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Part IV

Indigenous Justice and the Administrative State

Diagnosing Administrative Law: A Comment on *Clyde River* and *Chippewas of the Thames First Nation*

Kate Glover Berger*

I. INTRODUCTION: THE DUTY TO CONSULT'S DIAGNOSIS OF ADMINISTRATIVE LAW

In *Beckman v. Little Salmon/Carmacks*, Binnie J. observed that administrative law processes and remedies are sufficiently nimble and robust to account for the constitutional rights and interests of Indigenous Peoples.[1] The comment, directed to a procedural issue, disclosed a faith in existing frameworks of Canadian administrative law to compel government actors to act honourably and respond meaningfully when Indigenous communities are, or could be, affected by government action. This faith was not intended to diminish or downplay the constitutional character of the honour of the Crown or the duty to consult and accommodate. Rather, it affirmed that this principle and these duties are not only matters of interest to constitutional law, but are also of particular concern for the law of good government decision-making; that is, for administrative law. There was no need therefore, in Binnie J.'s conception of Canadian state public law, to develop novel constitutional remedies to address failures of consultation or dishonourable public decision-making practices. Rather, the remedies of administrative law, with their capacities to declare, quash and compel, already offered mechanisms for substantial redress and the pursuit of reconciliation.

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1 [2010] S.C.J. No. 53, 2010 SCC 53, at para. 47 (S.C.C.) [hereinafter "*Little Salmon/Carmacks*"].

There is nothing intrinsic to the field of administrative law that would prevent Binnie J.'s observation from becoming a reality, rather than simply an aspiration. Shortcomings tend to arise through theory and practice, through choice and decision, through historical inheritances and present biases, not through the identification of a field itself. Further, the fact that Aboriginal and treaty rights and the honour of the Crown are of a *constitutional* character does not mean that they automatically overflow the containers of flexibility and responsiveness that administrative remedies and review can offer. Administrative law strives to accommodate the full range of legal principles, rules, traditions, and remedies that govern government decision-making and there is nothing in the logic or ethic of administrative law that necessarily precludes the attainment of this goal. That said, given the breadth of the field and its ambition, the health of administrative law cannot be taken for granted; regular check-ups are needed.

One part of checking in on the health of administrative law, the part with which this paper is concerned, is to test the accuracy of Binnie J.'s diagnosis of the state of the relationship between administrative law and section 35 of the *Constitution Act, 1982*.[2] To do so,[3] this paper examines the Supreme Court of Canada's most recent cases dealing with the duty to consult — *Clyde River*[4] and *Chippewas of the Thames*[5] — in light of Binnie J.'s claim. As will be discussed in greater detail below, these cases speak directly to the current state of the law on consultation, administrative law, and the relationship between them. These decisions show that the courts conceive of the core principles and rules of Canadian state law on the duty to consult as relatively stable. *Haida Nation* is the legal lodestar for consultation and accommodation, setting out the principles that underlie the duty, as well as the analytical frameworks that should be used to work through questions of consultation in individual cases.[6]

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[2] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[3] Many others have explored aspects of this relationship. See, *e.g.*, Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (Fall 2015) 65 U.T.L.J. 382; Janna Promislow, "Irreconcilable? The Duty to Consult and Administrative Decision Makers" (2013) Cdn. J. Admin. L. & Prac. 251.

[4] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] S.C.J. No. 40, 2017 SCC 40 (S.C.C.) [hereinafter "*Clyde River*"].

[5] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] S.C.J. No. 41, 2017 SCC 41 (S.C.C.) [hereinafter "*Chippewas of the Thames*"].

[6] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73 (S.C.C.) [hereinafter "*Haida Nation*"].

The post-*Haida Nation* cases — *Carrier Sekani*,[7] *Little Salmon/Carmacks First Nation*[8] and *Tsilhqot'in Nation*[9] — then fill in many of the details. *Clyde River* and *Chippewas of the Thames*, along with a third recent case that deals with a duty to consult issue, *Ktunaxa*,[10] do not test the holdings of these foundational cases; they apply and clarify them, adding some nuance in not unexpected ways. In *Clyde River* and *Chippewas of the Thames*, for example, the Court confirms that the actions of independent regulatory agencies can trigger the Crown's duty to consult. Further, these cases affirm that the Crown can rely on the processes of these administrative tribunals and agencies to satisfy its duty to consult and accommodate, as long as the statutory powers of the agency allow for processes that can satisfy the duty. Further still, *Clyde River* and *Chippewas of the Thames* clarify that administrative decision-makers cannot make final decisions that could adversely affect the rights and interests of Indigenous Peoples without assessing whether the consultative demands of section 35(1) have been met. A decision taken without such an assessment is unconstitutional. Then *Ktunaxa* applies *Haida Nation*, confirming that upon judicial review, a government conclusion that adequate consultation and accommodation have taken place is entitled to deference, to be reviewed on a standard of reasonableness.

These holdings show that *Clyde River* and *Chippewas of the Thames*, along with *Ktunaxa*, fit comfortably in the arc of contemporary duty to consult jurisprudence. So too, this paper argues, do they fit within the trajectory of modern administrative law writ large. Over the past several decades, a paradigm shift has unfolded in contemporary administrative law jurisprudence, namely a shift from demonstrable skepticism and fear of the administrative state to evident comfort and trust in administrative decision-makers. The courts have come to conceive of the administrative state as vital to effective governance. *Clyde River* and *Chippewas of the Thames* fit neatly within this narrative of confidence and trust. Indeed, these recent cases draw attention to the narrative of confidence, which was previously latent and abstract, and expose some of its implications. In bringing this narrative into high relief, *Clyde River* and *Chippewas of the Thames* reveal insights into

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[7] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] S.C.J. No. 43, 2010 SCC 43 (S.C.C.) [hereinafter "*Carrier Sekani*"].

[8] *Little Salmon/Carmacks*, *supra*, note 1.

[9] *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44 (S.C.C.).

[10] *Ktunaxa Nation v. British Columbia (Forests, Lands, and Resources Operations)*, [2017] S.C.J. No. 54, 2017 SCC 54 (S.C.C.) [hereinafter "*Ktunaxa*"].

the current state not only of the law on the duty to consult, but also — and perhaps more starkly — of administrative law more broadly.

In this paper, I examine the 2017 decisions of *Clyde River* and *Chippewas of the Thames* in light of Binnie J.'s faith in administrative law. In Part II, I sketch the shifts in administrative law jurisprudence that set the foundations of the narrative of confidence within which Binnie's comments are nested. Then, in Part III, I outline the primary lessons and developments on the duty to consult from the Supreme Court's opinions in *Clyde River* and *Chippewas of the Thames* and indicate how they continue this narrative.

In Part IV, I turn to the ways that *Clyde River* and *Chippewas of the Thames* also expose how judicial confidence in the administrative state has implications relevant not only to the duty to consult, but also to the future health of administrative law and public decision-making. This section focuses on two examples of these implications, striving to describe rather than resolve the challenges revealed. The first example deals with the process of consultation and warns against bestowing such responsibility on administrative decision-makers while simultaneously neglecting to hold other state institutions accountable for their own duties of consultation and good governance. The second deals with the process of judicial review of administrative action and sharpens existing concerns about relying on categories of question as proxies for qualitative assessments of context in the standard of review analysis.

I conclude in Part V by signalling a final lesson learned, and question raised, about the narrative of confidence in *Clyde River* and *Chippewas of the Thames*. The lesson stems from the holding in *Chippewas of the Thames* that administrative agencies "must *usually*" provide reasons to address concerns about the adequacy of consultation, but that neither a "formulaic '*Haida* analysis'" nor explicit reasons are necessarily required.[11] Here, the Court's faith in sound administrative judgment despite the absence of reasons highlights the chronic idealism with which the courts have treated administrative decision-making. And this idealism raises the forward-looking question posed in Part V: What should, indeed what must, a meaningful conception of confidence demand of the administrative state?

