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# Delegation, Deference and Difference: In Search of a Principled Approach to Implementing and Administering Aboriginal Rights

Janna Promislow\*

## I. INTRODUCTION

In 2017, the Supreme Court of Canada (SCC) decided two duty to consult cases, heard together: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*<sup>1</sup> and *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*<sup>2</sup> (“the 2017 cases”). Within the issue of whether the duty to consult had been satisfied, key points of contention focused on who is responsible for discharging the duty to consult Indigenous Peoples, including assessing the adequacy of the consultation. The cases presented the particular situation of a regulatory agency (the National Energy Board or NEB) that had final approval authority, without the involvement of the Crown “proper” (understood as a minister of the Crown or cabinet). In other words, can the duty be satisfied without the Crown participating in the process and assessing its adequacy? The Court’s answer: “While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.”<sup>3</sup> A second, equally contentious issue was about what is required of a regulatory agency in assessing the obligation to consult when this obligation rests with it. Embedded within this issue is the

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\* Associate Professor, Thompson Rivers University, Faculty of Law. This paper evolved and was improved through discussions at the Osgoode Constitutional Cases Conference and the National Roundtable on Administrative Law, held by the Canadian Institute for the Administration of Justice. Thanks to Sonia Lawrence for her wise editorial advice and to Scott Robertson and Ben Ralston for their insights and comments.

<sup>1</sup> [2017] S.C.J. No. 40, 2017 SCC 40, [2017] 1 S.C.R. 1069 (S.C.C.) [hereinafter “*Clyde River*”].

<sup>2</sup> [2017] S.C.J. No. 41, 2017 SCC 41, [2017] 1 S.C.R. 1099 (S.C.C.) [hereinafter “*Chippewas of the Thames*”].

<sup>3</sup> *Clyde River*, *supra*, note 1, at paras. 1 and 30; *Chippewas of the Thames*, *id.*, at para. 1.

question: what is the degree of specificity or formality with which the existing or claimed Aboriginal or treaty rights must be treated for the duty to assess adequacy to be discharged? The Court's answer:

An agency will not "always [be] required to review the adequacy of Crown consultation by applying a formulaic '*Haida* analysis'.... Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case."<sup>4</sup>

"[W]here deep consultation is required and the issue of Crown consultation is raised" with the agency, the agency "will be obliged to 'explain how it considered and addressed' Indigenous concerns ... What is necessary is an indication that the [agency] took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate."<sup>5</sup>

The Court's answers to these key questions are responsive but also equivocal, particularly when the statements of principle are paired with their application in the two cases. The answers also open a host of new questions, such as the circumstances under which the responsibility of the agency is full or partial; how Indigenous peoples (and others interested in the regulatory processes in issue) are supposed to be apprised of variable distributions of responsibility for obligations owed to them, particularly given the retrospective answer to this question in *Chippewas of the Thames*; the mechanisms and processes of Crown intervention in regulatory processes; and when agency responsibility requires more or less explicit treatment of the right.

Although these questions deserve further attention,<sup>6</sup> as does the evaluation of the 2017 cases for the contributions to the duty to consult law more generally,<sup>7</sup> the discussion that follows will focus on how the

<sup>4</sup> *Clyde River*, *id.*, at para. 42.

<sup>5</sup> *Chippewas of the Thames*, *supra*, note 2, at para. 63.

<sup>6</sup> For some discussion, see Nigel Bankes, "Clarifying the parameters of the Crown's duty to consult and accommodate in the context of decision-making by energy tribunals" (December 2017) *J. of Energy & Natural Resources* L. 1 [hereinafter "Bankes"] and Dwight Newman, "Changing Duty to Consult Expectations for Energy Regulators: Broader Implications from the Supreme Court of Canada's Decisions in *Chippewas of the Thames* and *Clyde River*" (2017) 5 *Energy Regulation Quarterly*, online: <<http://www.energyregulationquarterly.ca/articles/changing-duty-to-consult-expectations-for-energy-regulators-broader-implications-from-the-supreme-court-of-decisions-in-chippewas-of-the-thames-and-clyde-river#sthash.BQufO0w0.dzR0Hx36.dpbs>> [hereinafter "Newman 2017"]. For a discussion of how these decisions relate the obligations and authority of municipalities with respect to the duty to consult and accommodate, see Felix Hoehn and Michael Stevens, "Local Governments and the Crown's Duty to Consult" (2018) 55 *Alta. L. Rev.* (forthcoming).

<sup>7</sup> See John Borrows, "How Colonialism Works in Canada: Consultation, *Clyde River* and the *Chippewas of the Thames*", Draft Paper, 2018 (on file with author) [hereinafter "Borrows"] and Richard Stacey, "Honour in Sovereignty: Can Crown Consultation With Indigenous Peoples Erase

2017 cases relate to the treatment of constitutional rights in administrative and discretionary contexts more generally. Active debate regarding the current framework for the review of administrative discretion implicating Charter<sup>8</sup> rights and values,<sup>9</sup> as well as tribunal jurisdiction over constitutional questions and remedies more generally,<sup>10</sup> suggest that these matters are far from settled. Nevertheless, there are well-established policy groundings for the Charter frameworks. Judicial review in the context of administering Charter rights is aimed at governmental accountability for meeting its constitutional obligations by ensuring that Charter responsibilities and Charter rights enforcement is part of the work of the administrative branch. Such an approach aims to make Charter rights accessible to the rights-holders. As McLachlin J. (as she was then) famously stated in *Cooper v. Canada (Human Rights Commission)*:<sup>11</sup>

... The Charter is not some holy grail which only judicial initiates of the superior courts may touch. The Charter belongs to the people. ... Many more citizens have their rights determined by ... tribunals than by the

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Canada's Sovereignty Deficit?" (2018) 68 U.T.L.J. 405 [hereinafter "Stacey"]. For related discussion, see also Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 U.B.C. L. Rev. 139 and E. Ria Tzimas, "To What End the Dialogue?" (2011) 54 S.C.L.R. (2d) 493 and Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46 U.B.C. L. Rev. 347.

<sup>8</sup> *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"].

<sup>9</sup> As set out in *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12, [2012] 1 S.C.R. 395 (S.C.C.) [hereinafter "*Doré*"]; *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, 2015 SCC 12, [2015] 1 S.C.R. 613 (S.C.C.) [hereinafter "*Loyola*"]. For commentary, see Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter" (2014) 67 S.C.L.R. (2d) 561 [hereinafter "Macklin"]; Lorne Sossin & Mark Friedman, "Charter Values and Administrative Justice" (2014) 67 S.C.L.R. (2d) 391 [hereinafter "Sossin & Friedman"]; Matthew Lewans, "Administrative Law, Judicial Deference, and the *Charter*" (2014) 23 Constitutional Forum Constitutionnel 19; Evan Fox-Decent & Alexander Pless, "The Charter and Administrative Law Part II: Substantive Review" [hereinafter "Fox-Decent & Pless"] in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context*, 3d ed (Toronto: Emond Montgomery Publications, 2018) 507 [hereinafter "Flood & Sossin"]; and Mary Liston, "Administering the Charter, Proportioning Justice. Thirty-Five Years of Development in a Nutshell" (2017) 30 CJALP 211 [hereinafter "Liston"].

<sup>10</sup> See, e.g., Nicholas Lambert, "The *Charter* in the Administrative Process: Statutory Remedy or Refounding of Administrative Jurisdiction?" (2007-2008) 13 Rev. Const. Stud. 21 [hereinafter "Lambert"]; Beth Bilson, "The Voice from the Trenches: Administrative Tribunals and the Interpretation of the Charter" (2006) 69 Sask. L. Rev. 3; Deborah K. Lovett, "Administrative Tribunal Jurisdiction Over Constitutional Issues and the New Administrative Tribunals Act" (2005) 63 Advocate 177 [hereinafter "Lovett"]; and Fox-Decent & Pless, *id.*

<sup>11</sup> [1996] S.C.J. No. 115, [1996] 3 S.C.R. 854 (S.C.C.) [hereinafter "*Cooper*"].

courts. If the Charter is to be meaningful to ordinary people, then it must find its expression in the decisions of ... tribunals.<sup>12</sup>

In *Paul v. British Columbia (Forest Appeals Commission)*, the Supreme Court brought this same direction to tribunal jurisdiction regarding section 35<sup>13</sup> rights challenges, stating that “[t]here is no persuasive basis for distinguishing the power to determine s. 35 questions from the power to determine other constitutional questions. ... Section 35 is not, any more than the *Charter*, ‘some holy grail which only judicial initiates of the superior courts may touch’ ....”<sup>14</sup> But the 2017 cases do not take their cue from *Paul* and instead introduce several points of difference from the Charter context. *Paul* was decided before *Haida Nation v. British Columbia (Minister of Forests)*<sup>15</sup> foregrounded consultation and the honour of the Crown in relation to section 35 interests. It is time to revisit *Paul* and consider whether the assertion of there being “no persuasive basis” to distinguish the administration of section 35 rights from Charter rights still holds true given the evolution in tribunal authorities and responsibilities for Charter protections and section 35 jurisprudence since this case.

Starting from the policy motivations behind the frameworks in the Charter context, this paper will consider the 2017 cases and identify two main points of Indigenous difference.<sup>16</sup> The first is in respect of the framing of tribunal jurisdictions over constitutional rights, where “delegation” to tribunals through legislation applies in Charter contexts while the 2017 cases introduce an element of Crown “reliance” on tribunals into this interpretive exercise. The second area of difference is in the review of decisions violating or implicating constitutional rights, and particularly the application of the reasonableness standard with respect to values (Charter context) and claimed rights (section 35

<sup>12</sup> *Id.*, at para. 70. Aspects of *Cooper* on tribunal jurisdiction over Charter challenges to its enabling legislation were later overturned, and adopting McLachlin J.’s words in *Nova Scotia (Workers’ Compensation Board) v. Martin*; *Nova Scotia (Workers’ Compensation Board) v. Laseur*, [2003] S.C.J. No. 54, [2003] 2 S.C.R. 504 (S.C.C.) [hereinafter “*Martin*”]. See also *R. v. Conway*, [2010] S.C.J. No. 22, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.) [hereinafter “*Conway*”].

<sup>13</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>14</sup> [2003] S.C.J. No. 34, 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 36 (S.C.C.) (citations omitted) [hereinafter “*Paul*”].

<sup>15</sup> [2004] S.C.J. No. 70, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter “*Haida Nation*”].

<sup>16</sup> With apologies to Patrick Macklem for potentially bending his 2001 book title out of shape from his original use of this term to refer to socio-economic and historical differences, rather than differences of treatment in the law as I am using it here: Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001).

context) that have not yet crystallized as rights or as rights that have been violated. The paper will demonstrate that to some extent, Indigenous difference in the administration of constitutional rights and obligations might reflect narratives of Crown and Indigenous treaty relationships, ongoing questions about Crown sovereignty, and the premise that negotiated solutions to section 35 rights disputes and claims are preferred.<sup>17</sup> Such narratives already provide a purposive grounding for the duty to consult and accommodate. This paper will explore whether they also provide a purposive (and principled) grounding for understanding the posture and approaches the Court should adopt in judicial review of administrative decisions that implicate section 35 rights. In spite of such differences, my main argument will be that an approach of “difference” is unsupported by any purposive or historical differences between section 35 and Charter rights, and instead undermines processes of reconciliation that the duty to consult is intended to support. Even taking into account rigorous debate and cautions relating to the evolving framework for review of decisions breaching Charter rights under a “reasonableness as proportionality” standard,<sup>18</sup> I nevertheless suggest that applying the same judicial review principles relating to the intersection of constitutional and administrative law would better protect the rights-quality of section 35 rights than the directions coming out of the 2017 cases. Ultimately, the motivating policies for the Charter approaches are equally pressing in the section 35 context: the adjudication of section 35 rights must be made accessible to Indigenous rights-holders.

