inability to tailor the accommodation to the consultations.[83] This in turn compromises the extent to which the consultation process itself can advance reconciliation between the Crown and Aboriginal peoples.

Finally, delegation is likely to cause confusion as to who carries the obligation to consult in the first place, which, in turn, has the potential to result in an unfulfilled or inadequately fulfilled duty. As explained above, the jurisprudence has made it possible for proponents and public bodies such as administrative agencies and tribunals, regulatory approval boards, and municipalities to play some role in the duty to consult. With respect to the public entities, *Carrier Sekani* tells us that whether they have a role to play and what that role may be must be assessed on a case-by-case basis.[84] The extent of their participation is dependent upon the terms of their enabling statute and whether those terms provide them with the ability to carry out the full consultative duty (which includes the ability to engage in consultation as well as the remedial powers needed to make the necessary

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81 Monique Passelac-Ross & Verónica Potes, "Consultation with Aboriginal Peoples in the Athabasca Oil Sands Region: Is it Meeting the Crown's Legal Obligations?" (2007) 98 Resources 1 at 6.

82 *Ibid.*

83 Sossin, *supra* note 4 at 108.

84 *Carrier Sekani*, *supra* note 52 at para 55.

accommodations in relation to those consultations), or whether they are only able to assess the adequacy of consultation efforts made thus far.

It is clear that identifying which regulatory or adjudicative bodies play a role and what role they play is not a simple and straightforward task. As a result, it will likely be somewhat difficult for Aboriginal communities, government employees, proponents, and anyone else involved in the consultation process to determine who has a duty, and what that duty is, without going through some (albeit limited) legal analysis. Even regulatory or adjudicative bodies may find themselves guessing what role, if any, that they are obligated to play in the process. This uncertainty may encourage participation in "defensive consultation": public bodies may participate in consultation efforts as a precaution to avoid potential litigation. This may be a positive reaction in the sense that it may lead to a meaningfully fulfilled duty, or a negative reaction, adding to the already overwhelming referral process and burying First Nations further into an unproductive administrative process.

Confusion also arises when proponents participate in the consultation process. As Dwight Newman notes, one danger of having different industry stakeholders involved in consultations is that it may become difficult for an Aboriginal community to identify when it is engaged in discussions that amount to consultation for the purpose of the duty to consult, and when it is not.[85] When the Crown formally delegates certain aspects of the consultation process to proponents, yet maintains a "strong supervisory presence",[86] the extent of this confusion can be reduced. However, the Crown is not always so clear—as noted above, the Crown is often informal in its delegation of consultation responsibilities to proponents. In some cases, the Crown will rely almost exclusively on proponents to engage in consultation and accommodation with First Nations, as was the case in *Platinex*. Although the Court found that this rendered the consultation inadequate, the case illustrates the confusion and uncertainty that often arise as a result of delegation of the duty to consult: consultation processes become inadequate, less meaningful, and compromise reconciliation.

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85 Newman, *supra* note 18 at 36.

86 *Platinex*, *supra* note 34 at para 93.

IV. THE DIFFICULTY OF "FUNDING" CONSULTATION PARTICIPATION

The second area of risk pertains to the ability (or inability) to fund the consultation process. The ability to actually engage and participate in the consultation process requires both financial and human resources. Notices of projects and decisions must be sent out to affected First Nations, read through, and sorted. Research regarding the proposed activity and the impact of that activity has to be completed and assessed. This will likely require the hiring of experts and the completion of studies, such as archeological and hydro-geological assessments, government-required environmental assessments, and so on. In addition, it is likely the hiring of additional experts to peer-review these studies will be required. Periodic consultation and negotiation meetings will have to occur, resulting in administrative costs and, in many cases, travel expenses.

While this is true for both the Crown and the First Nation, more often than not it is the latter party that experiences the greatest difficulty finding the resources required to fuel their participation in the consultation process. It is well known that the majority of First Nation communities are lacking in resources of every kind. When one considers this in the context of the duty to consult, their lack of resources becomes even more of a concern given the standard practice that government has adopted to approach or invite First Nations into consultations. This has been termed the "Crown referral process",[87] discussed further below. What is more, there are limited funding and capacity options and programs available to assist First Nations with participation in consultation. Despite some judicial pronouncements in support of the matter, there is currently no legal obligation on the part of the Crown to provide any funding or capacity assistance to communities who choose to participate. Further, any funding programs or options that do exist are problematic. This scenario often results in significant financial and social

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[87] Maria Morellato, "Crown Consultation Policies and Practices Across Canada" (April 2009) at 4, online: National Centre for First Nations Governance <http://fngovernance.org/publication_docs/NCFNG_Crown_Consultation_Practices.pdf> [Morellato, "Crown Consultation Policies"].

costs to First Nation communities that elect to participate in consultation processes. This casts doubt on the ability of the duty to consult to fulfill its goals of meaningful consultation and advancement of reconciliation between Aboriginal peoples and the Crown.