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[11] *Clyde River*, *supra*, note 4, at paras. 41 and 42; *Chippewas of the Thames*, *supra*, note 5, at para. 63.

II. CONFIDENCE IN THE REGULATORY STATE

The narrative in contemporary Canadian public law about the administrative state has changed since the early days of administrative law. Over the past four decades, with the explosive growth of the administrative state across the 20th century, scholarly skepticism about the capacity of regulatory agencies and independent statutory tribunals to serve as legal decision-makers and act in accordance with law, has given way to faith in administrative actors as essential to the modern state. Fears about reckless and arbitrary exercises of executive discretion have waned somewhat, with debates now focused on how best to manage discretionary decision-making power rather than how to avoid or stifle it.[12] A shift towards trust or confidence in the administrative state has also been apparent in Canadian public law jurisprudence over the last half-century.[13] A close reading of the case law reveals several developments and turns in the law, each one reflecting a deepening judicial appreciation of the work of administrative decision-makers and their contribution to access to justice, the delivery of public programs, and effective governance. Together, these turns in the law and scholarship signal a broader shift in conceptions of the administrative state in Canada's public order, a shift from skepticism to confidence, from fear to respect, from toleration to embrace.

While not exhaustive, for the purposes of this paper, there are three turns in the modern case law that are particularly revealing of the confidence in the administrative state that has emerged in Canadian public law. The first is found in the transformation of judicial resistance to administrative power into a posture of judicial deference to administrative decisions, including deference on questions of law and statutory interpretation.[14] While the courts still exercise powers of

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[12] For a helpful summary of this transition, see, *e.g.*, Colleen M. Flood & Jennifer Dolling, "A Historical Map for Administrative Law: There Be Dragons" in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context*, 3rd ed. (Toronto: Emond Publications, 2018) 1 [hereinafter "Flood & Sossin"].

[13] On the constitutional implications of these turns in the law, see Kate Glover, "The Constitutional Status of the Administrative State" (February 20, 2018), online: Double Aspect <https://doubleaspectblog.wordpress.com>.

[14] See, *e.g.*, *CUPE Local 963 v. New Brunswick Liquor Corp.*, [1979] S.C.J. No. 45, [1979] 2 S.C.R. 227 (S.C.C.); *Union des employés de service, local 298 v. Bibeault*, [1988] S.C.J. No. 101, [1988] 2 S.C.R. 1048 (S.C.C.) [hereinafter "*Bibeault*"]; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58, [1994] 2 S.C.R. 557 (S.C.C.); *Canada (Director of Investigation and Research) v. Southam Inc.*, [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748 (S.C.C.); *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46, [1998] 1 S.C.R. 982 (S.C.C.) [hereinafter "*Pushpanathan*"]; *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC

exacting review under a correctness standard in some cases,[15] this is now the exception rather than the norm. A "well-established presumption" has emerged, such that when an administrative body interprets its home statute or statutes familiar to it, an interpretive task at the heart of administrative action, the reasonableness standard will apply.[16] Indeed, the Court has accepted that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review".[17] This deferential approach reflects a judicial appreciation for the expertise of administrative bodies within their statutory realm, a respect for the capacity of specialized decision-makers to respond nimbly to the questions of regulation and policy that arise before them, and a sensitivity to the wisdom and intent of the legislature in the design of regulatory agencies. And in this commitment to deference, we see an institutional identity shift not only for administrative decision-makers, but also for the courts. That is, the courts are abandoning the premise that judges are always best suited to respond to legal disputes and valuing the authority, competence, and expertise of decision-makers within the administrative state. Showing deference is, in some measure, an act of trust.

The second turn in the jurisprudence that exposes the courts' confidence in the administrative state is found in judicial interpretation of section 96 of the *Constitution Act, 1867*.[18] Section 96 protects the special status and core jurisdiction of the superior courts, striving to shield the country's courts of general jurisdiction from legislative or executive attack.[19] This section of the Constitution can thus be used to challenge legislation that creates new administrative bodies that deal with matters historically resolved by the superior courts. In the early eras of Canadian administrative law, a protectionist stance prevailed, with the courts interpreting section 96 in ways that constrained the growth of the

9 (S.C.C.) [hereinafter "*Dunsmuir*"]; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal*, [2018] S.C.J. No. 22, 2018 SCC 22 (S.C.C.) [hereinafter "*West Fraser Mills*"]; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] S.C.J. No. 31, 2018 SCC 31 (S.C.C.) [hereinafter "*Canada (CHRC)*"].

15 For when correctness applies, see *Dunsmuir*, *id.*, at paras. 57-61.

16 *Canada (CHRC)*, *supra*, note 14, at para. 27.

17 *Id.*, at para. 50.

18 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

19 *MacMillan Bloedel Ltd. v. Simpson*, [1995] S.C.J. No. 101, [1995] 4 S.C.R. 725 (S.C.C.) [hereinafter "*MacMillan Bloedel*"].

administrative state.[20] And yet by the mid-20th century, the courts had pivoted to a facilitative position, recognizing generous legislative authority within section 96 to establish new regulatory bodies and quasi-judicial tribunals that were connected to government policy goals and coherent in their design.[21] As Lamer C.J.C. explained in concurring reasons in *Reference re Amendments to the Residential Tenancies Act (N.S.)*, a case about the constitutionality of Nova Scotia's residential tenancies scheme, the flexible jurisprudential approach to section 96 emerged from "sympathy for the proposition that s. 96 should not be interpreted so as to thwart or unduly restrict the future growth of provincial administrative tribunals".[22] Rather, "'[a]daptations must be permitted to allow the legislatures scope to deal effectively with emerging social problems and concerns, and to develop new techniques of dispute resolution and the expeditious disposition of relatively minor disputes' for the benefit of its citizenry … After all, the Constitution is a document for the people and one of the most important goals of any system of dispute resolution is to serve well those who make use of it."[23] Here, the affirmation of confidence in the administrative state is expressed through creating conditions in which it can flourish.

The third illustrative turn in the case law emerges from the courts' wrestling with questions about the constitutional jurisdiction of administrative actors. In the Supreme Court's words, the relationship between the courts, the Constitution and administrative decision-makers has been "completely revised" over time.[24] In the later decades of the 20th century, the historic judicial reluctance to recognize a direct relationship between administrative decision-makers and the Constitution[25] was overtaken by a decisive trend: a move towards

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[20] See, *e.g.*, *Toronto Corp. v. York Corp.*, [1938] AC 415 (P.C.).

[21] See, *e.g.*, *Saskatchewan (Labour Relations Board) v. John East Iron Works Ltd.*, [1948] J.C.J. No. 5, [1949] A.C. 134 (P.C.); *Québec (Procureur Général) v. Barreau de la province de Québec*, [1965] S.C.R. 772 (S.C.C.); *Tomko v. Nova Scotia (Labour Relations Board)*, [1975] S.C.J. No. 111, [1977] 1 S.C.R. 112 (S.C.C.); *Mississauga (City) v. Peel (Regional Municipality)*, [1979] S.C.J. No. 46, [1979] 2 S.C.R. 244 (S.C.C.); *Reference re Residential Tenancies Act 1979 (Ontario)*, [1981] S.C.J. No. 57, [1981] 1 S.C.R. 714 (S.C.C.); *Reference re Amendments to the Residential Tenancies Act (N.S)*, [1996] S.C.J. No. 13, [1996] 1 S.C.R. 186 (S.C.C.) [hereinafter "*Residential Tenancies Reference No. 2*"].