The paper will start with a brief overview of the cases and the factual differences emphasized by the Supreme Court to reach different results for the Indigenous parties. I will then turn to consider how the Court’s treatment of the role of administrative tribunals in the duty to consult and accommodate is different from the treatment of tribunal jurisdiction and responsibility for Charter rights and other constitutional issues, first with respect to the jurisdiction of tribunals over constitutional questions; and second, with respect to proportionality in reasonableness review of administrative decisions impacting constitutional rights protections. With respect to each of these aspects of tribunal responsibility and authority

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<sup>17</sup> Such themes are long-standing in the s. 35 jurisprudence — *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) [hereinafter “*Sparrow*”] and *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010 (S.C.C.) [hereinafter “*Delgamuukw*”]. This orientation also relates to the history of s. 35; see note 70, below.

<sup>18</sup> As discussed in the materials noted, *supra*, note 8 and discussed in detail in Part III.2, below.

over constitutional matters, I will try to make sense of these differences, searching for purposes and reasons that can explain the differences and identifying absences of principle. Finally, I will conclude by considering principled directions for the development of this law.

## II. THE CASES

The 2017 consultation cases involved similar regulatory structures *vis-à-vis* the role of the Crown, but were otherwise quite dissimilar. In *Clyde River*, the Inuit of the Nunavut hamlet contended with international oil and gas companies (the “proponents”) who were seeking a geophysical operations authorization (“GOA”) from the National Energy Board to conduct seismic testing in Baffin Bay and Davis Strait under section 5 of the *Canada Oil and Gas Operations Act*.<sup>19</sup> The seismic testing in issue is known to have impacts on marine mammals, including the seals and narwhal that are part of the country food diet the Inuit of the area continue to rely on. The marine mammals are also the subject of treaty rights under the *Nunavut Land Claim Agreement*,<sup>20</sup> including priority Inuit harvesting rights and commitments to Inuit participation in wildlife management decisions and resource management that sustains and restores depleted wildlife populations.<sup>21</sup> The GOA decision was subject to a proponent-led environmental assessment process that did not require a panel hearing. The proponent did a poor job of responding to Inuit questions about the testing, posting practically inaccessible and long documents only after community consultation meetings.<sup>22</sup> While organizations representing Inuit contacted the Minister of Aboriginal and Northern Affairs specifically requesting a strategic environmental assessment (SEA) prior to issuance of the GOA, the Minister declined to delay the GOA to allow this broader environmental assessment process to take place first.<sup>23</sup> The NEB thus issued the GOA to the proponents without significant participation from a Minister of the Crown. On judicial review, Karakatsanis and Brown JJ., writing for the full Court, found that the consultation process was significantly flawed and quashed the GOA.

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<sup>19</sup> R.S.C. 1985 c. O-7 [hereinafter “COGOA”].

<sup>20</sup> Inuit of the Nunavut Settlement Area and Canada, May 25, 1993 [hereinafter “NCLA”].

<sup>21</sup> *Id.*, articles 5, 15, 16, esp. 5.1.2-5.1.6, 16.1.3

<sup>22</sup> *Clyde River*, *supra*, note 1, at para. 49.

<sup>23</sup> *Id.*, at para. 13.

In *Chippewas of the Thames*, treaty harvesting rights were also in issue, but this time arising from a series of historic treaties dating from the early 19th century. Beyond the scope of these treaties, the Chippewas of the Thames First Nation also claim Aboriginal title to the riverbed of the Thames River and an Aboriginal right to use the water of the Thames River.<sup>24</sup> Enbridge Pipelines Inc. proposed a pipeline modification project to reverse the flow of part of its 40-year-old Line 9 pipeline to move eastward from Sarnia to Montreal, and also increase its capacity and allow it to carry diluted bitumen or heavy crude. The project was subject to approval under section 58 of the *National Energy Board Act*,<sup>25</sup> an authority that allows the NEB to issue a final approval of smaller pipeline projects without the involvement of the federal cabinet. The Chippewas of the Thames and other First Nations were notified about the project by Enbridge and then participated in the environmental assessment hearing process conducted by the NEB. The Chippewas of the Thames First Nation also sent letters to the Prime Minister and other Cabinet Ministers prior to the NEB hearings raising concerns, including that no Crown-led consultation had occurred with respect to the proposed project. They called on the Ministers to initiate consultations. A response was received only after the NEB hearing process was concluded, during which the Chippewas of the Thames and other First Nations presented their concerns about the impacts of the proposed project on their lands, livelihoods and heritage. The ministerial response, received only after the hearing concluded, was to the effect that the Crown would rely on the NEB's process to fulfil its duty to consult on the project. The NEB thus approved the Line 9 project without direct participation of the Crown. In this case, the Supreme Court (again with Karakatsanis and Brown JJ. writing) found that the duty to consult and accommodate had been satisfied and upheld the approval.

The Court's treatment of the administrative law issues in these cases was given short shrift in favour of a focus on the merits: was the duty to consult met in each of the cases? The absence of the administrative law notably aligns with recent discussions in the jurisprudence urging judicial review to focus on the merits of the cases rather than the abstract intricacies of judicial review.<sup>26</sup> This absence, however, is also a notable

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<sup>24</sup> Factum of the Chippewas of the Thames First Nation, at para. 13. Additional rights claims included Aboriginal rights to access and preserve sacred sites and a treaty right to exclusive use and enjoyment of Reserve lands; summarized by the SCC, *Chippewas of the Thames*, *supra*, note 2, at para. 7.

<sup>25</sup> R.S.C. 1985, c. N-7 [hereinafter "NEB Act"].

<sup>26</sup> For example, Abella J. in *Wilson v. Atomic Energy of Canada Ltd.*, [2016] S.C.J. No. 29, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 25 (S.C.C.) [hereinafter "*Wilson*"].



departure from previous cases addressing the fit of the duty to consult with regulatory processes. Unlike in *Haida Nation*; *Carrier Sekani Tribal Council*<sup>27</sup> and *Beckman v. Little Salmon/Carmacks First Nation*,<sup>28</sup> there were no overtures to the utility and flexibility of administrative law to absorb and address the issues and context of the duty to consult. Further, there was no mention of deference or the standard of review in either judgment, an absence that demonstrates what Paul Daly has described as the compelling inconsistency of the standard of review doctrine.<sup>29</sup> Perhaps the absence demonstrates that it was easier for the Supreme Court to agree on the merits of these cases than the standards of review and what they mean. Regardless of the motivations, the Court's discussion of what constitutes meaningful consultation, particularly in *Clyde River*, is significantly more directive than its treatment of the administrative law issues. Nevertheless, the lack of explicit treatment does not mean these cases lack administrative law significance.

### III. INDIGENOUS DIFFERENCE AND THE 2017 CASES

#### 1. Reliance and the Premises of Deference

##### (a) Identifying Indigenous Difference

On the administrative law issues, the 2017 cases pick up issues addressed in the 2010 decision, *Carrier Sekani Tribal Council*, which set out that “[t]he legislature may choose to delegate to a tribunal the Crown’s duty to consult”<sup>30</sup> and in addition, or alternatively, “the legislature may choose to confine a tribunal’s power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process.”<sup>31</sup> The latter authority depends on expressed or implied authority in the legislation over questions of law, following the course established in *Martin* and *Paul* regarding tribunal authority to decide questions of

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<sup>27</sup> *Carrier Sekani Tribal Council v. Rio Tinto Alcan*, [2010] S.C.J. No. 43, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.) [hereinafter “*Carrier Sekani Tribal Council*”].

<sup>28</sup> [2010] S.C.J. No. 53, 2010 SCC 53, [2010] 3 S.C.R. 103 (S.C.C.) [hereinafter “*Little Salmon/Carmacks First Nation*”].

<sup>29</sup> Paul Daly, “Why is Standard of Review So Addictive?” *Blog: Administrative Law Matters* (February 12, 2018), online: <<http://www.administrativelawmatters.com/blog/2018/02/12/why-is-standard-of-review-so-addictive/>>.

<sup>30</sup> *Supra*, note 27, at para. 56.

<sup>31</sup> *Id.*, at para. 57.

constitutional law. The former authority depends on the remedial powers discernible from the legislation and specifically that a tribunal with authority to engage in consultation must “possess remedial powers necessary to do what it is asked to do in connection with the consultation”,<sup>32</sup> following the course established in *Conway* regarding tribunal jurisdiction to grant Charter section 24 remedies.<sup>33</sup>

The 2017 cases confirmed the approach from *Carrier Sekani Tribal Council*. However, taking its cue from the arguments of several of the parties,<sup>34</sup> the Supreme Court also added new glosses to these established approaches. Tribunal authority was repackaged as a matter of Crown reliance on tribunal processes rather than a matter of legislative delegation of authority to administrative tribunals:

The Crown may *rely* on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances. ... However, if the agency’s statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval.<sup>35</sup>

Is this new language significant? Is it different to switch the focus of the analysis from the agency, to whom legislatures might intend to *delegate* an obligation (or be assumed to intend absent an explicit withdrawal of authority), to the Crown, whose duty lies outside and beyond legislation, and who might *rely* on administrative agencies to assist with the carrying out of the Crown’s obligations?<sup>36</sup> In a word, yes.<sup>37</sup>

Under the reliance theory, new questions arise. For example, how might Indigenous parties (or proponents for that matter) be expected to

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<sup>32</sup> *Id.*, at para. 60.

<sup>33</sup> For discussion, see Janna Promislow, “Irreconcilable? The Duty to Consult and Administrative Decision Makers” (2013) 22 Constitutional Forum Constitutionnel 63 [hereinafter “Promislow 2013”].

<sup>34</sup> See, e.g., the facts of the Respondent Attorney General for Canada, and of the Appellants Chippewas of the Thames First Nation and The Hamlet of Clyde River.

<sup>35</sup> *Chippewas of the Thames*, *supra*, note 2, at para. 32 (emphasis added and citations omitted).

<sup>36</sup> The language of reliance was not brand new in these decisions. It has been part of the federal policy guidelines on the duty to consult since at least 2011 (Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), online: <<http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>>). It was also used by the Federal Court of Appeal in *Hamlet of Clyde River v. TGS-NOPEC Geophysical Co. ASA (TGS)*, [2015] F.C.J. No. 991, 2015 FCA 179 (F.C.A.).

<sup>37</sup> For a more limited view of what the cases decided, although without analysis of the language of reliance, see Newman 2017, *supra*, note 6.

know about Crown's intention to rely on the regulatory process in a given case? The Court's answer was that "where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying."<sup>38</sup> Any potential stringency of such a requirement was, however, immediately undermined by the application of these principles in *Chippewas of the Thames*, in which efforts to engage the Crown separately from the NEB hearing process were not answered until after the NEB had approved the Line 9 project. Instead, the Court considered the NEB's early notice of the hearing process along with knowledge that the NEB was the final decision-maker in the matter and that the Crown was not a participant in the process, to have "made it sufficiently clear to the Chippewas of the Thames that the NEB process *was intended* to constitute Crown consultation and accommodation."<sup>39</sup> Intended by whom, one wonders — Parliament or the Crown? Under *Carrier Sekani Tribal Council* (and *Martin, Paul and Conway*), the role of the tribunal *vis-à-vis* the duty to consult was a question of legislative intent. In *Chippewas of the Thames*, the question of reliance became one of constructive Indigenous party knowledge and maybe Crown and/or legislative intent. This is different. It is premised on different facts and a different kind of inquiry, such that the well-trodden principles of discerning and respecting legislative intent in these circumstances may prove to be of limited assistance in spite of the centrality of these principles in *Carrier Sekani Tribal Council* and the rest of public law.