A. THE CROWN REFERRAL PROCESS

The "Crown referral process" is one of the greatest logistical difficulties faced by Aboriginal communities in the context of the duty to consult.[88] This process has become the government's standard approach to inviting Aboriginal communities to participate in consultations. It functions as follows: first, a strategic planning decision is made in a Crown department to propose a project or make a decision that may impact Aboriginal or treaty rights; then the Crown sends out a referral package or a series of letters to the First Nations that it thinks might be affected, describing the proposed project or decision and the intended use of land that lies within their traditional territories. The Crown proposal might involve a lease, sale, permit, or development initiative. The referral stipulates that the First Nation has a prescribed time period in which it can respond, and that if no response is made, the Crown will proceed with its initiative. If the First Nation responds claiming the proposed initiative adversely affects its rights, the consultation process will begin.[89]

The issue with this process is primarily one associated with the *volume* of referral packages received by First Nation communities. Referrals are received from numerous, unrelated government departments and thus inevitably result in band offices being buried with paper.[90] The prospect of carefully assessing every referral to determine the extent of the impact on Aboriginal or treaty rights and forming a complete response is overwhelming; to do so would both be incredibly time consuming and

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88 *Ibid.*

89 Morellato, "Crown's Constitutional Duty", *supra* note 32 at 69.

90 Timothy Huyer, "Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation" (2006) 21 Windsor Rev Legal Soc Issues 33 at 44.

require substantial resources.[91] In addition, if a First Nation chooses to respond, its correspondence with that government department is substantially increased, stretching its limited resources even further.[92]

Justice Vickers acknowledged the limited resources available to the First Nations in responding to the numerous requests of government officials for consultation in *Tsilhqot'in Nation v British Columbia*:[93]

> It must be borne in mind that it is a significant challenge for Aboriginal groups called upon in the consultation process to provide their perspectives to government . . . There is a constant need for adequate resources to complete the research required to respond to requests for consultation. Even with adequate resources, there are times when the number and frequency of requests simply cannot be answered in a timely fashion.[94]

This illustrates that courts acknowledge the strain that even the initial stages of any consultation process places on Aboriginal communities. When consultation processes proceed further, the amount of resources, time, and energy required increases substantially.

Given that this reality means some First Nations might not be able to participate in the consultation process at all, it would seem that funding is or should be a necessary requirement in order to produce meaningful consultation, as described earlier in this article. However, as mentioned above, the current state of the law does not place this obligation on the Crown or the proponent. Discussion of the existing case law with respect to funding consultation participation will serve to illustrate this further.

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91 Meyers Norris Penny LLP, "Best Practices for Consultation and Accommodation" (September 2009) at 32, online: New Relationship Trust <http://www.newrelationshiptrust.ca/downloads/consultation-and-accomodation-report.pdf>.

92 *Ibid.*

93 2007 BCSC 1700, [2008] 1 CLNR 112 [*Tsilhqot'in*].

94 *Ibid* at para 1138.

B. THE CURRENT LEGAL AND POLITICAL LANDSCAPE: CONSULTATION FUNDING AND THE COURTS

As mentioned above, there is presently no legal obligation on the part of the Crown to fund consultation. While there are some cases in which courts have acknowledged or required that "economic accommodation" be provided, it is clear that, when doing so, courts have tread carefully.[95]

Dene Tha' First Nation v Canada (Minister of Environment)[96] was a 2006 decision involving the design of the regulatory and environmental review processes related to the Mackenzie Gas Pipeline. The Dene Tha' alleged that Canada failed to fulfill its constitutional duty to consult with respect to the design of the review processes. The Federal Court held that there was a duty to consult, and that it had been breached. As a remedy, the Court ordered that a hearing be held to address, among other things, the provision of technical assistance and funding to the First Nation to carry out the consultation.[97]

In *Wii'litswx v British Columbia (Minister of Forests)*, a decision regarding the approval of forest-licence replacements, the British Columbia Supreme Court affirmed an existing arrangement between the Crown and the Gitanyow Nation to provide interim periodic payments to support ongoing consultation initiatives. The court held that such economic accommodation "suggest[s] good faith ongoing consultation and accommodation on the part of the Crown to advance this process".[98] Regarding the substantive issue of whether the Gitanyow are entitled to a share of the logging revenue, Justice Neilson expressed some caution, holding that while the economic component of Aboriginal interests is a significant issue, it was not unreasonable for the Crown to decline to consider this aspect of the Gitanyow's claim.[99]

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95 Newman, *Duty to Consult*, *supra* note 18 at 61.