[22] *Residential Tenancies Reference No. 2*, *id.*, at para. 28.

[23] *Id*.

[24] *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12, at para. 30 (S.C.C.) [hereinafter "*Doré*"].

[25] See, *e.g.*, *Cooper v. Canada (Canadian Human Rights Commission)*, [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854 (S.C.C.) [hereinafter "*Cooper*"].

broadening the jurisdiction of administrative decision-makers over constitutional matters and loosening the exclusive judicial grip on constitutional interpretation. The law now recognizes, for example, that administrative decision-makers must engage widely and directly with the obligations and values of the Constitution as they execute their mandates. Administrative actors are on the front lines of interpreting and implementing constitutional rights and obligations in their interactions with the public.[26] Accordingly, administrative decision-makers are bound to act in accordance with the *Canadian Charter of Rights and Freedoms*[27] and must exercise their discretion in ways that are infused with Charter values and substantive commitments to proportionality.[28] As another example, the law now provides that public actors with the authority to decide questions of law are necessarily empowered to answer the constitutional questions attached to those legal matters and to grant remedies under section 24(1) of the Charter, unless such authority has been clearly revoked.[29] Access to justice, administrative expertise, and constitutional logic demand nothing less.[30] A final example is found in the deferential posture that the courts now take when reviewing discretionary decisions of administrative decision-makers that limit Charter rights or values.[31] The deferential approach is intended to reflect the "distinct advantage that administrative bodies have in applying the Charter to a specific set of facts and in the context of their enabling

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[26] See, *e.g.*, Vanessa MacDonnell, "The Civil Servant's Role in the Implementation of Constitutional Rights" (2015) 13:2 Intl. J. Constitutional L. 383 [hereinafter "MacDonnell, 'Civil Servant'"].

[27] *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 (S.C.C.); *R. v. Conway*, [2010] S.C.J. No. 22, 2010 SCC 22, at para. 79 (S.C.C.) [hereinafter "*Conway*"]. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[28] *Doré*, *supra*, note 24; *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, 2015 SCC 12 (S.C.C.) [hereinafter "*Loyola High School*"]; *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.) [hereinafter "*T.W.U. (B.C.)*"]; *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, 2018 SCC 33 (S.C.C.) [hereinafter "*T.W.U. (L.S.U.C.)*"].

[29] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] S.C.J. No. 54, 2003 SCC 54 (S.C.C.) [hereinafter "*Martin*"]; *Conway*, *supra*, note 27.

[30] *Conway*, *id.*, at para. 79. See also *Dunsmuir*, *supra*, note 14, at para. 49; *Martin*, *id*.

[31] *Doré*, *supra*, note 24; *Loyola High School*, *supra*, note 28; *T.W.U. (B.C.)*, *supra*, note 28; *T.W.U. (L.S.U.C.)*, *supra*, note 28. For a critique of this approach, see the comments of Lauwers and Miller JJ.A. in *Gehl v. Canada (Attorney General)*, [2017] O.J. No. 1943, 2017 ONCA 319, at paras. 68-83 (Ont. C.A.) and *T. (E.) v. Hamilton-Wentworth District School Board*, [2017] O.J. No. 6142, 2017 ONCA 893, at paras. 102-125 (Ont. C.A.).

legislation".[32] In each of these examples, we see the courts' confidence in the administrative state reflected in the law's credence of the deepening intimacy between statutory actors and the Constitution.

Read in light of this broader narrative of confidence in regulatory actors and these specific jurisprudential turns towards the administrative state, the Court's principal holdings in *Clyde River* and *Chippewas of the Thames* are unsurprising. Both cases raised the issue of whether the actions of a regulatory agency, specifically, the National Energy Board ("Board" or "NEB"), can either trigger or satisfy the Crown's duty to consult and accommodate under section 35 of the *Constitution Act, 1982*. As is discussed in greater detail in Part II, the Court's answer to both queries was, unanimously, yes. The Court also clarified that in making a final decision on a matter that might adversely affect Indigenous rights or interests, a regulatory body must assess whether the duty has been met. A decision taken in the absence of adequate consultation and accommodation is unconstitutional. In these clarifications and advancements of the law governing administrative actors in relation to section 35, *Clyde River* and *Chippewas of the Thames First Nation* slide easily into the narrative of confidence recounted above. They fit comfortably in the part of the story in which administrative actors are directly accountable to the Constitution and bear the responsibility of upholding constitutional principles and duties. Indeed, in these two cases, we see the Court conceiving of regulatory bodies as active participants in constitutional relationships between government and Indigenous Peoples, and affirming the role and responsibilities of administrative actors in the pursuit of reconciliation. In their holdings, these decisions are robust affirmations of the vital, active, and ultimately deserved role that administrative actors play in the architecture of Canada's public order. In the strength of their commitments regarding the role of the administrative state in the structure of the Constitution and in the direct responsibilities and high expectations they place on statutory tribunals, these cases not only contribute to the narrative of confidence, but also help to push it out of the implicit realm.

III. CONFIDENCE, REGULATORY AGENCIES AND THE DUTY TO CONSULT

The Court's opinions in *Clyde River* and *Chippewas of the Thames* stand for three propositions in relation to the role of administrative

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[32] *Doré*, *supra*, note 24, at para. 48.

agencies in the duty to consult. The first confirms that regulatory action can trigger the Crown's duty to consult; the second affirms that the Crown can rely on regulatory processes to fulfil its duty to consult; and the third clarifies that administrative actors must consider the adequacy of consultation before issuing a final approval of a project.

The facts in *Clyde River* and *Chippewas of the Thames* are similar; both involve corporate parties seeking approval from the National Energy Board for energy extraction projects. In *Clyde River*, three corporate parties (the "proponents") applied to the Board to carry out offshore seismic testing for oil and gas resources. The tests involved towing airguns through Baffin Bay and Davis Strait, producing sound waves in order to locate and measure underwater energy resources. The proposed testing would last five years. The Board initiated an environmental assessment of the project and the Hamlet of Clyde River objected, raising concerns about the effects of the testing on the treaty right of the Inuit of Clyde River to harvest marine mammals in the Nunavut Settlement Area. The Inuit community in the Area relies on these mammals for physical, economic, cultural, and spiritual well-being. Their concerns about the impact of the testing were ultimately undisputed.

Over the next two years, the project's proponents met with the communities that would be affected by the testing. The proponents were often unable to answer basic questions about the impact of their project on the region's marine mammals and so the Board suspended its assessment. Soon after, the proponents submitted to the Board a 4000-page document addressing the lingering queries. The document was posted online and delivered to the hamlet offices. It was not translated into Inuktitut. The Board resumed its assessment.

Throughout the process, Clyde River and other organizations wrote to the Board and to the Minister of Aboriginal Affairs and Northern Development, calling for further consultation. The Minister denied the request and the Board continued its deliberations. In 2014, the Board granted the proponents' application, concluding that there had been adequate consultation of Indigenous communities. Further, according to the Board, while the testing could alter migration routes of marine mammals, increase their mortality, and thus negatively affect the harvesting of the mammals, the proponents would strive to mitigate the chances of significant adverse environmental effects.

In *Chippewas of the Thames*, Enbridge Pipelines applied to the National Energy Board under section 58 of the *National Energy Board Act*[33] for exemptions from several filing requirements in relation to its Line 9 Pipeline project. If approved, the project would reverse the flow and increase the capacity of the Line 9 Pipeline, which has run across the traditional territory of the Chippewas of the Thames First Nation since 1976. If granted, the exemptions would authorize Enbridge to proceed with the project without filing a certificate of public convenience and necessity. Under the *National Energy Board Act*, the Board was the final decision-maker on section 58 exemptions.