*(b) Explaining and Evaluating this Difference*

To address the potential friction between the premises of deference and the concept of Crown reliance on regulatory process, we must first understand the non-delegable quality of the honour of the Crown. The non-delegable quality of the honour of the Crown was first addressed in the seminal *Haida Nation* decision. Among the issues decided in that case was whether Weyerhaeuser Company Ltd., a non-governmental party proponent and beneficiary of the government conduct in question, bore legal responsibility for the duty to consult. The Supreme Court held unambiguously it did not:

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<sup>38</sup> *Clyde River*, *supra*, note 1, at para. 23. See also *Chippewas of the Thames*, *supra*, note 2, at para. 44.

<sup>39</sup> *Chippewas of the Thames*, *id.*, at para. 46 (emphasis added).

[T]he duty to consult and accommodate ... flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. ... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.<sup>40</sup>

This statement was in relation to the issue of third party liability,<sup>41</sup> distinct in both tone and content from the commentary the Supreme Court offered at the time, in both *Haida Nation* and the companion case *Taku River Tlingit First Nation*,<sup>42</sup> on how the duty would be integrated with the existing regulatory state. In that commentary, it was equally clear that the Supreme Court envisioned the duty being carried out within existing regulatory structures, and even offered a hopeful note that governments might “set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts.”<sup>43</sup> In these statements, the Court in *Haida Nation* did not suggest that the duty cannot be delegated in the administrative law sense of the word.<sup>44</sup> Indeed, *Carrier Sekani Tribal Council* confirmed that even accommodation — the substantive element of the duty — may be delivered by administrative bodies, although only to the extent that is consistent with the remedies available within the pertinent statutes.<sup>45</sup> Thus, the non-delegable quality of the constitutional principle of the

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<sup>40</sup> *Haida Nation*, *supra*, note 15, at para. 53.

<sup>41</sup> The obligations of third parties in private law in relation to interference with Aboriginal title specifically are currently being litigated in relation to the tort of nuisance; see the dismissal of the application for summary judgment in *Saik'uz First Nation and Stelat'en First Nation v. Rio Tinto Alcan Inc.*, [2015] B.C.J. No. 694, 2015 BCCA 154 (B.C.C.A.).

<sup>42</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.) [hereinafter “*Taku River Tlingit First Nation*”].

<sup>43</sup> *Haida Nation*, *supra*, note 15, at para. 51.

<sup>44</sup> The one point of connection is the reference to the “procedural” aspects as the delegable part of the duty, whether to third parties or the regulatory bodies that are part and parcel of “government” if not the Crown. This point that deserves further attention, particularly in light of the Supreme Court's insistence in *Tsilhqot'in Nation* of the duty as procedural in nature, leaving the substantive elements of accommodation to other elements within the justification analysis. For discussion of the procedural nature of the duty to consult, see Stacey, *supra*, note 7.

<sup>45</sup> *Carrier Sekani Tribal Council*, *supra*, note 27.

honour of the Crown<sup>46</sup> is akin to the applicability principles under section 32 of the Charter that have been interpreted to mean that the Charter does not govern disputes between private parties directly.<sup>47</sup> Further, it is distinct from the administrative law principles, which demand the opposite: obligations that flow from the honour of the Crown must bind administrative agencies so that government cannot avoid constitutional obligations simply through legislative delegations.<sup>48</sup>

In the 2017 version of these principles, the Supreme Court described the Crown as always holding “ultimate responsibility for ensuring consultation is adequate.”<sup>49</sup> This statement does not mean that the duty cannot be delegated. It also does not mean that the regulatory process cannot fully satisfy the constitutional obligations in a given case.<sup>50</sup> Nevertheless, if it is to mean anything, it means that the duty cannot be fully or completely delegated without some Crown oversight. This language suggests that the Crown must be aware of consultation processes and must be confident in them and/or evaluate the adequacy of consultation administered through regulatory processes. As Karakatsanis and Brown JJ. explained, this awareness does not have to be at the granulated level of each individual consultation process with each Indigenous community:

[A] minister of the Crown [is not required to] give explicit consideration in every case to whether the duty to consult has been satisfied, ... [nor are they required to] directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments .... Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and

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<sup>46</sup> *Little Salmon/Carmacks First Nation*, *supra*, note 28, at para. 42.

<sup>47</sup> *Dolphin Delivery v. Retail, Wholesale and Department Store Union, Local 580*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.); *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] S.C.J. No. 7, 2002 SCC 8, [2002] 1 S.C.R. 156 (S.C.C.).

<sup>48</sup> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] S.C.J. No. 43, 2000 SCC 44, [2000] 2 S.C.R. 307 (S.C.C.) [hereinafter “*Blencoe*”]; *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844 (S.C.C.) [hereinafter “*Godbout*”].

<sup>49</sup> *Clyde River*, *supra*, note 1, at para. 22; *Chippewas of the Thames*, *supra*, note 2, at para. 37.

<sup>50</sup> For discussion, see Newman 2017, *supra*, note 6.

perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties are obliged to act diligently to advance their respective interests).<sup>51</sup>

The ultimate responsibility of the Crown is thus connected to a conversation with Indigenous parties, who are expected to make the Crown aware of the procedural deficiencies of at least specific regulatory processes.

Perhaps out of a concern to not overstep its proper competence and inappropriately and inadvertently overburden government, the Court was vague on what is required of government in its “ultimate responsibility” role. The onus to bring the inadequacies of regulatory consultations to the Crown’s attention in a particular case clearly lies with Indigenous Peoples, with no corresponding obligation on the Crown to respond. This feather-light onus on the Crown to anticipate and be deliberate in its engagements with consultation through the regulatory processes creates additional hurdles for Indigenous parties seeking recognition and accommodation of their constitutional rights. Not requiring specific attention by the Crown — or, as we will see in the next section, tribunals either — to the implementation and assessment of Aboriginal rights also bolsters arguments that the duty facilitates assimilation rather than reconciliation.<sup>52</sup> This approach also does not, as Richard Stacey argues it should, promote the duty to consult as a vehicle for state accountability to Indigenous Peoples.<sup>53</sup> But for my purposes in this paper, the focus is on the implications of a reliance approach to section 35 constitutional responsibilities, as opposed to the tried-and-true delegation approach for the Charter.

The most significant innovation in the reliance framework flows from a change in the role of legislative intent. In the Charter context, delegation to adjudicate rights and the extent of section 24(1) remedial authority depends on legislative intent, while responsibilities to uphold Charter rights and values flow from the application of the Charter to tribunals under section 32 and section 52.<sup>54</sup> Government can choose to organize the adjudication of rights by removing Charter jurisdictions from particular tribunals, but it is questionable whether legislatures can remove responsibilities to attend to Charter values in decision-making

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<sup>51</sup> *Clyde River*, *supra*, note 1, at para. 22 (citations omitted).

<sup>52</sup> See authors cited in *supra*, note 6.

<sup>53</sup> Stacey, *supra*, note 7.

<sup>54</sup> *Conway*, *supra*, note 12.

from tribunals.<sup>55</sup> In relation to the Charter and in administrative law more generally, legislative intent is a cornerstone for understanding the scope of authorities and obligations entrusted to administrative agencies and actors of all sorts and the role of the courts on judicial review.<sup>56</sup> Switching to the section 35 context, the Crown's ability to rely on regulatory processes is determined through a mix of Crown and legislative intent. Moreover, the Crown's ultimate authority for the adequacy of consultation — pinned to a non-delegable constitutional principle, the parameters of which I suggest above have been inappropriately extended in the context of administrative law — suggests there can be no legislative intent to fully delegate the duty, or at least not the obligation to assess adequacy and make up for any missing elements. Instead, the statements in *Clyde River* and *Chippewas of the Thames* create a constitutional limitation on legislative intent, such that some constitutional responsibilities *cannot* be delegated, even where questions of law are clearly within tribunal authority (such as in the case of the NEB in the 2017 cases).

To be clear, this is more of a theoretical or structural problem than a functional one. The constitutional limitation does not undermine the ability of regulatory agencies to fully carry out the duty. Instead, it changes point of inquiry from one of what legislatures intended ahead of a particular process to a mostly retrospective focus on what the executive did and intended in relation to a particular process. The Crown, rather than the legislature, must determine the fullness of the agency's process in relation to the satisfaction of constitutional obligations. This point of Indigenous difference inverts of the usual hierarchies of law and policy, putting the Crown in the driver's seat and limiting the control of the legislature.<sup>57</sup> By potentially re-orienting judicial review to a distinct Crown decision to rely or not rely on regulatory decisions and

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<sup>55</sup> See, e.g., *Ismail v. British Columbia (Human Rights Tribunal)*, [2013] B.C.J. No. 1308, 2013 BCSC 1079 (B.C.S.C.): "A direction in the legislation that a tribunal has no jurisdiction to decide constitutional questions relating to the *Charter* should not be viewed as a direction that the tribunal should ignore *Charter* values" (at para. 309). See also *Duncan v. British Columbia (Human Rights Tribunal)*, [2017] B.C.J. No. 2651, 2017 BCSC 2375, at paras. 60-101 (B.C.S.C.).

<sup>56</sup> A key point of debate in this area has been whether it is constitutional for legislatures to remove consideration of the Charter from the fulfilment of legal responsibilities. For commentary see Lambert, *supra*, note 10, and Fox-Decent & Pless, *supra*, note 9.

<sup>57</sup> This is itself problematic. For related analysis see Janna Promislow & Naomi Metallic, "Realizing Aboriginal Administrative Law" [hereinafter "Promislow & Metallic"] in Flood & Sossin, *supra*, note 9, at 87; and Kate Glover Berger, "Diagnosing Administrative Law: A Comment on *Clyde River* and *Chippewas of the Thames First Nation*" (2019) 88 S.C.L.R. (2d) 107.

processes,<sup>58</sup> this point also aggravates a dynamic noted by commentators in relation to judicial review of ministerial decisions affecting Charter rights and values under which courts defer to government actors who may be “inclined to trade off individual rights in the name of political gain.”<sup>59</sup> This inclination is at least as strong in relation to Aboriginal rights, the protection of which often remains in juxtaposition or outside the conception of the public interest.<sup>60</sup> It further throws a wrench in the workings of the usual administrative law theory of deference on top of an already confused and confusing application of standard of review logic to review of the duty to consult.<sup>61</sup> The key issue emerging from this new twist is whether a tribunal can ever be presumed to be an expert in relation to its responsibilities over the duty to consult when legislatures are constitutionally barred from fully delegating these responsibilities to them.