96 2006 FC 1354, [2007] 1 CNLR 1 [*Dene*].

97 *Ibid* at para 134.

98 *Wii'litswx*, *supra* note 34 at para 239.

99 *Ibid.*

There are other occasions where courts, while not necessarily ordering economic accommodation, have made explicit pronouncements recognizing the unfairness resulting from the financial imbalances that exist between Aboriginal parties and the Crown, and often the proponent of the project in question. For example, in the latest of a series of Superior Court of Justice decisions on the matter of *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*,[100] Justice Smith commented that "the issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a 'level playing field'".[101] This comment, "while not substantively articulating a duty to fund the consultation process", illustrates that the Court acknowledges that appropriate funding is essential to a fair consultation process and may be willing to "consider the availability of resources when assessing the adequacy of the consultation process".[102] Most recently, the British Columbia Supreme Court stated in *Taseko Mines*[103] that funding the consultation process is "a cost and condition of doing business" with First Nations, and that "[o]nly by upholding the process can reconciliation be promoted".[104]

Thus, while it seems as though courts are becoming more comfortable commenting on the importance of funding and capacity assistance in creating a fair and balanced consultation process, it is evident that they are not yet willing to articulate a substantive duty upon the Crown to fund the consultation process as part of the duty to consult and accommodate Aboriginal peoples. Despite this reality, there are some options outside of the legal landscape to provide First Nations communities with an opportunity to obtain capacity or funding assistance. However, as will be illustrated below, these options are few and, in practice, they often prove to be inadequate.

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100 See *supra* note 34.

101 *Ibid* at para 27. See *Platinex*, *supra* note 34 at para 27.

102 Morellato, "Crown's Constitutional Duty", *supra* note 32 at 48.

103 *Supra* note 34.

104 *Ibid* at para 60.

C. THE CURRENT LEGAL AND POLITICAL LANDSCAPE: EXISTING FUNDING OPTIONS

The first option that will be discussed, which often (but not always) occurs in practice, is to develop an agreement. In some instances, the First Nation will enter into an agreement with the Crown wherein the First Nation is to be provided funding to cover reasonable costs associated with consultations. These agreements are products of negotiations between the Crown and the First Nation. This type of arrangement was seen in the *Wii'litswx* and *Platinex* cases, cited above. Funding may be given as a lump sum, as was the case in *Platinex*, or as periodic payments, as in *Wii'litswx*.

Agreements of this sort can also be reached with the proponent. Often, the proponent is a large corporation with a project supported by a budget, and, in the interests of "good business practice", it may be willing and perhaps eager to develop an agreement with the affected First Nation(s).[105] These types of agreements typically take the form of impact-and-benefit agreements (IBAs; also known as contracts, agreements, letters of understanding, memoranda of understanding, etc.),[106] and they usually address issues such as employment, education and training, and, possibly, resource sharing and compensation.[107]

In addition to self-initiated agreements, some provinces within Canada have developed funding programs seeking to help Aboriginal communities participate in consultation processes. For example, the Ontario government has established the "New Relationship Fund", which seeks to aid Aboriginal communities in building consultation and engagement capacity.[108] There are two components to this fund: the Core Consultation Capacity program and

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105 See Thomas Isaac & Anthony Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2005) 23:4 J Energy & Nat'l Res L 427 (arguing that these agreements produce "better and more certain relationships between Aboriginal communities and industry" and thus are part of "common-sense business practice", at 453).