The Board advised the Chippewas of the Thames and 18 other potentially affected Indigenous communities about the project and the Board's process. The process included a public hearing in late 2013. The Chippewas of the Thames were granted intervener status, as well as funding from the Board to participate. In September 2013, before the hearing was held, the Chiefs of the Chippewas of the Thames and the Aamjiwnaang First Nation wrote to the Prime Minister, the Minister of Natural Resources, and the Minister of Aboriginal Affairs and Northern Development, raising concerns about the impact of the Enbridge project on the asserted Aboriginal and treaty rights of both communities. The letter urged the Ministers to initiate Crown consultation. In January 2014, after the Board hearing, the Minister of Natural Resources responded to the request for consultation. He indicated that the Crown relied on the Board's process to fulfil the duty to consult in relation to this project. The Board ultimately approved the Enbridge project, holding that in light of the project's limited scope, the affected Indigenous groups had sufficient opportunity to be heard through the Board's process and meetings with Enbridge. Further, the Board concluded, any impact of the project on the rights and interests of Indigenous communities was likely to be minimal and appropriately mitigated.

Clyde River and the Chippewas of the Thames each applied for judicial review of the Board's decisions on the grounds of insufficient consultation. Clyde River was ultimately successful; the Chippewas of the Thames were not. At stake in each case was the Board's role in triggering, satisfying, and assessing compliance with the duty to consult. Both Clyde River and the Chippewas of the Thames argued that the Crown's constitutional obligations under section 35 could not be satisfied by a regulatory process in which the Crown did not participate.

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[33] *National Energy Board Act*, R.S.C. 1985, c. N-7.

The Supreme Court was unpersuaded, leading to the three principal holdings of these cases. These holdings reflect the comfort and trust that the law has come to find and have in the administrative state, a comfort with and trust in the authority, competence, and judgment of administrative actors, a comfort and trust of sufficient weight to sustain the responsibility of pursuing reconciliation between Indigenous Peoples and the Crown. I turn to these holdings now.

First, the Court held that the actions of a regulatory agency, like decisions and authorizations issued by the National Energy Board, can constitute Crown action that triggers the duty to consult and accommodate. Justices Karakatsanis and Brown, writing for the Court, affirmed that the duty is a constitutional obligation owed by the Crown and that regulatory agencies are neither "the Crown", strictly speaking, nor its agents. However, they held, these observations alone do not adequately account for the character of the administrative state or its connection to the Crown. "[O]nce it is accepted", and it must be so accepted, they held, "that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away."[34] The regulatory agency becomes "the vehicle through which the Crown acts" and it becomes unhelpful to distinguish between the Crown and an agency as final decision-maker on a resource project.[35] The statutory body exercises its powers "on behalf of the Crown"[36] and, as a result, its decisions constitute Crown action, which can then in turn trigger the duty to consult. Justices Karakatsanis and Brown explained, "the duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet".[37] The final decisions of a regulatory agency, they held, can thus constitute Crown conduct that triggers the duty to consult.

In this holding, the Court strives to reason from the realities of administrative justice, from a recognition that in the modern regulatory state, administrative actors are the primary decision-makers in most legal disputes and for most individuals interacting with or seeking an outcome

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34 *Clyde River*, *supra*, note 4, at para. 29.
35 *Id*.
36 *Id*.
37 *Id*.

from the public sector,[38] including in processes of regulating and approving resource projects and other public works with the potential to adversely affect Aboriginal and treaty rights. The Court's aim to develop the law in line with the perceived realities of administrative action and their potential impact on Indigenous communities reflects the Court's belief in the importance of the work of regulatory agencies and a confidence in the capacity of those agencies to carry out their mandates, once granted, in meaningful and serious ways. Such was the case in *Clyde River*. The Board issued a final decision regarding the proponents' application to conduct seismic testing. In so doing, the Board was the vehicle through which the Crown acted and the duty to consult was triggered. The same was true in *Chippewas of the Thames*. The Board's decision to approve the Enbridge project triggered the Crown's duty to consult. "As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights", the Court reasoned, "the NEB acted on behalf of the Crown in approving Enbridge's application."[39] In that moment, the obligation to provide meaningful consultation, consultation to the constitutional standard, had to arise. To hold otherwise would be blind to the potential adverse effect of the Board's processes on the constitutional rights of the Chippewas of the Thames First Nation.

The second principal holding in *Clyde River* and *Chippewas of the Thames* is more accurately a confirmation, an affirmation that the Crown is entitled to rely on regulatory processes in order to fulfil its duty to consult. The Crown need not directly participate in the processes and indeed, according to the Court, need not supervise every instance of consultation. Rather, the critical query for the Crown will be whether the administrative agency has the statutory capacity to engage in adequate consultation and accommodation in the circumstances. By confirming this framework, read alongside its section 35 jurisprudence, the Court can be taken to signal its trust in the actors of the administrative state to execute their mandates in accordance with the principles and duties embodied in section 35, that is, to use their procedural discretion to respond meaningfully to the demands of the Constitution. It is, in effect, a confidence in the capacity of administrative decision-makers to act honourably.

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[38] Chief Justice Beverley McLachlin, P.C., "Administrative Tribunals and the Courts: An Evolutionary Relationship", Remarks delivered to the 6th Annual Conference of the Council of Canadian Administrative Tribunals, Toronto, Ontario (May 27, 2013).

[39] *Chippewas of the Thames*, *supra*, note 5, at para. 31.

On the facts of both *Clyde River* and *Chippewas of the Thames*, the Court concluded that the Crown was justified, at least in principle, in relying on the Board to fulfil the duty to consult. The Board, with its procedural powers to hold hearings, solicit information, impose conditions, conduct environmental assessments, and establish funding programs for public participation under the *Canada Oil and Gas Operations Act* (in *Clyde River*) and the *National Energy Board Act* (in *Chippewas of the Thames*), had the capacity to consult to the requisite constitutional threshold with the Inuit of Clyde River and the Chippewas of the Thames First Nation. Similarly, the Board, with its remedial authority to attach conditions and deny applications, had the capacity to accommodate the rights of Indigenous communities, when appropriate. So too, in its expertise in supervising energy projects, the Board had the institutional and technical expertise needed to conduct meaningful consultations and implement appropriate accommodations. In these circumstances, the Court held, the Crown was entitled to rely on the deliberative process of the Board to satisfy its obligation to engage in consultation with the Indigenous communities potentially affected by these energy projects. Confidence in the Board to make constitutional rights real was, in other words, justified.

The third issue requiring the Court's attention in *Clyde River* and *Chippewas of the Thames* dealt with the duty of regulatory agencies to consider Crown consultation before approving a project or taking other action. Drawing on *Carrier Sekani*[40] and *Conway*,[41] the Court stated a general rule, that "a tribunal empowered to consider questions of law must determine whether … consultation was constitutionally sufficient" as long as the issue is properly raised and the authority to decide constitutional questions has not been expressly withdrawn.[42] In these circumstances, an administrative agency must consider the sufficiency of consultation in order to protect the constitutionality of its own decision. While the Crown always bears the responsibility to ensure that the honour of the Crown is upheld, "administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations".[43] Again, the Court held, when the agency is the final decision-maker on a project, the agency's power and

40 *Supra*, note 7.
41 *Supra*, note 27.
42 *Clyde River*, *supra*, note 4, at para. 36.
43 *Chippewas of the Thames*, *supra*, note 5, at para. 37.

obligation to assess the adequacy of consultation does not depend on whether the government participates in the Board's proceedings. Section 35 is clear, Karakatsanis and Brown JJ. explained, in its demand for adequate consultation and uncompromising in its disdain for attempts to "pass the buck" of technical responsibility between government actors. Thus, the rule is simple: Once the Crown's duty to consult has been triggered, "a decision maker may only proceed to approve a project if Crown consultation is adequate."[44] This is the case regardless of who bears ultimate responsibility for carrying out consultation, the Crown or the agency. And here, in the obligation of administrative actors to assess compliance with section 35 before a project is approved or a decision is taken, to ensure that the state is not running roughshod over the rights of Indigenous Peoples, to uphold some of the most fundamental values of Canadian constitutionalism, is the signal of the Court's faith in these regulatory actors to be active players in the pursuit of reconciliation.