A more detailed review of the potential questions at stake within a judicial review of a decision on the duty to consult and accommodate will wait until the next section, below. The question at stake in the Crown’s particular, non-delegable role is adequacy, a question to which deference applies. As the Federal Court of Appeal explained in *Gitxaala Nation*: “When considering whether that duty has been fulfilled — *i.e.*, the

<sup>58</sup> The potential for this structure to create additional opportunities and decisions for judicial review was not treated by the Court in the 2017 cases. However, it was already present in the case law. See, *e.g.*, *Gitxaala Nation v. Canada*, [2016] F.C.J. No. 705, 2016 FCA 187 (F.C.A.) [hereinafter “*Gitxaala Nation*”]; *Prophet River First Nation v. Canada (Attorney General)*, [2017] F.C.J. No. 64, 2017 FCA 15 (F.C.A.) [hereinafter “*Prophet River FCA*”], leave to appeal to the Supreme Court denied [2017] S.C.C.A. No. 127 (S.C.C.); *Prophet River v. British Columbia (Minister of the Environment)*, [2017] B.C.J. No. 182, 2017 BCCA 58 (B.C.C.A.) [hereinafter “*Prophet River BCCA*”], leave to appeal to the Supreme Court denied [2017] S.C.C.A. No. 127 (S.C.C.). For a critique of this development, see Newman 2017, *supra*, note 6.

<sup>59</sup> Macklin, *supra*, note 9, at 574. For a similar point, in relation to the potential conflict inherent in relation to tribunals tasked with both the obligation to carry out the duty to consult and the obligation to assess the adequacy of consultation, as quasi-judicial and independent tribunals, see Bankes, *supra*, note 6.

<sup>60</sup> *Clyde River* addressed this issue, but indicating that the public interest is not supported by decisions that breach constitutionally protected rights (*supra*, note 1, at para. 40). But short of a determination of a breach of rights, it is unclear how the unresolved rights claims often at stake in the duty to consult impact the public interest. See, for example, the minority decision in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] S.C.J. No. 54, 2017 SCC 54 (S.C.C.) [hereinafter “*Ktunaxa Nation*”] (decided just after the 2017 consultation cases) and commentary in Naomi Metallic, “Deference and Legal Frameworks Not Designed By, For or With Us” [hereinafter “*Metallic*”], *The Dunsmuir Decade*, a blog symposium hosted by Paul Daly (*Administrative Law Matters*) and Leonid Sirota (*Double Aspect*), (February 27, 2018), online: <<http://www.administrativelawmatters.com/blog/2018/02/27/deference-and-legal-frameworks-not-designed-by-for-or-with-us-naomi-metallic/>> [hereinafter “*The Dunsmuir Decade*”].

<sup>61</sup> For a thorough discussion of the standard of review, see *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, [2015] F.C.J. No. 969, 2015 FC 981, at paras. 79-94 (F.C.).



adequacy of consultation — we are not to insist on a standard of perfection; rather, only reasonable satisfaction is required.”<sup>62</sup> But tribunals may still be responsible for assessing adequacy. Post-*Clyde River* and *Chippewas of the Thames*, should deference be applied to tribunal assessments of adequacy or just the Crown’s? To be clear, this issue is not addressed in the decisions. The Court skipped the discussion of deference altogether. However, the theory of ultimate Crown responsibility suggests deference to tribunals on these questions is not appropriate. It is possible to argue that the reliance theory does not remove delegation of the question of adequacy from tribunals, but rather adds a further layer of assessment on top of the delegation, and that this leaves in place the premises of legislative intent to delegate such matters to expert tribunals. But this argument fails to recognize the structural limit on tribunal authority put in place in *Chippewas of the Thames* and *Clyde River*. Related concerns are identified in *United Food and Commercial Workers, Local 401 v. Alberta (Attorney General)*,<sup>63</sup> in which the Alberta Court of Appeal noted that where constitutional jurisdictions have been explicitly removed by statute, the standard of review will be affected even when it is a discretionary decision at stake:

The *Administrative Procedures and Jurisdiction Act* should not be viewed as a direction to Alberta tribunals that they should ignore *Charter* values. As *Doré* states at para. 35 “administrative decisions are *always* required to consider fundamental values”. But because the statute limits their power to directly resolve *Charter* issues by limiting their jurisdiction, the statute will necessarily influence the standard of review analysis relating to the tribunal’s decisions. As *Doré* points out at para. 30, the rule in *Dunsmuir* is based in part on legislative intent, and the intent of the *Administrative Procedures and Jurisdiction Act* is clearly that the excluded tribunals have a limited role to play in this area. ... In all the circumstances, applying the four part test in *Dunsmuir*, the standard of review of the compliance of the decision of the Adjudicator with the *Charter* should be reviewed for correctness.<sup>64</sup>

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<sup>62</sup> *Gitxaala Nation*, *supra*, note 58, at para. 8.

<sup>63</sup> [2012] A.J. No. 427, 2012 ABCA 130, 349 D.L.R. (4th) 654 (Alta. C.A.) [hereinafter “*UFCW (ABCA)*”], *affd* *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, [2013] S.C.J. No. 62, [2013] 3 S.C.R. 733, 2013 SCC 62 (S.C.C.) (standard of review was not discussed at the S.C.C.). Note, however, that there are differences among members of the Supreme Court on characterizing legislative intent through specific indicators that lead away from deference. See, e.g., *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Limited*, [2016] S.C.J. No. 47, 2016 SCC 47, [2016] 2 S.C.R. 293 (S.C.C.).

<sup>64</sup> *UFCW (ABCA)*, *id.*, at paras. 42, 44.

The logic here is augmented in *Clyde River* and *Chippewas of the Thames* by the constitutional nature of the limitation on legislative intent. A legislature cannot intend a tribunal to be the expert on a matter that they are constitutionally restricted from fully or finally delegating to the tribunal.<sup>65</sup> Thus in a move aimed at a different problem, the Supreme Court in *Clyde River* and *Chippewas of the Thames* has arguably rebalanced the standard of review question in favour of correctness across all aspects of the duty to consult, at least when it is the decisions of a tribunal rather than a minister of the Crown being reviewed.<sup>66</sup>

At a time when a potentially wholesale revisiting of the standard of review analysis is pending,<sup>67</sup> and the role of correctness review is already in question,<sup>68</sup> the relevance of these arguments may only be to reveal structural relationship between the executive, the legislature and the courts.<sup>69</sup> But as an argument about how Aboriginal rights are implemented and administered, and how this differs from the Charter context, the structural point is nevertheless illuminating. It is difficult to imagine other contexts in the Canadian constitutional state in which a constitutional obligation be so anchored in the executive so as to place a

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<sup>65</sup> The 2017 cases are especially interesting in light of the evolving standard of review doctrines, in which the role of a contextual versus presumptive approach to legislative intent in relation to tribunal expertise continues to be debated; see the reasons of the majority and the concurring reasons of Brown J. in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] S.C.J. No. 31, 2018 SCC 31 (S.C.C.).

<sup>66</sup> See, e.g., *Ktunaxa Nation*, *supra*, note 60, in which the scope of consultation required was at the deep end of the scale, and the Supreme Court applied reasonableness to how the Minister conducted the consultation. For commentary, see Janna Promislow, “Deference with a Difference: *Dunsmuir* and Aboriginal Rights” [hereinafter “Promislow 2018”], *The Dunsmuir Decade*, *supra*, note 60. Since expertise rests with the Crown under the reliance theory, *Chippewas of the Thames* and *Clyde River* do not give rise to arguments that disturb the approach to deference in relation to decisions of ministers and their delegates. This raises the odd possibility that there should be deference to ministers on the same decisions where deference is not owed to tribunals. Administrative law since *Dunsmuir* has moved away from distinguishing between tribunals and other types of administrative decision-makers, such as ministers and their delegates. Applying deference to ministerial decision-makers but not tribunals is not a promising path to follow.

<sup>67</sup> As the Supreme Court has signalled in its leave decision on *Bell Canada v. Canada (Attorney General)*, [2018] S.C.C.A. No. 9 (S.C.C.), and to be heard alongside *National Football League v. Canada (Attorney General)*, [2018] S.C.C.A. No. 28 (S.C.C.) and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2017] S.C.C.A. No. 352 (S.C.C.).

<sup>68</sup> See comments of Abella J. in *Wilson*, *supra*, note 26, and commentary in *The Dunsmuir Decade*, *supra*, note 60.

<sup>69</sup> Indeed, structural characteristics of the relationships between the institutions of government and the balancing of legislative supremacy and the rule of law are what proponents of maintaining the correctness standard point to as its primary purpose. See, for example, the concurring reasons of Rowe and Côté JJ. in *Canada (Human Rights Commission) v. Canada (Attorney General)*, [2018] S.C.J. No. 31, 2018 SCC 31, at para. 77 (S.C.C.).

limit on legislative action to reorganize how that constitutional obligation is carried out. While the ethereal limit imposed by the reliance theory does not allow the Crown's conduct to displace legislation, the ever-present and overarching responsibility of the Crown certainly nudges towards an inversion of the usual hierarchy of legislation displacing Crown prerogatives.<sup>70</sup> This suggested inversion in turn reminds us that, unlike their Charter cousins, the Aboriginal rights protected by the *Constitution Act, 1982* are not established by the text of section 35. Instead, the content and existence of section 35 rights was expected to be defined through further constitutional negotiations.<sup>71</sup> In the wake of the failure of those post-1982 processes, the Supreme Court's jurisprudence has treated Aboriginal rights as rights that have to be proven, on a case-by-case basis, while treaty rights give rise to litigation of both scope and application of the right, along with questions of existence.<sup>72</sup> Only the former type of treaty right case is akin to what the Charter rights litigation attempts to determine.<sup>73</sup>

In the 2017 cases, Indigenous parties argued for Crown responsibility in consultation processes. These arguments reflect their experiences of articulating concerns over threats to their treaty rights to whomever has been identified as the consultation partner, only to have their concerns bounced between proponent-agency-Crown without ever being directly addressed.<sup>74</sup> Their arguments also reflect conceptions of treaties supporting nation-to-nation relationships. Indigenous nations have long viewed their treaty relationships as being with the Crown, referring to the monarch, and

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<sup>70</sup> Craig Forcece, "The Executive, The Royal Prerogative, and the Constitution" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds., *The Oxford Handbook of The Canadian Constitution* (New York: Oxford University Press, 2017) 150, at 155-58.

<sup>71</sup> Douglas E. Sanders, "The Indian Lobby" in Keith Banting & Richard Simeon, eds., *And No One Cheered: Federalism Democracy and the Constitution Act* (Toronto: Methuen, 1983) 301, at 320; Michael Woodward & Bruce George, "The Canadian Indian Lobby of Westminster 1979-1982" (Fall 1983) 18 J. of Cdn. Studies 119; Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2d ed. (Toronto: University of Toronto Press, 1993), at 122, and Chapters 10, 11; Madeline Rose Knickerbocker & Sarah Nickel, "Negotiating Sovereignty: Indigenous Perspectives on the Patriation of a Settler Colonial Constitution, 1975-83" (2016) 190 BC Studies 67 and Jeremy Webber, "After Patriation: Aboriginal Rights, Meech Lake, and Charlottetown, 1982-1992" in *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal and Kingston: McGill-Queen's University Press, 1994) 122.

<sup>72</sup> Promislow 2013, *supra*, note 33, at 65. See also *Prophet River FCA*, *supra*, note 58, at para. 36.

<sup>73</sup> *Sparrow*, *supra*, note 17.