106 See *ibid.*

107 See *ibid* at 454.

108 See Ministry of Aboriginal Affairs, *New Relationship Fund*, online: Ontario Ministry of Aboriginal Affairs <http://www.aboriginalaffairs.gov.on.ca>.

the Enhanced Capacity Building program. The former program is directed towards aiding communities in enhancing their internal consultation capacity (e.g., hiring an employee), whereas the latter seeks to fund specific projects beyond what is required to enhance internal capacity (e.g, the creation of a database cataloging historical and traditional sites within a community's territory).[109] Alberta launched a similar program called the First Nations Consultation Capacity Investment Program (FNCCIP), which seeks to fund First Nations' involvement in the consultation process with industry and the provincial government.[110] British Columbia and Nova Scotia have also recognized the need for funding and have created similar programs.[111]

Lastly, there are programs tied to federal regulatory processes that can provide funding if these processes are required in order for a particular project to move forward. For example, the Canadian Environmental Assessment Agency (CEAA) "can provide funding in relation to projects that are assessed by a review panel or a comprehensive study under the *Canadian Environmental Assessment Act*."[112] The CEAA Program includes an Aboriginal funding envelope to assist Aboriginal groups with respect to Aboriginal or public consultation efforts.[113]

While at first glance it may seem as though there is plenty of opportunity for Aboriginal communities to obtain funding and/or capacity assistance to allow for meaningful consultation, there are several reasons why this situation is problematic. First, none of these options guarantees that Aboriginal communities in need of funding will in fact receive it. The self-initiated agreements depend upon the goodwill of the parties to enter

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109 See *ibid.*

110 See Ministry of Aboriginal Relations, *Consultation Guidelines FAQ*, online: Alberta Ministry of Aboriginal Relations <http://www.aboriginal.alberta.ca/573.cfm> [*Consultation Guidelines*].

111 See Morellato, "Crown Consultation Policies", *supra* note 87 at 4.

112 See Government of Canada, *Aboriginal Consultation and Accommodation—Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Ottawa: Minister of the Department of Indian Affairs and Northern Development Canada, March 2011) at 31.

113 See *ibid.*

into such an agreement and provide funding. While government policy may encourage industry and government to do so, this is not a requirement, leaving open the possibility that they will not.

Second, with respect to the existing provincial funding programs, only four of Canada's ten provinces have recognized this need for funding and established programs to provide for it (the remaining six provinces have yet to do so).[114] In addition, the programs that exist are contingent upon the availability of government funds.[115] Alberta, for example, has recently reduced the funding available to First Nation communities via FNCCIP; only those experiencing high volumes of resource-development requests and activity will receive supplemental funding under the program.[116]

Third, programs tied to other regulatory processes can only assist Aboriginal communities if those regulatory processes are triggered by the proposed Crown project or decision. For example, if the Crown initiative does not need to be assessed by a review panel or a comprehensive study, there is no opportunity for the Aboriginal community to seek funding under the CEEA Program.

The result is that Aboriginal communities who choose to participate in consultation processes may be left with the onerous task of resourcing their own participation. The financial and social costs associated with this are considerable. Take Saugeen Ojibway Nation (SON), for example. SON is one of the wealthiest First Nations in the country, staffed with full-time band council members.[117] Even given their privileged financial situation, SON still struggles to meet the financial demands associated with consultation. In the

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114 See Morellato, "Crown Consultation Policies", *supra* note 87 at 4.

115 See Ministry of Aboriginal Affairs, Enhanced Capacity Building Program Guide 2013-2014, online: Ontario Ministry of Aboriginal Affairs <http://www.aboriginalaffairs.gov.on.ca/english/policy/nrf/NRF_Enhanced_Capacity_Program_Guide_2013-2014.pdf>; Ministry of Aboriginal Affairs, Core Consultation Capacity Program Guide 2013-14, online: <http://www.aboriginalaffairs.gov.on.ca/english/policy/nrf/NRF_Core_Capacity_Program_Guide_2013-2014.pdf>.

116 See *Consultation Guidelines*, *supra* note 110, where it states that funding in Alberta has been reduced recently.

117 See Chief Kahgee, *supra* note 76.

past fiscal year, SON spent $2.2 million funding its participation in consultations with various proponents and municipalities regarding quarry and park developments.[118]

Spending this money on consultation processes creates further social costs to the community as a whole. Allocating massive amounts of funds to consultation efforts diverts time, energy, and resources away from internal community developments and rehabilitation efforts. For example, SON was obligated to forgo an opportunity to establish its own Environment Office.[119] In addition, SON was unable to sponsor an articling student to work at a law firm with the intention to return to the community as SON's in-house legal counsel.[120] Money spent on resourcing consultation therefore detracts from the ability of an Aboriginal community to direct their limited resources to the improvement of health care, education, and other initiatives.