The Board lived up to the Court's expectations in *Chippewas of the Thames*, but not in *Clyde River*. On the facts of *Chippewas of the Thames*, the Court concluded that the Crown was not only entitled to rely on the Board's process to satisfy the duty to consult, but also that the duty had been satisfied. In the Court's view, the Board provided the affected Indigenous communities with adequate opportunities to participate in the decision-making process. The Chippewas of the Thames seized this opportunity and participated in the proceedings as an intervener. They received funding from the Board to participate, tendered expert evidence, and made closing submissions at the hearing. Further, the Court held, the Board's report assessed the potential impact of the Enbridge project on the rights of Indigenous communities and concluded that the potential for adverse effects was minimal and could be mitigated. Further still, the Board imposed a condition on Enbridge for continued consultation with Indigenous communities, which the Court held adequately accommodated the Aboriginal rights at stake. Finally, the Board provided reasons that were directly responsive to the issue of consultation and section 35. The reasons reviewed the evidence, identified the interests at stake, assessed the risks of the project, and imposed conditions on Enbridge. The Court concluded that although the Board did not discuss the degree of consultation required in the circumstances or engage in a *Haida* analysis, the Board's reasons were sufficient to show that, taking the Chippewas of the Thames' arguments

[44] *Clyde River*, *supra*, note 4, at para. 39.

at their strongest, the Board had sufficiently considered the asserted Aboriginal and treaty rights and accommodated them where appropriate. This, the Court held, was "manifestly adequate" to satisfy both the Board's and the Crown's obligations under section 35 prior to granting the exemption.[45]

The same was not true in *Clyde River*. On the facts of that case, the Board was the final decision-maker for the proponents' application and the Crown's duty to consult had been triggered. Further, the Board had the statutory authority to determine all relevant matters of fact and law and there was no indication that constitutional jurisdiction had been withdrawn. Accordingly, the Board was empowered to assess the sufficiency of consultation and indeed, was constitutionally obliged to withhold approval of the project until the threshold of sufficiency was met. And yet, the Court held, the Board failed to do so. The rights at risk were guaranteed by treaty and the potential for adverse impact was high. Thus, on the principles and framework well established in *Haida*, deep consultation was required. This threshold was not met. While the Crown was entitled to rely on the Board's processes to fulfil the duty to consult, it failed to inform the Inuit of Clyde River that it was doing so. Further, while the Board assessed the project's impacts on the marine mammal populations through its environmental assessment, it failed to consider the implications of the project on the treaty rights as rights, rather than as concerns about the environmental impact of the project. Finally, while the Board had the statutory capacity to provide meaningful consultation, it failed to do so. No oral hearings were held and affected parties were not provided funding to collect evidence or prepare expert reports. Further, the Inuit of Clyde River were never provided with accessible, substantive answers to their questions about the effect of the project on the marine mammal population. The Court explained that these procedural safeguards of participation, funding, and responsiveness are not a checklist of prerequisites for deep consultation, which will never be captured by a one-size-fits-all approach. But, the Court held, "their absence in this case significantly impaired the quality of consultation."[46] The Board had not lived up to the confidence bestowed upon it and therefore its authorization of the project could not stand.

By drawing administrative tribunals and regulatory agencies further into constitutional and treaty relationships, I am arguing that *Clyde River*

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45 *Chippewas of the Thames*, *supra*, note 5, at para. 43.

46 *Clyde River*, *supra*, note 4, at para. 49.

and *Chippewas of the Thames* act on impulses already familiar in administrative law. In these decisions, the tendency to trust the work of the administrative state manifests as confidence in the capacity of administrative decision-makers to exercise their mandates with due attention to the impact of their decisions on Aboriginal rights, to act honourably in their interactions with Indigenous Peoples and to refuse to act without assurance that their decisions advance the aspiration of reconciliation. These decisions thus fit comfortably into ongoing conversations in administrative law. The principal holdings of *Clyde River* and *Chippewas of the Thames* are consistent with Binnie J.'s belief in *Little Salmon/Carmacks*[47] that administrative law is sufficiently robust to implement and guarantee constitutional forms of consultation. And yet, as is discussed in Part IV, when these decisions are examined more closely — when focus falls on the details and the practical implications of *Clyde River* and *Chippewas of the Thames* — implications of the narrative of confidence for both the duty to consult and administrative law more broadly are brought into relief.

IV. TROUBLES WITH CONFIDENCE

The confidence in administrative actors that has developed in Canadian public law is intended, it seems, to be comforting. As noted above, administrative decision-makers are the most common legal decision-makers and the most frequent way in which citizens interact with the state. Modern governance has been "administerized" and with many positive results. The regulatory state has thus come to be treated in public law as effective, capable, and worthy of our trust, at least in its systemic, institutional dimensions.

Within this context of administrative law discourse, it seems that the Supreme Court's opinions in *Clyde River* and *Chippewas of the Thames* are also intended to be comforting. When much executive power is carried out in the administrative realm and when administrative actors enjoy much discretionary power, including significant discretion over who participates in decision-making and how, knowing that these administrative actors will be held accountable for triggering the duty to consult, carrying out meaningful consultation, and policing compliance with section 35 can offer some relief from concerns about the power of state actors to undermine constitutional rights.

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47 *Supra*, note 1.

However, a closer reading of the Court's reasoning in *Clyde River* and *Chippewas of the Thames* on matters of consultation reveals some concerning consequences of the narrative of confidence for both the way the duty to consult is carried out and for the future of administrative law more generally. In this Part, I focus on two such consequences. The first deals with the process of consultation and, more particularly, the shifts in institutional responsibility and focus that flow from judicial confidence in administrative actors. The second deals with the process of judicial review and, more particularly, the continued reliance on categories of question in the standard of review analysis.

1. The Process of Consultation and Shifting Accountabilities

In *Clyde River*, the Court affirms that the duty to consult is, always and ultimately, a constitutional duty of the Crown. In each instance of public decision-making that may affect the rights and interests of Indigenous Peoples, "the Crown always holds ultimate responsibility for ensuring consultation is adequate."[48] Accordingly, when an administrative actor is the final decision-maker on a project and either fails to provide adequate consultation or does not have access to adequate consultative procedures in its statutory mandate, the Crown "must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval."[49] That said, despite the Crown's ultimate responsibility for fulfilling the duty to consult and accommodate, it is not, according to the Court in *Clyde River* and *Chippewas of the Thames*, responsible for overseeing, monitoring, or participating in each instance of administrative decision-making. As Karakatsanis and Brown JJ. explain, "[p]ractically speaking" the fact that the Crown, in embodying its duty to act honourably, is the site of final constitutional responsibility for fulfilling the demands of section 35, "does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to consult has been satisfied, or must directly participate in the process of consultation."[50] Rather, as recounted above, the Crown is entitled to rely on regulatory actors to carry out the appropriate stages of consultation when those statutory decision-makers render the final decision on a

48 *Clyde River*, *supra*, note 4, at para. 22.
49 *Chippewas of the Thames*, *supra*, note 5, at para. 32.
50 *Clyde River*, *supra*, note 4, at para. 22.

project. Consider, then, how the process might unfold for an Indigenous community involved in a determinative regulatory decision-making scheme in the post-*Clyde River* legal realm.