<sup>74</sup> As explained, for example, by Scott Robertson regarding the experience of the Chippewas of the Thames First Nation: "Pushing the Bounds of Administrative Law to Get Closer to Justice", National Roundtable on Administrative Law, Ottawa, Ontario (June 2, 2018).

not with the administrative delegates and branches far removed (in theory, independent from) the head of state.<sup>75</sup> A nation-to-nation relationship requires that treaty relationships be renewed and for ongoing negotiations of disputed matters.<sup>76</sup> Decisions on important projects affecting Indigenous lands, waters, and resource use and the regulatory processes by which such projects are decided are undoubtedly matters that require discussion. If those discussions are understood as part of an ongoing treaty relationship, they are not just about a free-standing duty to consult, but about a continuation of a treaty relationship with more than a project-based foundation in consent.<sup>77</sup> Moreover, the difference between “claimed” versus “proven or recognized” status at Canadian law does not change the nature of the treaty relationship or the connection between consultations and those treaty relationships. From such a perspective, allowing the Crown to rely on independent tribunals for all aspects of its treaty-based consultation obligations may jump too far ahead of the conversations that enduring treaty relationships require, particularly where the tribunal was not itself established in relation to treaty discussions and commitments.<sup>78</sup>

The arguments of the Indigenous parties find some resonance with a structural perspective of what the reliance theory achieves, resonance that provides a glimmer of a reasoned basis for the Indigenous difference

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<sup>75</sup> For example, before patriation in 1982, Treaty First Nations brought an action in the United Kingdom arguing that the treaty obligations were still owed by the Queen in right of Her Government in the United Kingdom, in an attempt to block patriation: *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians*, [1981] 4 C.N.L.R. 86 (U.K. C.A.). See also, “Constitution Express”, Indigenous Foundations, online: <[https://indigenousfoundations.arts.ubc.ca/constitution\\_express/](https://indigenousfoundations.arts.ubc.ca/constitution_express/)>; Clive Linklater *et al.*, “The Constitution Story” (1982), Saskatchewan Indian, Constitution Special Edition 7, online: <<http://www.sicc.sk.ca/archive/saskindian/a82apr04.htm>>.

<sup>76</sup> For discussion, see Mark D. Walters, “Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall” (2001) 24 Dal. L.J. 75; John Borrows, “Ground-Rules: Indigenous Treaties in Canada and New Zealand” (2006) 22 N.Z.U. L. Rev. 188; James [Sa’ke’j] Youngblood Henderson, “Dialogical Governance: A Mechanism of Constitutional Governance” (2009) 72 Sask. L. Rev. 29; James Tully, “Consent, Hegemony, and Dissent in Treaty Negotiations” in Jeremy Webber & Colin M. Macleod, eds., *Between Consenting Peoples. Political Community and the Meaning of Consent* (Vancouver: University of British Columbia Press, 2010) 233 and Janna Promislow, “Treaties in History and Law” (2014) 47 U.B.C. L. Rev. 1085; and essays in John Borrows & Michael Coyle, eds., *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017).

<sup>77</sup> See, e.g., Myeengun Henry, “First Nation questions relationship with Canada following court ruling” *Toronto Star* (August 11, 2017), online: <<https://www.thestar.com/opinion/commentary/2017/08/11/first-nation-questions-relationship-with-canada-following.html>>.

<sup>78</sup> There are many co-management and joint management boards that have a role in wildlife and resource decisions in Canada that have been created as a result of modern treaty or other negotiated relationship instruments; see, e.g., the McKenzie Valley Environmental Impact Review Board and the Haida Gwaii Management Council.

identified above. Treaty relationships have broken down, and cannot be repaired through project-based consultations with the Indigenous parties in which the Crown is not even present. On the flipside, from the perspective of state law, Canada's authority has been described by the Supreme Court as (only) *de facto*,<sup>79</sup> interpreted by many to denote a nascent or evolving quality to Canadian sovereignty, subject to or limited by the *de jure* status of continuing Indigenous sovereignties, at least until a point of reconciliation that may or may not be attainable in the foreseeable future.<sup>80</sup> Relatedly, as Webber argues, the concept of sovereignty is not simply a historical fact; instead, the defining characteristics of sovereignty include relationality and ongoing dispute, a conceptualization that understands the Canadian state and Indigenous Peoples to "still [be] seeking forms of relationship that are adequate to our lives together."<sup>81</sup>

However, this point of principle — one that potentially connects to moments in prior jurisprudence that allowed for an openness in the conception of state sovereignty — is not sustained by the doctrinal directions in the 2017 cases. Those cases do not recognize the nation-to-nation relationship or an open and disputed quality to Crown sovereignty that might potentially be supported through a different version of the reliance theory. The principles do not require the Crown to assess particular regulatory processes, let alone nurture the treaty relationship and discuss how to implement resource regulation with Indigenous nations. Equally concerning from the perspective of the mainstream of public law, the principles articulated do not require any action from the legislature to address the implementation and administration of Aboriginal and treaty rights. Contrary to the strong presumptions of authority over constitutional questions emerging from *Martin* and *Paul* — which, it should be noted, were followed by legislative action to

<sup>79</sup> *Haida Nation*, *supra*, note 15, at para. 32.

<sup>80</sup> See, e.g., Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012) and Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 *Queen's L.J.* 470-520. See also Stacey, *supra*, note 7; Jeremy Webber, "We Are Still in the Age of Encounter: Section 35 and a Canada Beyond Sovereignty" [hereinafter "Webber"] in Patrick Macklem & Douglas Sanderson, eds., *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) [hereinafter "Macklem & Sanderson"]; Mark W. Walters, "Knots in the Bulrush: Law, Sovereignty and Aboriginal Rights" in Macklem & Sanderson, *id.*, at 40; Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 S.C.L.R. (2d) 433; and Ryan Beaton, "*De Facto* and *De Jure* Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada" (2018) 27 *Constitutional Forum Constitutionnel* 25.

<sup>81</sup> Webber, *id.*, at 99.

withdraw and reorganize constitutional jurisdictions in at least two provinces<sup>82</sup> — the 2017 cases give the ability of the Crown to potentially “fix” consultation conducted through regulatory process but do not set any measures to assess Crown action or inaction in a given case apart from whether the consultation was, on judicial review, reasonable. The ability to retrospectively fix consultation through regulatory processes, combined with a lack of accountability for the Crown’s obligation to supervise or assess particular processes, is a recipe for government inaction, especially legislative inaction, on the duty to consult and on implementing and administering Aboriginal and treaty rights more generally.

## 2. When *Doré* Met *Haida Nation*: Constitutional Rights, Values and “Unformulaic” Analyses of Rights Claims

### (a) Identifying Indigenous Difference

A second point of Indigenous difference can be identified when we consider the judicial review principles that apply to ensure that where a discretionary administrative decision limits Charter protections, the impact is not disproportionate. This section will detail how the Supreme Court’s approach in the 2017 cases both align with these principles, as set out in *Doré* and *Loyola*, and departs from the more developed (albeit still evolving) principles applied in that context that are intended to ensure that constitutional rights are not impacted disproportionately.

Above, the discussion focused on potential limitations to judicial deference in relation to review of tribunal and Crown assessments of the consultation process to ensure its adequacy. This is the third of three points of analysis established in *Haida Nation*. The two questions that precede the determination of whether the duty has been satisfied are: (1) has the duty to consult been triggered? (2) what is the scope or content of the duty? These two questions are questions of constitutional law, to date

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<sup>82</sup> *Administrative Tribunals Act*, S.B.C. 2004, c. 45, ss. 44-45; *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, s. 11. It would be interesting to consider how to empirically support an argument about what judicial review principles should be to prompt or encourage governmental and legislative action to address such problems. In the absence of a stronger empirical basis, my argument here is premised on the relatively strong response elicited by *Martin* and the common law tradition of strong presumptions that the legislature can replace with explicit language in statutes (see, e.g., *Nicholson v. Haldimand-Norfolk (Regional) Police Commissioners*, [1979] S.C.J. No. 88, [1979] 1 S.C.R. 311 (S.C.C.)).

assessed on a correctness standard, while the third question of adequacy (satisfaction of the duty) is a matter more akin to administrative discretion and, to date at least, assessed on a reasonableness standard. Logically, questions 1 and 2 — whether the duty is triggered and the scope of the duty — must be answered before question 3. Without such attention, the level of consultation required remains undefined and the standard of reasonableness, if applied to the final question of adequacy, seeps into the first two questions. Even if correctness is not applied to the first two questions distinctly, a decision that proceeds on an erroneous assessment of the rights claimed and/or the impact of the proposed conduct on those rights, would necessarily be unreasonable.<sup>83</sup>

In *Clyde River*, the Supreme Court accepted the scope of the duty as deep, but in *Chippewas of the Thames*, the question of the scope of the duty was not addressed by the NEB or the courts. And again, no mention of the standard of review that applied to such questions, or any distinction between a court's role on review of the distinct questions was made. The parties argued that a tribunal that has jurisdiction to assess the adequacy of consultation must engage the analysis of the scope of the duty from *Haida Nation*, an analysis that requires assessing the rights claimed and not simply some generalized notion of Indigenous interests and environmental impacts at stake in the projects. In *Clyde River*, the Supreme Court provided a partial answer to these arguments when it considered that the NEB's failure to consider the impact of the seismic testing on the Inuit treaty rights separately from the impact on the environment, also contributed to the failure of the consultation process. In the Court's words,

[T]he inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. No consideration was given in the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.<sup>84</sup>

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<sup>83</sup> *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Attorney General)*, [2011] B.C.J. No. 887, 2011 BCSC 620 (B.C.S.C.) put it this way (at para. 147):

In my view, this is a situation where the Crown misconceived the impact of the Minister's decision, and ... also misconceived the seriousness of the Da'naxda'xw's claim. No deference should be given to the government's decision to determine the issue under the 2010 Protected Area Policy. In these circumstances, the scope and adequacy of the consultation should be reviewed on a standard of correctness.

<sup>84</sup> *Clyde River*, *supra*, note 1, at para. 45 (emphasis in original).

While this passage emphasizes that the articulation of the impact of a project on rights as a distinct inquiry from the impact on the environment, it is only a partial answer to the parties' arguments because the Court addresses this point in relation to the review of the *process* (adequacy) of consultation, and not the assessment of the *scope* of the duty.

Further, had the same approach been applied in *Chippewas of the Thames*, the end result may not have changed, but the quality of the conversation required would have been considerably improved. This is because the Chippewas of the Thames First Nation claimed a number of rights (detailed above), including title to the riverbed, but the nature of these rights and strengths of the claims were not explored in the NEB's assessment decision nor in the judicial reviews that followed. As Karakatsanis and Brown JJ. noted, "neither the NEB nor the Federal Court of Appeal assessed the depth of consultation required in this case."<sup>85</sup> The Supreme Court also did not engage in this analysis. Instead, the Supreme Court, like the NEB, emphasized the minimal "footprint" of the proposed project,<sup>86</sup> and found the NEB's hearing process and Aboriginal engagement initiatives (including participant funding) and mitigation measures required and committed to by the proponent Enbridge, satisfied the duty to consult and accommodate. Consequently, several of the First Nation's rights claims were never addressed. This implicitly sanctions a risk management strategy whereby consultations and accommodations *may* exceed the requirements of the strict letter of the law. One does not actually know what the law requires of the proponent, a regulatory agency, or the Crown in these situations; only that the duty may be satisfied without any party responding to Indigenous concerns about the articulation of its scope. There may be practical advantages to glossing over the assessment of rights and impacts on rights in favour of richer consultation processes, particularly for rights claimants who have weak claims or who lack the resources to fully research and support their claims.<sup>87</sup> Nevertheless, the risks of rights-avoidance are well demonstrated in *Chippewas of the Thames*. Not

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<sup>85</sup> *Chippewas of the Thames*, *supra*, note 2, at para. 47.

<sup>86</sup> National Energy Board, Reasons for Decision. In the matter of Enbridge Pipelines Inc. Application dated 29 November 2012 for the Line 9B Reversal and Line 9 Capacity Expansion Project, OH-002-2013 (March 2014) at 85-86, 97 [hereinafter "NEB Report, Line 9"].