In this light, the consultation process, in the absence of economic accommodation and given the inadequacy of supplementary funding programs, forces many First Nations to make impossible choices: whether to participate in consultation and forgo efforts to enhance their community, or forgo participation in consultation and allow development projects to proceed with the likelihood that their land, resources, and rights will be adversely affected. The result is that the consultation process is substantially less meaningful, as the resources available to the majority of First Nation communities to enable them to participate in the consultation process fully are inadequate or non-existent. The potential that this process will advance the goal of reconciliation is therefore considerably diminished.

V. THE EROSION OF ABORIGINAL RIGHTS AND INTERESTS: THE CUMULATIVE EFFECTS OF CONSULTATION

The third and final area of risk associated with the implementation of the duty to consult is probably the most threatening of the three addressed in this paper. It is the risk associated with the cumulative effects of consultation:

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[118] *Ibid.*

[119] *Ibid.*

[120] *Ibid.*

the danger that Aboriginal participation—or lack thereof—in numerous consultation and accommodation processes will lead to the eventual erosion of Aboriginal rights and interests by gradually diminishing the land base upon which many of their rights and practices rely.

It is important to note that in this section, the cumulative effects of consultation do not refer to the adverse effects that numerous consultations (and thus numerous development projects) can have on the land and the environment itself, although this is also a concern. Rather, cumulative effects refer to the gradual erosion of Aboriginal and/or treaty rights that are tied to or exercised on that land. More consultations will lead to more development, and more development will lead to a reduced land base upon which a First Nation is able to exercise its traditional practices and Aboriginal or treaty rights. As such, First Nation participation in numerous consultation processes can lead to the erosion of Aboriginal and treaty rights.

This danger, it will be argued, is a consequence of two factors. The first is made clear when one takes a more detailed look at the mechanics of the duty to consult framework, as enunciated by the SCC in *Haida*. A closer look will suggest that there is a clear power imbalance within the duty itself. This implies that, more often than not, it will be First Nations who are obligated to make the most significant compromises in each instance of consultation. The second is the inability or difficulty of First Nations to resource their own participation in consultation processes, as discussed in Part IV of this paper. The number of requests for consultation may be too many, and the resources of First Nations too few, to allow First Nations to meaningfully participate in every consultation process. When this is the case, First Nations may have no choice but to forgo participation in one, some, or many consultation processes.

Thus, over time, Aboriginal peoples may in effect be consulting and accommodating themselves out of their rights, or, alternatively, will have no choice but to stand by and watch as their rights and interests that exist on traditional lands are destroyed.[121] When the duty to consult is viewed in this light, it is difficult to have faith in its potential to advance reconciliation between the Crown and Aboriginal peoples.

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[121] See Morellato, "Crown's Constitutional Duty", *supra* note 32 at 69.

A. Imbalance of Power Inherent in the Duty to Consult Framework

As mentioned above, there is a clear imbalance of power implicit within the duty-to-consult framework itself, which can be made clear by taking a closer look at the principles laid out by the SCC in *Haida*, when the Court first articulated the duty.

First, the duty to consult does not provide Aboriginal peoples with the opportunity to say "no" to a Crown initiative that has the potential to adversely affect their rights and interests. In other words, the duty does not amount to a veto. As the SCC states, "the duty to consult does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim ... Aboriginal "consent" ... is appropriate only in cases of established rights, and then by no means in every case."[122]

Mikisew Cree, a case pertaining to consultation in the context of established treaty rights, alludes to the notion that there *may* be a case for a veto in circumstances where a First Nation could be left with "no meaningful right to hunt".[123] Other than this narrow possibility, however, the Court is clear that the duty does not provide First Nations with the ability to stop or prevent outright a particular Crown initiative from occurring.[124]

Second, the duty to consult does not include a duty to reach an agreement: "[T]here is no duty to agree; rather, the commitment is to a meaningful process of consultation."[125] While the duty does require the Crown to negotiate in "good faith" and with the "intention of substantially addressing the concerns" of First Nations,[126] agreement is not required. This, together with the inability of First Nations to veto, means that the Crown could proceed even in the absence of an agreement, if it so chose.[127]

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[122] *Haida*, *supra* note 3 at para 48.

[123] *Supra* note 12 at para 48.

[124] *Haida*, *supra* note 3 at para 48.

[125] *Ibid* at para 42.