Assuming that the agency's prospective decision could adversely affect Aboriginal or treaty rights, whether those rights are established or claimed, the agency's actions will trigger the duty to consult and, possibly, to accommodate. If the agency has access to procedural mechanisms that could satisfy the duty in its statutory mandate, the Crown is entitled to rely on the agency to satisfy the duty. Within this model, how is an Indigenous community to proceed if it contests the adequacy of the agency's processes of consultation?

Initially, it seems, the affected Indigenous community must wait for the agency to fail to live up to the constitutional standard and then initiate a gap-filling process with the Crown. Unlike a party seeking to challenge government action that contravenes the Charter, an Indigenous claimant or community concerned with the constitutionality of administrative action under section 35 cannot go directly to the courts to enforce the right. Instead, an Indigenous community must seek *ad hoc* relief from the Crown. As held in *Clyde River*, "[w]here the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty".[51] These measures could include the filling of procedural gaps, making submissions to the agency, requesting that the agency reconsider a decision, or pursuing legislative or regulatory amendments. When the regulatory agency is the final decision-maker in the process, it is responsible not only for carrying out consultation and implementing accommodations (with the additional possibility of some gap-filling by the Crown), but also for ultimately assessing, at first instance, whether the consultation and accommodation that have taken place are sufficient. Once a final assessment of adequate consultation is reached at the regulatory stage, judicial review is available to an Indigenous party seeking more meaningful consultation or more responsive accommodation of Aboriginal and treaty rights. As the Court confirms in both *Clyde River* and *Chippewas of the Thames*, "any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review."[52]

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51 *Id.*

52 *Id.*, at para. 24.

This procedural framework, on the one hand, fits into a narrative of confidence in the performance of administrative agencies within the architecture of the Canadian state. The central role of these agencies includes active participation in constitutional processes of consultation with Indigenous communities who are affected by government decision-making. And yet, on the other hand, in this framework, administrative decision-makers do not bear accountability for their role in consultation commensurate with their constitutional responsibilities. Rather, the Crown must step in to fill the administrative decision-maker's inadequacies. While this may provide opportunities for flexibility and consultation tailored to the context, *Clyde River* and *Chippewas of the Thames* also hold that the Crown is not legally required to supervise or monitor every instance of consultation that unfolds at the administrative level, nor is it legally required to inform the administrative actors that it intends to rely on the regulatory processes to fulfil the duty to consult. Although the Crown is under an obligation to inform affected Indigenous communities that it intends to rely on regulatory processes to satisfy its duty under section 35, *Chippewas of the Thames* shows that express notice is not required; silence can satisfy the duty to inform in the right circumstances. As such, the scheme set out in these decisions requires that Indigenous communities bear the burden of initiating, auditing, and alternating between communication with various administrative, executive, and potentially judicial, decision-makers to ensure that meaningful consultation takes place.

The procedural framework emerging from *Clyde River* and *Chippewas of the Thames* not only reflects a belief in the administrative state as powerful, reliable, and trustworthy, but also, in line with a long thread in section 35 jurisprudence, expressly encourages negotiation over adjudication in the realization of Aboriginal and treaty rights. "[J]udicial review is no substitute for adequate consultation", Karakatsanis and Brown JJ. write.[53] "... True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process."[54] Consultation is, they continue, "'[c]oncerned with an ethic of ongoing relationships'" and so, citing *Haida*, "'negotiation is a preferable way of reconciling state and

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[53] *Id*.

[54] *Id.* (emphasis in original).

Aboriginal interests'".[55] In the Court's view, "no one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation."[56]

A structural framework that seeks to realize the aspirations of section 35 should facilitate robust opportunities for meaningful consultation before a project proceeds rather than through retrospective remedies. And relying on negotiation with ministerial actors and broad procedural discretion for regulatory agencies in order to satisfy the duty to consult and accommodate can facilitate processes that are tailored to the circumstances of each case and account for the rights at stake, the impact of the decision-making on those rights, and the historical context. Further, by locating ultimate responsibility for consultation with the Crown, the processes prescribed by *Clyde River* and *Chippewas of the Thames* are "responsive to Indigenous Peoples' arguments to the extent that [they preserve] their relationship as with the Crown and not with arm's length regulatory agencies such as the NEB".[57]

However, in favouring negotiation and case-by-case procedural responses, these two decisions also entrench a preference for discretionary, *ad hoc* and policy-based approaches to the pursuit of reconciliation over statutory frameworks of principle, procedure, and obligation that can, with careful attention and an embrace of animating principles, provide more robust constraints on discretion that would also be subject to formal constitutional scrutiny. When the Crown "can (indeed, must) correct any flaws in the consultation process" or when accountability stops at the level of the regulatory agency through judicial review, there is no motivation to inquire into the systemic barriers to reconciliation found in the governing legislative structures. Nor is there a constitutional basis to require legislative or regulatory design that implements "process[es] designed with the duty to consult in mind".[58] Rather, the approach envisioned in *Clyde River* and *Chippewas of the Thames* contributes to the conditions in which "policy solutions [are preferred] over legislative frameworks that institutionalize Indigenous interests".[59] This approach avoids cultivating a culture of legislative and

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[55] *Id*.

[56] *Id*.

[57] Janna Promislow & Naiomi Metallic, "Realizing Aboriginal Administrative Law" in Flood & Sossin, *supra*, note 12, 87, at 121-22.

[58] *Id.*, at 122.

[59] *Id*.

regulatory design that is animated by the honour of the Crown and reconciliation. Recourse for inadequate processes that unfold either in practice or by design is to be found in the Crown and then ultimately the courts, rather than through the legislative process. In these ways, a firm commitment to a narrative of confidence in the regulatory state and in the Crown's capacity to fill in the gaps may divert energies away from urging legislatures to participate, alongside all other state actors, in the pursuit of reconciliation by, for example, trying to cultivate administrative cultures and conditions for meaningful consultation through careful legislative drafting, mandate-setting, and administrative design.

This reflection on the institutional and procedural structures that emerge from *Clyde River* and *Chippewas of the Thames* is a reminder that a public order operates through a dynamic network of actors and elements, each linked to each other by constitutional history, experience, practice, and design. Given these links, the scope of authority of one actor within the network must be conceived with regard to the scope of authority of the others. Shifts in power and role for one will inevitably be felt by the others.[60] Accordingly, when confidence attaches to the administrative state — just one part of the network — in ways and in places in which it did not historically attach, not only is an inquiry into the implications of confidence for administrative actors warranted, but so too is an inquiry into the impact of confidence on other institutions in the network, both individually and in relation to each other. These inquiries raise two questions: When the courts' gaze is so set on the administrative state, which institutions fall out of focus and at what cost? And when the administrative state is seen to be powerful and trustworthy, which other institutional relationships are affected and how?

The comments above have already offered the start of an answer to the first query by suggesting that the narrative of confidence might divert attention from legislative obligations in relation to section 35. In this way, *Clyde River* and *Chippewas of the Thames* serve as reminders that confidence in one set of actors need not, and must not, lead to neglect of the roles and responsibilities of other institutions. But these cases also offer some context relevant to the second query, which asks about the effect of a narrative of confidence on the relations and interactions between public institutions. Indeed, given the actors involved, these cases

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[60] See *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 50 (S.C.C.) [hereinafter "*Secession Reference*"]; *Reference re Senate Reform*, [2014] S.C.J. No. 32, 2014 SCC 32, at para. 26 (S.C.C.) [hereinafter "*Senate Reform Reference*"].

offer a particularly useful context for reflecting on institutional relationships. In the usual administrative law case, the relationship of interest is that between the courts, the executive, and the legislature. But in *Clyde River* and *Chippewas of the Thames*, the relevant relationships engage the courts, Parliament, the regulatory agency, the Crown and Indigenous Peoples. Unlike in the Charter context, for instance, in these cases the Court both distinguishes between the elements of the executive, attributing distinct roles and responsibilities to the Crown and the Board, and also notes their effective collapse into a single vehicle for carrying out government policy. I turn now to one of these institutional relationships.