<sup>87</sup> For a related discussion of the pragmatics of "the creative use of ambiguity", see Dwight Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014), at 169-71 [hereinafter "Newman, *Revisiting*"].



only does this approach damage the meaningful conversation that the duty is intended to support, lack of attention to the impact on rights at even the third step of assessing the adequacy of consultation meant no attention to the difference between the title claim and traditional land use rights emphasized by the NEB and the courts. As the Supreme Court said in *Tsilhqot'in Nation*, "... Aboriginal title is a beneficial interest in the land .... In simple terms, the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development."<sup>88</sup> A focus on impacts on rights requires attention to the fact that a project with a small footprint has more obvious impacts on the use and benefit of land than on resource use rights.

The partial answer from *Clyde River* regarding the obligation to address section 35 rights (and its non-application in *Chippewas of the Thames*) is rounded out by the Supreme Court's statement that a "formulaic 'Haida analysis'" is not always required of the tribunal.<sup>89</sup> This answer suggests that the constitutional rights at stake do not need to be addressed as questions of constitutional law by a regulatory agency with constitutional authority to assess the adequacy of consultation (as *per Martin, Paul and Carrier Sekani Tribal Council*). Although confusing at first — how can an authority delegated as a question of constitutional law not be reviewed on the same basis<sup>90</sup> — the Supreme Court's move away from treating constitutional questions that arise in the course of exercises of administrative discretion is in many ways consistent with the treatment of Charter rights and values as articulated in *Doré, Loyola*, and most recently, *Law Society of British Columbia v. Trinity Western University*.<sup>91</sup> The consistency is found in that, like in the 2017 cases, a reviewing court does not require that tribunals perform the *Oakes* justification analysis as a court would under the *Doré/Loyola* framework. To do so would be to impose court-like standards on sometimes very different administrative bodies, and risk opening the door to too much court intervention in administrative decisions. An overly interventionist court on judicial review is not respectful of legislative intent to delegate matters to administrative agencies in the first place, and this includes interventions on matters implicating Charter

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<sup>88</sup> *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, 2014 SCC 44, [2014] 2 S.C.R. 257, at para. 70 (S.C.C.) (citation omitted) [hereinafter "*Tsilhqot'in Nation*"].

<sup>89</sup> *Chippewas of the Thames*, *supra*, note 2, at para. 63; *Clyde River*, *supra*, note 1, at para. 42.

<sup>90</sup> Recall that in *Carrier Sekani Tribal Council*, *supra*, note 27, the authority to assess adequacy depends on authority over questions of law.

<sup>91</sup> [2018] S.C.J. No. 32, 2018 SCC 32 (S.C.C.) [hereinafter "*LSBC v. TWU*"].

rights, particularly in administrative contexts where Charter rights are part and parcel of daily tribunal decisions.<sup>92</sup> In other words, the invocation and presence of Charter rights within an administrative context does not transform the administrative context, nor usurp the significance of administrative expertise. Instead, constitutional rights and values require attention and respect from administrative decision-makers as part of their role in administering law and justice in the Canadian state. This is achieved under *Doré* by aligning the reasonableness standard with the section 1 *Oakes*<sup>93</sup> justification test to ensure that decision-makers have proportionally balanced “the relevant *Charter* value with the statutory objectives”.<sup>94</sup>

At first glance, such logic applies equally well in Aboriginal rights and duty to consult contexts, in which boards such as the NEB and other environmental decision-makers that regularly recommend or approve or permit projects that will impact Indigenous Peoples’ lands, waters and land uses (and therefore, have probable impacts on Aboriginal and treaty rights). Moreover, as set out in *Clyde River*, even where deep consultation and reasons are required, the reasons do not have to be explicit “in every case. The degree of consideration that is appropriate will depend on the circumstances of each case.”<sup>95</sup> This point was further elaborated in *Chippewas of the Thames*, which set out the requirement as “an indication that the [agency] took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate.”<sup>96</sup> These points are also, at first glance, entirely consistent with Supreme Court articulations in Charter contexts, such as in *LSBC v. TWU*, in which reasons were not required of a decision-maker that used a referendum process of decision. Instead, the whole record can be examined to ensure that proportionate balancing was attended to in the decision process.<sup>97</sup> Under *Doré* and *Loyola*, it is the whole decision that must satisfy the reasonableness standard, an approach that takes account of and respects diverse administrative contexts with valuable expertise by requiring judicial flexibility with respect to the form and specificity of the reasoning, even in relation to the justification of infringements of Charter rights.

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<sup>92</sup> For example, parole boards as discussed in *Doré*, *supra*, note 9, at para. 51, citing David Mullan, “Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*” (2006) 21 N.J.C.L. 127.

<sup>93</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

<sup>94</sup> *Doré*, *supra*, note 9, at para. 58. See also McLachlin C.J.C.’s concurring reasons in *LSBC v. TWU*, *supra*, note 89, at para. 114 and critical and clarifying notes on the framework at paras. 115-119.

<sup>95</sup> *Clyde River*, *supra*, note 1, at para. 42.

<sup>96</sup> *Supra*, note 2, at para. 63.

<sup>97</sup> *LSBC v. TWU*, *supra*, note 91, at paras. 55-56.

Thus, even without citations to *Doré* and *Loyola*, the stipulation in the 2017 cases that a “formulaic” rights-based *Haida Nation* analysis is not required might be seen as a meeting of the jurisprudence from *Haida Nation* and the *Doré* line of cases. However, it is only a passing resemblance, and the merger of these approaches far from complete. Upon further examination, by not addressing the distinct points of analysis involved in the middle question of scope, and assessing only the pragmatic end-point of the adequacy of the process, the Supreme Court set a course that again marks a point of Indigenous difference in public law.

First, the analytic framework in the Charter context identifies a threshold step of determining whether a Charter protection has been limited before the proportionality analysis is engaged. As the majority in *LSBC v. TWU* reiterated, “the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections – both rights and values”.<sup>98</sup> The majority does not specify what this step involves, but in her concurring reasons, McLachlin C.J.C., presses on to suggest clarifications to the *Doré/Loyola* framework, including that a “decision based on an erroneous interpretation of a *Charter* right will be unreasonable.”<sup>99</sup> Studiously avoiding the language of preliminary questions and correctness review, McLachlin C.J.C. emphasizes that there must be consistency in interpretation of constitutional rights regardless of whether it is courts or executive actors who are deciding whether a right has been limited or violated by government conduct. It is also a point that closely tracks McLachlin C.J.C.’s statement in *Haida Nation* (at least once one takes into account the evolution of standard of review since 2004), where she stated, that “[s]hould the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness.”<sup>100</sup> This threshold step of ensuring the breach of any rights or impacts on values at stake have been properly identified, however, is not present or required in the 2017 cases. It may be true that the Supreme Court saw no relevance or found no consensus to pursuing this analysis in *Chippewas of the Thames*, having been persuaded that the final outcome in that case was fair. Nevertheless, jumping over the distinct treatment of the right demonstrates the concern raised by critics

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<sup>98</sup> *Id.*, at para. 58.

<sup>99</sup> *Id.*, at para. 116. See also Liston, *supra*, note 9, at 233.

<sup>100</sup> *Supra*, note 15, at para. 63. Relatedly, McLachlin C.J.C. also stated in *Haida Nation* that “one cannot ‘meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope’” (at para. 36, citation omitted).

of *Doré/Loyola*.<sup>101</sup> One cannot know if the impact on a right is proportional and therefore that a decision is reasonable if the constitutional interests at stake have not been fully and properly identified.

Second, the lack of a threshold analysis focusing on the constitutional protections at stake in the 2017 cases is not only out of step with the Charter jurisprudence, it is also out of step with a growing line of lower court decisions that clearly require the Crown to carry out a preliminary assessment of rights. As the Federal Court said in *Enge v. Canada (Minister of Indian Affairs and Northern Development)*: “The failure of the Crown to conduct a preliminary assessment of the strength of an Aboriginal claim, to determine the scope of the consultation required, and to discuss its preliminary assessment with the Aboriginal group in question can itself be a breach of the duty to consult.”<sup>102</sup> And as the Ontario Superior Court stated in *Saugeen First Nation v. Ontario (Ministry of Natural Resources and Forestry)*: “The Crown was obliged to do an initial assessment. This is a requirement of constitutional stature. ... ‘Scoping’ is also a requirement of constitutional stature.”<sup>103</sup> In these cases, this constitutional requirement sits with the Crown, and is specific to particular consultations. If this obligation is not automatically delegated to agencies with their responsibilities over the duty to consult, and if the Crown, as ultimately responsible, is not required to specifically assess the scope of the duty (as discussed in the previous section), the potential for the Crown to evade its constitutional obligations through delegation is enlarged yet goes unremarked upon in the 2017 cases.<sup>104</sup> Alternatively, perhaps the reliance framework demarcates a different role for the Crown “proper”, setting directions for Aboriginal administrative law that are markedly different from the direction since *Dunsmuir* to treat all administrative decision-makers exercising statutory authorities through the same lens and principles.<sup>105</sup>

<sup>101</sup> See, e.g., authors noted at *supra*, note 9. See also the separate concurring judgments of McLachlin C.J.C. and Rowe J. in *LSBC v. TWU*, *supra*, note 91.

<sup>102</sup> [2017] F.C.J. No. 963, 2017 FC 932, at para. 210 (F.C.), citing *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources)*, [2011] B.C.J. No. 942, 2011 BCCA 247, at para. 113 (B.C.C.A.) [hereinafter “*West Moberly First Nations BCCA*”]. This approach builds upon Stratias and Dawson J.J.A.’s comments in *Gitxaala Nation*, *supra*, note 58, at paras. 308-309. See also *Kwakiutl First Nation v. North Island Central Coast Forest District*, [2015] B.C.J. No. 1605, 2015 BCCA 345 (B.C.C.A.).

<sup>103</sup> [2017] O.J. No. 3701, 2017 ONSC 3456, at para. 54 (Ont. Div. Ct.).

<sup>104</sup> Avoidance of constitutional responsibilities through delegation is a key concern in the Charter jurisprudence. See *Blencoe*, *supra*, note 48 and *Godbout*, *supra*, note 48.

<sup>105</sup> See, e.g., *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.).

A further point of Indigenous difference in the 2017 cases is highlighted by turning our attention to matters of significant debate in the Charter context — how and whether the “unformuliac” approach to proportionality under the *Doré/Loyola* framework provides for a sufficiently rigorous protection of Charter rights. This framework has been repeatedly criticized, including concerns that review of decisions for “implicating” Charter values that allow a rights analysis to be avoided will lead to diluted and weaker rights protections.<sup>106</sup> Commentators who are more optimistic about this framework note that Charter values are distinct from rights and already circumscribe administrative discretion, and further that it extends the policy of the accessibility of Charter rights by demanding that tribunals attend to proportionality in their decisions potentially even before a breach of a Charter right has been alleged.<sup>107</sup> The commentary was directly addressed in *LSBC v. TWU*. The majority reiterated the ability to achieve a “robust proportionality” analysis under the reasonableness standard:

The framework set out in *Doré* and *Loyola* is not a weak or watered down version of proportionality — rather, it is a robust one. ... [T]he reviewing court must be satisfied that the decision *proportionately* balances [the statutory objectives with the Charter protection], that is, that it ‘gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate’ (*Loyola*, at para 39). Put another way, the *Charter* protection must be ‘affected as little as reasonably possible’ in light of the applicable statutory objectives (*Loyola*, at para 40). When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.<sup>108</sup>

The dissenting judges, Brown and Côté JJ. were blunt in their disagreement, suggesting the debate reinforces their preference for applying the tried and true *Oakes* test “to justify state infringements of *Charter* rights, regardless of the context in which they occur.”<sup>109</sup> Chief Justice McLachlin and Rowe J. both provided their own concurring reasons in which they agreed with the premises of *Doré*, but suggested a

<sup>106</sup> Macklin, *supra*, note 9. Other criticisms have included the onus on the party to demonstrate reasonableness, which reverses the onus in the court-based approach.