[126] *Ibid.*

[127] There are costs to this. First, the Crown would be further damaging the relationship between it and the First Nation. Second, where an Aboriginal right is asserted, it is

Third, the duty to consult does not preclude any hard bargaining on the part of the Crown: "Sharp dealing is not permitted. . . . Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted".[128] Giving the Crown the power, or rather the right, to "bargain hard" creates a significant power imbalance, given the vast disparity in resources that exists between the parties. There is also some indication in *Haida* of an expectation that First Nations will co-operate and agree: "... Aboriginal claimants ... 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".[129]

Together, these principles illustrate an obvious power imbalance inherent in the duty to consult. With no ability to veto, no obligation on the parties to agree, and the ability of the Crown to "bargain hard",[130] First Nations seem to be at a clear disadvantage even before any consultation and negotiation occurs. As such, consultation and accommodation will likely require some

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possible that that right could be found to "exist" as per *Sparrow* later on, at which point the Crown might be infringing upon that Aboriginal right, possibly unjustifiably (see *Sparrow*, *supra* note 6 at 1112–13). If this was the case, the Crown may be required to compensate the First Nation (see *Sparrow*, *supra* note 6 at 1119). This compensation could be significant, especially if the Aboriginal right affected is a title right, as the Crown might be required to compensate the First Nation at fair value of the land at issue (see *Delgamuukw*, *supra* note 6 at para 169). Thus, compensation *may* be a significant deterrent to government acting unilaterally in a context of an asserted Aboriginal right, especially if it is a title right. However, one should note that the Crown would only have to compensate in the event that it was found by a court to be infringing upon an Aboriginal right, and that compensation is required. A compensation order therefore requires a First Nation to bring a legal challenge against the Crown—an event that is unlikely to occur given the limited resources of First Nations. It is therefore questionable as to what extent compensation will discourage government from acting in the absence of agreement with First Nations.

128 *Haida*, *supra* note 3 at para 42.

129 *Ibid.*

130 *Ibid* at para 32.

compromise be made on the part of the First Nation.[131] As Gordon Christie states,

> [t]he decision to build a road, for example, might have to be made through consultation with potentially affected Aboriginal rights-holders, and the road itself might have to be constructed in such a way as to 'accommodate' certain of the interests expressed during consultation . . . . But almost certainly, the road will be built.[132]

With each compromise made, the ultimate result of a First Nation's participation in numerous consultation processes pertaining to development on its traditional lands will be the gradual erosion of Aboriginal and treaty rights that are tied to those lands.

To use Gordon Christie's example, with each new road that is built, there is less land available upon which a First Nation can, for example, exercise its right to hunt or trap. The only way to curb this result is for all branches of the Crown to recognize the cumulative effects that consultations can have on First Nations' ability to exercise their traditional practices, on their traditional lands, when consulting with First Nations.

Currently, however, it seems the Crown is extremely reluctant to do so. This issue was a central one in the recent *West Moberly*[133] case. The West Moberly First Nations of British Columbia took the position that any sampling and future mining, taken cumulatively with previous developments, would have damaging, irreversible impacts on their ability to practice their treaty rights on their traditional lands—namely, to hunt. British Columbia officials responded that it was not within their mandate to address concerns of this scope:[134] they were only required to consult on the permit for sampling, not on the cumulative impacts of past development.

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[131] This is not to say that the Crown does not make compromises; however, Aboriginal peoples have to be willing to make *some* compromise in order to have any say at all (i.e., participate in consultation) with respect to what happens with their land.

[132] Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39:1 UBC L Rev 139 at 160.

[133] *West Moberly*, *supra* note 80, leave to appeal to SCC refused, 34403 (February 23, 2012).

[134] *Ibid* at paras 103–07.

The First Nations launched an action for judicial review, claiming that the province had failed to adequately consult by not taking these cumulative effects into account. The trial judge agreed with the West Moberly First Nations, staying the permit for sampling for a period of time until proper accommodation could be made. On appeal, the decision was affirmed. With respect to cumulative effects, Chief Justice Finch held that what has occurred before the current project is indeed relevant: "[T]he historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt."[135] As this statement demonstrates, Chief Justice Finch is concerned not with the direct impact of the cumulative effects on the land itself, but on the Aboriginal treaty right to hunt that is tied to that land.

While an encouraging judgment, courts are only beginning to recognize the cumulative effects of consultation and development decisions, and the Crown is only doing so when the issue is forced. Consultation that refuses to acknowledge these cumulative effects on the land cannot be considered meaningful, as it inevitably leads to the gradual erosion of the Aboriginal rights and interests that are tied to the land—a result clearly at odds with the duty's primary purpose: reconciliation and the improvement of relations between Aboriginal peoples and the Crown.