2. The Process of Judicial Oversight and the Choice of Standard of Review

Recent case law bears witness to the Supreme Court's struggle to conceive of and quantify deference in the exercise of judicial review of administrative action.[61] The question of standard of review is a structural one, one with the relationships between the courts, the legislatures, the administrative state, and affected parties at its heart. A thick theory of standard of review must therefore tend to the roles of these institutions and actors, individually and in relation to each other, within Canada's constitutional order.

A narrative about the administrative state will inevitably inform and shape judicial approaches to standard of review. When the narrative is one of confidence and administrative actors are conceived as capable, competent contributors to the rule of law project, the justification for widespread deference is strengthened. As described in Part II, this has been the pattern of contemporary administrative law jurisprudence in Canada. Since *Dunsmuir*, presumptions of reasonableness as the applicable standard of review are common. That said, drawing a straight line between confidence and deference is too simple a response to the standard of review dilemma given the institutional roles and relationships involved. A narrative of confidence alone doesn't tell us much about the effect of a strong legal conception of the administrative state on other institutions and their interactions, and what those effects might mean for a standard of review analysis.

Clyde River and *Chippewas of the Thames* do not expressly address the issue of standard of review. This is itself a sign and symptom of the

[61] See, *e.g.*, *Canada (CHRC)*, *supra*, note 14; *West Fraser Mills*, *supra*, note 14.

Court's uneven approach to deference in judicial review more generally. The Court's reasoning in these cases suggests that reasonableness, or something akin to it, was at play.[62] The Court started its review of the challenged decisions with the procedural choices of the Board, assessing the justifiability of those choices in the decision-making context. This is the methodology of reasonableness.[63] Further, *Ktunaxa*, released shortly after *Clyde River* and *Chippewas of the Thames*, confirms that reasonableness applies when a court reviews a minister's determination that consultation was adequate.[64] *Ktunaxa* dealt with the decision of British Columbia's Minister of Forests, Lands, and Natural Resources Operations to approve the development of a ski resort on the spiritual territory of the Ktunaxa Nation. While the primary issue was whether the Minister's decision was consistent with the Ktunaxa's right of religious freedom under the Charter, the Court also considered whether the Minister had consulted adequately with the Ktunaxa before authorizing the development. In doing so, the Court confirmed that reasonableness was the appropriate standard when assessing the adequacy of consultation. It is notable that in *Ktunaxa*, the applicable standard of review was taken as settled law, with McLachlin C.J.C. and Rowe J. concluding (for the Court on this point), "[t]he Minister's decision that an adequate consultation and accommodation process occurred is entitled to deference".[65] Elaborating, McLachlin C.J.C. and Rowe J. held, "[t]he chambers judge was required to determine whether the Minister reasonably concluded that the Crown's obligation to consult and accommodate had been met. A reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks rather whether the decision of the Minister, on the whole, was reasonable."[66]

Despite the suggestion to the contrary in *Ktunaxa*, the issue of standard of review on matters of adequacy of consultation is not settled. Before *Dunsmuir*, the Court speculated in *Haida Nation* that questions of adequacy of consultation would be reviewed on a standard of

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[62] Although, the Court also holds that "any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review.": *Clyde River*, *supra*, note 4, at para. 24. This may suggest that they were imagining a standard of correctness applied.

[63] *Dunsmuir*, *supra*, note 14.

[64] *Supra*, note 10.

[65] *Id.*, at para. 77.

[66] *Id.*

reasonableness.[67] More recently, and post-*Dunsmuir*, the Court has reasoned that correctness is the more appropriate standard for questions of adequacy of consultation given their constitutional character. The Court in *Little Salmon/Carmacks* held that the adequacy of consultation would be reviewed on a standard of correctness:

> In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. In other words, if there was adequate consultation, did the Director's decision to approve the Paulsen grant, having regard to all the relevant considerations, fall within the range of reasonable outcomes?[68]

On the *Little Salmon/Carmacks* approach, only an administrative decision-maker's final decision whether to approve a project, a matter distinct from adequacy of consultation, is to be reviewed on a standard of reasonableness. The adequacy of the consultation must be correctly decided.

In light of *Little Salmon/Carmacks*, the decisiveness of the choice of standard of review in *Ktunaxa* becomes surprising, although the reliance on categories of question is not. This reliance is consistent with the prevailing standard of review analysis set out in *Dunsmuir*. On the *Dunsmuir* model, the standard of review will most often be decided according to the category in which the impugned question falls, rather than in light of the administrative and statutory context in which the question arises and is to be decided. For example, questions of fact and of mixed fact and law call for deference (that is, a reasonableness standard), while questions of jurisdiction, of the boundaries between administrative decision-makers and of procedure are to be reviewed more strictly (that is, on a correctness standard).[69] Further, administrative

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[67] *Supra*, note 6, at paras. 62, 63.

[68] *Supra*, note 1, at para. 48.

[69] *Dunsmuir*, *supra*, note 14. With respect to procedure, see, *e.g.*, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817 (S.C.C.)

decisions on some constitutional questions, like matters of the division of powers or the principles of fundamental justice,[70] will not be shown deference, while decisions on other constitutional matters, like a decision's compliance with Charter values,[71] will be reviewed on a standard of reasonableness. On the *Dunsmuir* model, assigning an impugned question to a category serves as a proxy for assessing the constellation of contextual factors that might inform and shape the proper standard of review.

The category-based analysis established in *Dunsmuir* was intended to avoid the analytical uncertainties and debates that flowed from the contextual "pragmatic and functional" approach[72] that preceded it. However, the post-*Dunsmuir* case law shows that the uncertainties and debates have not disappeared; they have simply been repackaged into uncertainties and debates about which category best describes an impugned question.[73] What is missing in *Dunsmuir* and in subsequent cases, including in *Ktunaxa*, is a principled account of how to choose when an issue can be comfortably described in terms of several different categories. The need for such an account arises in *Ktunaxa*, *Clyde River* and *Chippewas of the Thames*. The question of adequacy of consultation is simultaneously a procedural question, a constitutional question, and a question of fact and law. And yet, the Court in *Ktunaxa* concluded, without explanation, that the issue's character as a question of fact and law was determinative. Why might this be the case? *Ktunaxa* does not offer an answer and indeed, ignores the question. And so, we are left wondering why an executive decision-maker is owed more deference in the context of procedural obligations arising under section 35(1) than under the Charter or at common law. Is this grant of deference designed to reflect the claim that the core relationship to be preserved and to bear

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[hereinafter "*Baker*"]; *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1 (S.C.C.) [hereinafter "*Suresh*"]; Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law Part I: Procedural Fairness" in Flood & Sossin, *supra*, note 12, 237, at 241. But see the cases and commentary in Paul Daly, "Canada's Bipolar Administrative Law: Time for Fusion" (2014) 40:1 Queen's L.J. 213.

[70] *Dunsmuir*, *id.*; *Suresh*, *id*.

[71] See, *e.g.*, *Doré*, *supra*, note 24; *Loyola High School*, *supra*, note 28; *T.W.U. (B.C.)*, *supra*, note 28; *T.W.U. (L.S.U.C.)*, *supra*, note 28. See also Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 S.C.L.R. (2d) 391; Matthew Lewans, "Administrative Law, Judicial Deference, and the *Charter* (2014) 23:2 Constitutional Forum Constitutionnel 219.