<sup>107</sup> Liston, *supra*, note 9 comments on the potential obligation on agencies to consider Charter values even when not raised by the parties. See also Sossin & Friedman, *supra*, note 9 and Fox-Decent & Pless, *supra*, note 9.

<sup>108</sup> *Supra*, note 91, at para. 80 (emphasis in original).

<sup>109</sup> *Id.*, at para. 304.

number of refinements to the analytical approach aimed at ensuring that the protection of Charter rights in administrative decisions is not lesser than the protection in relation to legislative action, including drawing a clear line between the notion of a Charter right and a Charter value.<sup>110</sup>

The recent *LSBC v. TWU* decision demonstrates that approach to incorporating and reviewing Charter protections in administrative discretion is still a livewire.<sup>111</sup> With such debate raging, it is odd and possibly ill-advised to point out how much better the *Doré/Loyola* framework is than what emerged from the 2017 cases with respect to section 35 protections, at least when it comes to protecting the “rights-quality” of the constitutional rights at stake. But in pursuit of identifying and understanding Indigenous differences in public law, I press on. Where the *Doré/Loyola* framework at least calls for a rigorous approach to the reasonableness standard, such that proportionality merges with reasonableness, the 2017 cases do not even use the word proportionality nor is there any analogizing to the justification analysis in section 35 contexts. Indeed, the Court does not get close to describing or calling for a robust approach to the reasonableness standard where an Aboriginal rights protection is implicated (otherwise known as when the duty to consult has been triggered). As noted above, the Court did not mention the reasonableness standard in the cases at all, making it awkward to have a discussion of what the reasonableness standard means in this context. One might argue that the proportionality inherent in the *Haida Nation* duty to consult — that consultation and accommodation obligations increase with the strength of the rights claim in issue and potential adverse impact on the rights — was evidenced in the *Chippewas of the Thames* decision, as a whole. As the NEB stated, and the Supreme Court repeated, the proposed Line 9 project would occur within Enbridge’s existing right of way, resulting in small likelihood of impacts on the “rights and interests” of Aboriginal groups.<sup>112</sup> In other words, the decision-maker (and the Supreme Court) viewed the project as having only a small “footprint” on the land, with low stakes for Indigenous rights-holders and project mitigation measures adopted to address those stakes. However, as argued above, without specifying the

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<sup>110</sup> *Id.*, at paras. 111-119, *per* McLachlin C.J.C. and paras. 162-208, *per* Rowe J.

<sup>111</sup> Leonid Sirota, for example, calls the majority decision a “catastrophe” in his swift and strongly worded blog: “The Supreme Court v the Rule of Law. In ruling against Trinity Western’s fundamentalist law school, the Supreme Court unleashes the administrative state” (June 18, 2018), online: <<https://doubleaspect.blog/2018/06/18/the-supreme-court-v-the-rule-of-law/>>.

<sup>112</sup> *Chippewas of the Thames*, *supra*, note 2, at para. 23.

rights at stake, one cannot know how relevant the fact of a project occurring on already disturbed lands might be to its impact on those who use or own (or claim to own) those lands, or the measures required to address minimal impairment of the right. The gap between the Charter context created by not requiring a threshold assessment of the limitations on section 35 protections (in the *Haida Nation* analysis of scope), is thus augmented by the lack of any consideration of what a robust proportionality analysis akin to a justification test is required in the assessment of the adequacy of the consultation process.

*(b) Explaining and Evaluating Difference*

The lack of attention to the nature of a rigorous proportionality analysis in relation to section 35 rights protections becomes more stark when one observes that *Clyde River* and *Chippewas of the Thames* involved treaty rights, modern and historic respectively. Unlike the Aboriginal rights at stake in *Haida Nation*, treaty rights are not “claimed” or “unproven” at law. As Binnie J. wrote for the Court in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, regarding historic treaties, “the Crown, as a party, will always have notice of its contents.”<sup>113</sup> Having notice of treaty contents in no way precludes debate about the scope and application of those treaty rights, or whether they are infringed in a given case.<sup>114</sup> But there should be no debate that at least the harvesting rights at stake in the 2017 cases were the subject of fully formed constitutionally protected, section 35 rights. If this is correct, then the discussion in the 2017 cases might be expected to focus on aligning reasonableness review with the justification of infringement test required in relation to treaty rights. In other words, the 2017 cases were an occasion to consider the merger of the *Sparrow*<sup>115</sup> and *R. v. Badger*<sup>116</sup> cases on justification with the *Doré/Loyola* framework.

In *Sparrow*, a seminal early section 35 case, the parties were able to agree at the Supreme Court that the Musqueam, a fishing people, had fishing rights as an Indigenous People. The case instead focused on

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<sup>113</sup> [2005] S.C.J. No. 71, 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 34 (S.C.C.) [hereinafter “*Mikisew Cree*”].

<sup>114</sup> For discussion, see *supra*, note 71.

<sup>115</sup> *Supra*, note 17.

<sup>116</sup> [1996] S.C.J. No. 39, [1996] 1 S.C.R. 771 (S.C.C.) [hereinafter “*Badger*”]. See also *R. v. Marshall*, [1999] S.C.J. No. 66, [1999] 3 S.C.R. 533 (S.C.C.).

whether those rights had been extinguished prior to 1982 and, given the Court's finding that they had not been extinguished, whether the fishing regulations in question unjustifiably infringed Ronald Sparrow's section 35 fishing rights.<sup>117</sup> In articulating the justification of infringement test, the Court borrowed heavily from section 1 of the Charter and the *Oakes* test in spite of no equivalent language existing under the text of section 35.<sup>118</sup> The test that emerged has evolved into a proportionality test, including key elements that overlap with the *Oakes* test to weigh legislative objectives against impacts on the rights to ensure that the honour of the Crown is substantively (and not just procedurally) upheld before an infringement of a section 35 right could be justified. Elements that are specific to the section 35 context were also articulated in *Sparrow*,<sup>119</sup> including consultation with respect to the accommodations required;<sup>120</sup> Indigenous priority with respect to at least subsistence or food, social and ceremonial harvesting rights; and, compensation in appropriate circumstances. In spite of these differences, assessment of government actions in the justification of infringement under section 35 has often aligned with section 1 approaches, including the satisfaction of the honour of the Crown standard through a lens of "reasonableness".<sup>121</sup> The extension of section 1 proportionality was furthered in *Badger* when the Supreme Court adapted the test from *Sparrow* to allow for justified

<sup>117</sup> For commentary, see Brian Slattery, "Understanding Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196; W.I.C. Binie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L.J. 217.

<sup>118</sup> On the justification test as proportionality, see Mark D. Walters, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Hanna Wilberg & Mark Elliott, eds., *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015) 395 at 401-402, regarding *Sparrow*, Dwight Newman, "The Limitation of Rights: A Comparative Evolution and Ideology of the Oakes and Sparrow Tests" (1999) 62 Sask. L. Rev. 543.

<sup>119</sup> The analysis from *Sparrow* also does not allow the same breadth of "public interest" objectives to justify an infringement of a s. 35 right as might be possible under a s. 1 Charter analysis (as applied by Vickers J. in *Williams v. British Columbia*, [2007] B.C.J. No. 1291, 2007 BCSC 853 (B.C.S.C.)). However, broader public interest objectives have been held to potentially ground a justification of an infringement of an Aboriginal title right or a commercial scale harvesting right: *Delgamuukw*, *supra*, note 17; *Tsilhqot'in Nation*, *supra*, note 88, and *R. v. Gladstone*, [1996] S.C.J. No. 79, [1996] 2 S.C.R. 723 (S.C.C.).

<sup>120</sup> It should be noted that other Charter rights with collective dimensions involve consultation obligations in the accommodation process and subsequent justification analysis; for example, see the freedom of association cases: *British Columbia Teachers' Federation v. British Columbia*, [2016] S.C.J. No. 49, [2016] 2 S.C.R. 407 (S.C.C.) and *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.). For discussion, see Peter Carver, "Comparing Aboriginal and Other Duties to Consult in Canadian Law" (2012) 49 Alta. L. Rev. 855.

<sup>121</sup> *R. v. Nikal*, [1996] S.C.J. No. 47, [1996] 1 S.C.R. 1013, at para. 110 (S.C.C.).



infringements of treaty rights.<sup>122</sup> Following *Haida Nation*, there has been some confusion regarding the relationship between these two frameworks and particularly whether the consultation obligation was one and the same. In 2014, *Tsilhqot'in Nation* provided clarification that in some cases additional consultation would be required following recognition of a "claimed right" as an actual constitutional right. *Tsilhqot'in Nation* further confirmed that governments must justify any infringement of an Aboriginal right to a strict standard, noting the fiduciary duty that applied to the title right in issue in that case.<sup>123</sup>

Recent appellate level cases, on the other hand, have suggested that the justification of infringement test is no longer available to Indigenous treaty parties in the context of regulatory processes. Treaty 8 First Nations, for example, argued that both the Federal and Provincial Crowns had an obligation to consider the infringement of their treaty rights before approving the Site C dam in the Peace River Valley.<sup>124</sup> In that environmental impact assessment process, the terms of reference for the joint federal and provincial review panel explicitly prohibited the Panel from commenting on scope of the Treaty rights in issue and their infringement.<sup>125</sup> Both provincial and federal courts of appeal declined to find the approving ministers and cabinet responsible for determining more than the adequacy of consultation in the context of the environmental impact review.<sup>126</sup> In reaching these conclusions, both courts analyzed the statutory context with reference to *Paul*, commenting on the Crown's non-adjudicative function, lack of fact finding role, and lack of a proper evidentiary record and fact finding role in these

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<sup>122</sup> For a critique of this extension, see Leonard I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test" (1997) 36 Alta. L. Rev. 149.

<sup>123</sup> The relevance of the discussion of the justification test in *Tsilhqot'in Nation* to other Aboriginal rights (*i.e.*, not title claims) is a matter of some uncertainty. For related discussion, see Peter Hogg & Daniel Styler, "Statutory Limitation of Aboriginal or Treaty rights: What Counts as Justification?" (2015-2016) 1 Lakehead L.J. 3.

<sup>124</sup> *Prophet River FCA*, *supra*, note 58; *Prophet River BCCA*, *supra*, note 58.

<sup>125</sup> *Prophet River First Nation v. British Columbia (Minister of Environment)*, [2015] B.C.J. No. 2026, 2015 BCSC 1682, at para. 35 (B.C.S.C.) [hereinafter "*Prophet River BCSC*"]: "2.5 The Joint Review Panel will not make any conclusions or recommendations as to: (a) the nature and scope of asserted Aboriginal rights or the strength of those asserted rights; (b) the scope of the Crown's duty to consult Aboriginal Groups; (c) whether the Crown has met its duty to consult Aboriginal Groups ...; (d) whether the Project is an infringement of Treaty No. 8; and (e) any matter of treaty interpretation."