B. THE INABILITY TO SECURE CONSULTATION RESOURCES

As discussed above, First Nation communities often struggle to find the human and financial resources needed to participate fully in consultation processes. This also contributes to the gradual erosion of Aboriginal rights. As we have seen, these difficulties are amplified by the method the Crown has adopted to invite First Nations to engage in consultation (the "Crown referral process"). The numerous referrals sent from unrelated government departments create significant difficulties for First Nations: most do not have the capacity, resources, or staff to address them all. If the First Nation does not respond to the referral, the Crown proceeds with its initiative and consultation does not occur.

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135 *Ibid* at para 117.

In addition, First Nations typically have fewer resources than the parties they consult with, namely governments and/or development corporations. As such, it stands to reason that if one party, which has substantial resources, continues to mount consultations with a party that has substantially fewer resources, the tendency will be that the party with fewer resources will be the one to compromise. Moreover, some First Nations might instead choose to direct what limited resources they have internally to advance health or education initiatives within the community, rather than spend the time, energy, and resources on consultation and accommodation processes, and they might thus elect not to participate.

In either scenario, the result is what many First Nations refer to as the "death of a thousand cuts":

> their traditional lands and resources are repeatedly alienated, lost or developed without regard to their Aboriginal or treaty rights and without meaningful accommodation simply because of lack of funding and capacity on the part of First Nations to engage in the process.[136]

These cumulative effects of consultation adversely affect the land, and by extension, the environment. More importantly, however, the cumulative effects of consultation also result in a gradual erosion of any Aboriginal and/or treaty rights exercised on that land. A consultation process that leads to this result cannot be described as meaningful and, even more so, cannot positively contribute to the advancement of reconciliation between the Crown and Aboriginal peoples. Without consideration of cumulative effects by all branches of the Crown, the duty to consult may contribute to the destruction of Aboriginal rights and interests, rather than ensure their protection and preservation.

VI. CONCLUSION: THE WAY FORWARD

Articulation of the duty to consult in *Haida* is probably one of the most important developments in Aboriginal law and jurisprudence to date. *Haida* instituted a legal framework that requires the Crown to consult with Aboriginal peoples before acting or making a decision that may adversely

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[136] Morellato, "Crown Consultation Policies", *supra* note 87 at 4.

affect both existing and potential Aboriginal rights and interests. It was envisioned that such a process would encourage meaningful negotiation where Aboriginal interests are seriously considered and accommodated in the Crown's plan of action, which would enhance the potential for reconciliation between the Crown and Aboriginal peoples.

While the duty to consult may have great potential, this article illustrates that there are issues associated with its implementation that serve to challenge the goals that the SCC had hoped it would achieve. These issues most clearly manifest themselves in three contexts: delegation, capacity and resources for participation in consultation, and protection of Aboriginal and treaty rights generally—the cumulative effects of consultation. It has been illustrated that each of these issues poses a threat to the realization of meaningful consultation and thus of consultation's potential to advance reconciliation.

Although the object of this article is to identify the implementation issues associated with the duty to consult and not to devise solutions, it will conclude with a brief discussion of possible steps that could be taken to reverse the trend and ensure that the duty to consult can be preserved as a tool that will further the protection and promotion of Aboriginal rights and interests.

A. STEPS WITH RESPECT TO DELEGATION

It was explained above that delegation creates three issues that pose a threat to the goals embedded within the duty to consult. First, delegation results in the loss of nation-to-nation negotiation, as consultation negotiations are increasingly taking place between First Nations and entities that are *not* the federal or provincial Crown. This leads to an ever-expanding disconnect between the Crown and Aboriginal peoples, rather than enhancing the potential for reconciliation. Second, delegation results in a reduction in the scope and range of accommodations that can be made in response to consultations that occur, as entities such as proponents and regulatory bodies find themselves limited by their own capacity to act. Lastly, delegation causes confusion as to which body carries the obligation to consult in the first place, which, in turn, has the potential to result in an unfulfilled or inadequately fulfilled duty.