[72] *Bibeault*, *supra*, note 14; *Pushpanathan*, *supra*, note 14.

[73] See, *e.g.*, *Canada (CHRC)*, *supra*, note 14.

accountability is the one of Indigenous Peoples with the Crown or with administrative agencies, rather than with the courts? Perhaps. But even if so, this seems to be a result of a consideration other than that the category "question of fact and law", or the notion of "reasonableness", is a satisfying or coherent proxy for choice of standard of review in the circumstances.

Reflecting on the task at hand when articulating the standard of review in cases like *Clyde River*, *Chippewas of the Thames* and *Ktunaxa* helps to sharpen the stakes of the debate between categorical and contextual approaches to standard of review. This is because the cases require one to assess the measure of deference to be shown to the decisions of specialized regulatory agencies in a way that does justice to the very specific institutional relationships involved: the relationships between institutions and Indigenous Peoples, whose constitutional rights are at issue when the adequacy of consultation is assessed. The cases show that what is at stake when choosing the applicable standard of review is not simply whether the question is one of fact or law, but rather which institutional relationships are to be preserved, promoted, and protected, and how to do so. And thus, at a moment when the Court has expressed its intention to reconsider the standard of review analysis in place since *Dunsmuir*,[74] the duty to consult context serves not to suggest what a revised approach might be, but rather raises queries and considerations that warrant reflection in the revision process: queries about the roles and relationships of the institutions and actors involved; about the character of the rights affected and the qualitative measure of the effects; about what is lost and what is gained with a reliance on proxies; and about the relationship between confidence, deference, and reasons.

V. CONCLUSION: WHAT CONFIDENCE DEMANDS

In *The Constitution of Canada: A Contextual Analysis*, Jeremy Webber reminds us that "[i]n its day-to-day operation, the rule of law depends, above all, on mechanisms built into the very structure of state institutions, the watchfulness of the public and the cultivation of an ethic of legality".[75] In this sense, "the protection of constitutional values

[74] *Canada (Citizenship and Immigration) v. Vavilov*, [2017] S.C.C.A. No. 352 (S.C.C.); *National Football League v. Canada (Attorney General)*, [2018] S.C.C.A. No. 28 (S.C.C.); *Bell Canada v. Canada (Attorney General)*, [2018] S.C.C.A. No. 9 (S.C.C.).

[75] Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015), at 108.

depends more upon systemic controls, embodied in the detailed practices and institutions of government — and upon the vigilance of citizens — than it does on adjudication alone".[76] To preserve and nourish the rule of law, the institutions that carry out the operations of government — administrative actors and regulatory agencies among them — need not only the authority to act in the service of their delegated mandates, but also conditions in which that authority is cultivated and protected. These conditions are in part internal, reflected in the institutional morality of individual organizations, but also external, expressed through legislative, judicial, and popular conceptions of, and interactions with, government actors. The narrative of confidence is, as is described in Part II, an expression of the law's contribution to those conditions. When the courts show confidence in administrative agencies as valuable participants in the common rule of law project, the courts contribute to a culture that cultivates strong and sound administrative decision-making. The idea is that administrative agencies will strive to live up to the faith that is entrusted to them.

As I discussed in Parts II and III, the Supreme Court's recent judgments in *Clyde River* and *Chippewas of the Thames* reflect and advance the confidence that has been percolating in administrative law cases outside the duty to consult context. Further, as discussed in Part IV, these cases also expose some of the concerns with this confidence for broader issues of public law, like its distraction from the role of other institutions in reconciliation, statecraft, and institutional design and the continued reliance on categories of question in the standard of review analysis. Both of the examples explored in Part IV urge an attentiveness to the shifts in institutional responsibility and accountability that flow from judicial confidence in the administrative state. The lesson there is not that the prevailing confidence should be diminished, but rather to appreciate its inevitable impact on the architecture of the public order more broadly and to account for those shifts when necessary. In this Conclusion, let me point to one final implication of the narrative of confidence that is revealed by a close reading of *Clyde River* and *Chippewas of the Thames*, an implication that gazes inward at the internal workings and expectations of administrative decision-making rather than resting on an examination of the structural whole.

A culture of confidence in the administrative state is one that takes seriously administrative modes of dispute resolution, one that respects

[76] *Id.*, at 109.

the impact of administrative decision-making on citizens and the public interest, and one that still strives to cultivate conditions in which the core constitutional conversations unfold without resort to the courts. We see all of these features at work in *Clyde River* and *Chippewas of the Thames*. But, it seems, a culture of confidence would also be one that has high expectations for the reasons that administrative actors provide for their decisions and one that would hold decision-makers accountable for failing to meet these expectations. Such expectations and mechanisms of accountability would serve as affirmations of the role that reasons play in sound decision-making and access to procedural and substantive justice.[77] Further, such expectations and mechanisms would help to foster a culture of administrative decision-making in which affected parties learn, in forms and ways that are appropriate to the context, why a decision was reached from the decision-maker herself, rather than from the courts after judicial review. A culture of decision-making in which the courts ultimately hold the key to the reasons for administrative decisions effectively forces affected parties, especially those parties who are uncertain whether they have been meaningfully heard, properly understood, or adequately accommodated, to pursue judicial review.

Current trends in administrative law do not always lend themselves to maintaining meaningful expectations for reason-giving that are consistent with a narrative of confidence in the administrative state. Rather, recent case law discloses a willingness by the courts to supplement, or sometimes provide fully, the reasons that an administrative decision-maker offered, or could have offered, to explain and justify her decision.[78] *Clyde River* and *Chippewas of the Thames* also send mixed signals about what is expected of administrative decision-makers when it comes to reasons. In *Clyde River*, adopted in *Chippewas of the Thames*, the Court provides, "... [w]hen affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation."[79] Justices Karakatsanis and Brown go on to explain the value of written reasons.

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[77] *Baker*, *supra*, note 69.

[78] See, *e.g.*, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] S.C.J. No. 61, [2011] 3 S.C.R. 654 (S.C.C.); *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] S.C.J. No. 62, [2011] 3 S.C.R. 708 (S.C.C.); *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, [2018] S.C.J. No. 4, 2018 SCC 4 (S.C.C.); *T.W.U. (B.C.)*, *supra*, note 28; *T.W.U. (L.S.U.C.)*, *supra*, note 28.

[79] *Clyde River*, *supra*, note 4, at para. 41.

"Written reasons foster reconciliation", they write, "by showing affected Indigenous peoples that their rights were considered and addressed. … Reasons are 'a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation'".[80] Indeed, they note, "[w]ritten reasons also promote better decision making".[81] However, the Court then goes on to qualify these expectations about reason-giving, also drawing on a conception of access to justice. "This does not mean," the Court holds,

> that the NEB is always required to review the adequacy of Crown consultation by applying a formulaic "*Haida* analysis", as the appellants suggest. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case.[82]

With these lowered expectations for reason-giving, *Clyde River* and *Chippewas of the Thames* provide one final diagnostic of the current state of administrative law, one that gives rise to one last worry. A confidence in the administrative state, one that is worthy of a constitutional configuration that is, in essence, a regulatory state, must be not only aspirational and affirming, but also demanding. Confidence is justified only when accompanied by measures and standards — of fair procedure, transparent accountability, and justification, for example — that command integrity in our processes and structures of public decision-making. When a culture of confidence is stripped of these features — that is, when confidence is not tempered by a healthy vigilance and skepticism — we risk substituting confidence with idealism in our conception of regulatory actors and their contribution to governance. In their participation in and contestation of the narrative of confidence, *Clyde River* and *Chippewas of the Thames*, help us to see — and can hopefully help us avoid — moving into such a romantic age of administrative law.

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80 *Id*.
81 *Id*.
82 *Id.*, at para. 42.