These issues can be largely resolved in either of two ways. The first is to eliminate the "divided duty" and replace it with a true government-to-government decision-making process. As Maria Morellato suggests, First Nations could discuss referrals from various government departments (that would at some point trigger the involvement of regulatory boards, municipalities, etc.) with government personnel who would have the authority to address land and resource matters within the traditional territory of that First Nation: what she calls the "Joint Decision-Making Committee".[137] By bringing the First Nation directly in contact with government authorities, the nation-to-nation relationship would be reinforced, thus enhancing the potential for reconciliation between the Crown and Aboriginal peoples. The confusion as to who is required to play a role in consultation and what that role is would be largely removed, and the issue of scope of accommodation would be addressed, as the government authorities at the table would not be limited in their capacity to act because they are Crown authorities.

In the alternative, another option is to allow First Nations involved in consultation processes to expand negotiations to areas that extend beyond the jurisdiction of the particular government, regulatory or adjudicative board, municipality, or proponent charged with the consultation role. This would be beneficial in two ways: First, it would provide Aboriginal communities with the option to negotiate with government or Crown authorities rather than regulatory bodies or proponents, and thus enhance the nation-to-nation relationship. Second, the issue regarding capacity with respect to the scope of accommodations made in response to consultations could be avoided because this option would allow First Nation communities to enter into negotiations with the appropriate Crown body that is capable of making the necessary accommodations. This would create more meaningful consultations, as Aboriginal interests would be addressed by the entities that can adequately and meaningfully address their concerns.

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[137] Morellato, "Crown's Constitutional Duty", *supra* note 32 at 71.

B. STEPS WITH RESPECT TO RESOURCING

Lack of resources for consultation participation is a major obstacle, both to ensuring that consultation is meaningful (ensuring that First Nations are able to peer-review Crown-initiated studies, attend consultation meetings, etc.) and to protecting and preserving Aboriginal rights and interests. However, as explained earlier, funding and capacity assistance for First Nations involved in consultations is not (legally) required.

Despite the fact that there are some funding options available, they are largely inadequate: either their very existence is dependent upon the goodwill of the parties involved (as is the case with agreements such as IBAs), or their availability is dependent upon success in a competitive application process or upon the availability of government funding. Thus, whether a First Nation will receive funding is, for the most part, unpredictable, and the likelihood that a First Nation will be able to adequately fund its own participation in every request for consultation that comes its way is highly unlikely. These problems are further aggravated by the Crown's standard method of notifying First Nations of an action that has the potential to affect their interests (the "referral process").

The solution to this issue is fairly obvious: the Crown should be legally obligated to provide consultation funding to First Nations involved in consultation processes. Courts have acknowledged the difficulties First Nations face in terms of participating fully in consultation processes, and they have on occasion ordered that consultation funding and support be provided. In addition, many provinces within Canada have recognized the need for funding and capacity support in their policies; some have even initiated funding programs (although there are issues with these, as explained earlier). Given this seeming support from both judicial and legislative branches, it would not be an enormous stretch for either the courts to order it, or, better yet, for government to institute it in a more structured and predictable manner (i.e., in the absence of a competitive application process). Economic accommodation is necessary in order to ensure that First Nations can participate meaningfully and fully in consultation processes.

C. STEPS WITH RESPECT TO THE EROSION OF ABORIGINAL RIGHTS

The duty to consult was created with the intention to preserve and protect even those rights and interests that are not yet proven, in the expectation that it would encourage meaningful negotiations and thus improve relations between the Crown and First Nations. However, as explained, there is the possibility that participation in numerous consultation and accommodation processes will lead to the eventual erosion of Aboriginal rights and interests.

The most effective solution would be to modify the duty-to-consult framework itself in such a way as to remove, or at the very least lessen, the existing power imbalance. However, the likelihood that the SCC would overrule or modify its judgment in *Haida* is extremely low. The next-best option would be for cumulative effects to become part of the law, so that every Crown actor would be legally required to recognize and take account of the cumulative effects of consultation. Recognizing that the erosion of Aboriginal rights is a real danger would render consultation negotiations significantly more meaningful, as it would allow for those negotiations to ensure that this danger is avoided to the greatest extent possible.

The duty to consult is probably the most significant legal development in the area of Aboriginal law to date, and it has great potential for improving relationships between Aboriginal peoples and the Crown. However, unless some action is taken to address the three areas of risk discussed in this paper, there is the potential that the duty to consult will become a legal tool that contributes to the erosion of Aboriginal rights and interests, rather than one that ensures their protection. It is therefore imperative that these risks be acknowledged and addressed so as to ensure that the duty to consult encourages and allows for consultation processes that are meaningful and promote the advancement of reconciliation between the Crown and Canada's Aboriginal peoples.