<sup>126</sup> This finding does not preclude the need for the Crown to conduct a preliminary assessment of the rights and the potential adverse impact on the rights to assess whether consultation was adequate in relation to the scope of the obligations, under the *Haida Nation* analysis as opposed to a treaty rights analysis. In these cases, this point was not contentious as deep consultation obligations were admitted and consultation and accommodation measures followed and offered matched that assessment.

processes,<sup>127</sup> factors that are part of the *Martin* and *Paul* frameworks for determining whether a decision-maker has implied authority over constitutional questions.<sup>128</sup> But the Federal Court of Appeal went further, describing an evolution in the case law whereby the Supreme Court has “moved away from” the justification of infringement framework under *Sparrow* to a framework of dialogue about claimed rights under *Haida Nation*,<sup>129</sup> and commenting that the Treaty 8 parties were “in reality inviting the Court to revert to the pre-Haida Nation case law. Specifically, they contend that claimed rights or treaty rights ought to be adjudicated by the GIC every time an infringement is alleged by an Aboriginal group.”<sup>130</sup> It was sufficient in the *Prophet River* case to decide on the basis of no implied authority over the constitutional questions in issue, but these comments go further and read as an attack on the logic of accessibility of constitutional rights, under *Paul* and *Martin*.

There are further problems raised by the discussion in *Prophet River* at the Federal Court, and in the adoption of reliance approach in the 2017 cases. First, the logic of *Haida Nation* overtaking the justification analysis is over-extended if applied beyond the “taking up” clauses in issue in *Prophet River*. The taking up clauses are common to the numbered treaties, and permit the Crown to take up lands within treaty settlement areas for settlement and development, but not in an unlimited manner.<sup>131</sup> In extending the *Haida Nation* duty to consult and accommodate to treaty rights in *Mikisew Cree*, the Supreme Court was addressing the implementation of these clauses in the treaties specifically:

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<sup>127</sup> *Prophet River FCA*, *supra*, note 58, at para. 78; *Prophet River BCCA*, *supra*, note 58, at paras. 22-23 and 27-28.

<sup>128</sup> *Martin*, *supra*, note 12, at para. 48; *Paul*, *supra*, note 14, at para. 39. These cases raise issues of the constitutionality of removing constitutional jurisdictions through intergovernmental agreements under legislation, particularly when the authority to consider the constitutional questions at stake do not rest with a later decision-maker either. For discussion, see Lambert, *supra*, note 10. And as these cases played out, further access to adjudication of the issues is then denied through judicial review, requiring bifurcation of the proceedings — an approach that has generally been discouraged in relation to Charter matters (*Conway*, *supra*, note 12, at para. 79), but the possibility of which has been recognized in the s. 35 context (*Carrier Sekani Tribal Council*, *supra*, note 27, at paras. 62-63).

<sup>129</sup> *Prophet River FCA*, *supra*, note 58, at para. 34.

<sup>130</sup> *Id.*, at para. 57 (emphasis added).

<sup>131</sup> See, for example, the text from Treaty 8: the signatory Indians “shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.” Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853#chp4>>. For discussion, see Shin Imai, “Treaty Lands and Crown Obligations: The ‘Tracts Taken Up’ Provision” (2001) 27 Queen’s L.J. 1.

[N]ot every subsequent “taking up” by the Crown constituted an infringement of Treaty 8 that must be justified according to the test set out in *Sparrow*. In *Sparrow*, it will be remembered, the federal government’s fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not “required or taken up from time to time for settlement, mining, lumbering, trading or other purposes” (emphasis added). The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.<sup>132</sup>

In *Mikisew Cree*, the Supreme Court was equally clear that “... [i]f the time comes that in the case of a particular Treaty 8 First Nation ‘no meaningful right to hunt’ remains over *its* traditional territories, the significance of the oral promise that ‘the same means of earning a livelihood would continue after the treaty as existed before it’ would clearly be in question, and a potential action for treaty infringement, including the demand for a *Sparrow* justification, would be a legitimate First Nation response.”<sup>133</sup> The 2017 cases, however, do not fit with this line of cases: the treaty rights at stake are different. The historic treaties signed by the ancestors of the Chippewas of the Thames are older and at least the recorded text is of a significantly different character than the post-Confederation numbered treaties, often described as resembling real estate transactions.<sup>134</sup> The constitutional rights at stake in *Clyde River* are defined under the NCLA, and include harvesting and stewardship rights.<sup>135</sup> While the Crown’s responsibilities to implement and administer both sets of treaties are subject to the honour of the Crown,<sup>136</sup> such

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<sup>132</sup> *Supra*, note 113, at para. 31 (emphasis in original).

<sup>133</sup> *Id.*, at para. 48.

<sup>134</sup> J.R. Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009). On their website, the Chippewas of the Thames First Nation list the following as their treaties: The Longwoods Treaty of 1822 (which they note has three written versions); The London Township Treaty of 1796; The Sombra Treaty of 1796; Treaty #29 of 1827; and The McKee Treaty of 1790 (online: <<http://www.cottfn.com/chief-council/our-history/>>). A version of the English text of some of these treaties is available online from the Government of Canada: <<https://www.aadnc-aandc.gc.ca/eng/1370372152585/1370372222012>>. There are no “taking up” clauses in the written text.

<sup>135</sup> *Supra*, note 20.

<sup>136</sup> Regarding the honour of the Crown applying to modern treaties, see *Little Salmon/Carmacks First Nation*, *supra*, note 28; regarding the honour of the Crown applying to the implementation of treaties and other solemn Crown commitments to Indigenous Peoples, see *Manitoba Metis Federation v. Canada (Attorney General)*, [2013] S.C.J. No. 14, 2013 SCC 14, [2013] 1 S.C.R. 623 (S.C.C.).

responsibilities cannot rewrite the Constitution and “overtake” the nature of the interests at stake as constitutional rights. As constitutional rights, these interests are prioritized and restrain both government decisions and legislative acts. The proportionality of the duty to consult analysis set out in *Haida Nation* was never intended to usurp the justification analysis. Both have their role in protecting section 35 rights and claimed rights.<sup>137</sup> The issue of concern highlighted by the 2017 cases (as well as the *Prophet River* litigation), however, is the relative inaccessibility of the rights framework,<sup>138</sup> and the lack of discussion of merging the justification analysis with the reasonableness standard in the context of section 35 rights as is occurring with respect to Charter protections.

A merged approach to justification of infringement and reasonableness analysis in the context of section 35 may raise as many concerns as it does in the context of Charter rights. Nevertheless, it would improve the “rights quality” of section 35 protections in two ways. First, as discussed above and in parallel to the related Charter framework, it would ensure that there would be a distinct analysis of the right (or claimed right) *before* the proportionality analysis takes place. As argued above, *Haida Nation* also requires this type of analysis in relation to the constitutional questions involved in determining the scope of the duty to consult and accommodate (preliminary assessment of the preliminary strength of the rights, and the seriousness of any potential impact) and would satisfy this step if it were treated as a threshold analysis on judicial review (if not also required of a tribunal). But where established treaty rights are in issue, and the issue is one of the “disputed” nature and scope of the rights rather than a claim to a right not yet established at law, the situation is not akin to the treaty issues to which the *Haida Nation* analysis was applied in *Mikisew Cree*. The situation is instead akin to that in *LSBC v. TWU*, in which the nature and degree of infringement of a Charter right was disputed and analyzed before the proportionality of the impact of the Law Society’s decision was assessed leaning heavily on the final two steps of *Oakes*. Translating this analysis into the treaty rights contexts at stake in *Chippewas of the Thames* and *Clyde River*, and to properly introduce *Doré* to *Sparrow*, a proportionality analysis would need to be considered in relation to the statutory objectives at stake, in relation to the concepts of minimal impairment and

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<sup>137</sup> The relationship between the *Haida* and *Sparrow* frameworks was recently revisited by the Supreme Court in *Tsilhqot’in Nation*, *supra*, note 88.

<sup>138</sup> For related commentary, see Borrows, *supra*, note 7; and, Stacey, *supra*, note 7, at 437.

Indigenous priority harvesting (with respect to non-commercial activities at least), and in relation to the quality of the consultation process that proceeded the breach.<sup>139</sup> There is overlap with the analysis under *Haida Nation*, since consultation and mitigation measures/conditions adopted in response are considered and address, at least partially, two of the justification elements. Further, both justification of infringement and consultation are measured against standards required to satisfy the honour of the Crown. Nevertheless, a focus on justifying a breach of treaty rights extends the concept of the honour of the Crown at stake beyond the narrowness of a duty to consult, which demands only that a meaningful conversation occur.<sup>140</sup> The honour of the Crown in relation to the justification analysis engages treaty interpretation principles in defining the right and its breach, as well as the Crown's obligations to honourably implement and administer treaties, giving rise to a higher standard of conduct expected and one that directly engages the treaty relationship rather than just an isolated conversation about one project.<sup>141</sup> Thus instead of this engagement with the evolving Charter law, the 2017 cases adopt only the weakest aspects of the Charter frameworks and leave section 35 protections on a different track, one that leaves Indigenous parties and observers wondering where one might find and realize the rights protections promised under section 35 of the Constitution.

#### IV. CONCLUSIONS

Indigenous difference in relation to the treatment of section 35 protections on judicial review is stark. Constitutional questions and responsibilities are not delegated by the legislature to administrative

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<sup>139</sup> For a recent discussion of the justification test, see *Ahousht Indian Band v. Canada (Attorney General)*, [2018] B.C.J. No. 717, 2018 BCSC 633 (B.C.S.C.) [hereinafter "*Ahousht*"].

<sup>140</sup> *Clyde River*, *supra*, note 1; *West Moberly First Nations BCCA*, *supra*, note 102.

<sup>141</sup> In relation to title, where the fiduciary duty is engaged once Aboriginal title is proven, the Supreme Court described the difference between the obligation in consultation versus justification as follows:

Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

*Tsilhqot'in Nation*, *supra*, note 88, at para. 80.

actors, but rather the Crown can rely on administrative agencies to fulfil its unique constitutional obligations. The lack of attention to rigorous proportionality and the modification of justification tests to suit administrative contexts cannot be explained by the existence of an “obligations” framework under *Haida Nation*, unless one accepts that disputed Aboriginal and treaty rights do not have the status of constitutional *rights*. Furthermore, the logic of the accessibility of enforcement and adjudication of these rights has not been centred as an important and motivating policy direction. As I set out at the beginning of this paper, my aim is to question whether there are principles that can explain and ground these differences, and whether there are good reasons for identifying alternative approaches to section 35 rights. In my view, the differences identified above cannot be justified. Although the Crown-reliance model might be rooted in treaty relationships and previous cases that nod towards ongoing and disputed Crown sovereignty, ultimate Crown responsibility for consultation as articulated in the 2017 cases does not correspond with such roots and directions. In any event, a different path is not warranted. Section 35 protections are simply not that different from Charter rights. They may be motivated by different aspects of the history of the state, with section 35 being rooted in a long Indigenous and colonial history in North America and the Charter being rooted in the evolution of individual rights and liberties in British, French and Euro-Canadian traditions.<sup>142</sup> Their political and potentially redistributive nature may require courts to be cautious of over-reaching to dictate potential negotiated resolutions and settlements of rights disputes.<sup>143</sup> Nevertheless, the protections against state action, and the

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<sup>142</sup> There are, of course, other differences between s. 35 and the Charter to consider. For example, the text is quite different, with s. 35 being very bare compared to the Charter. These textual differences, however, have been negated by judicial importations of Charter approaches into s. 35. One might also identify s. 35 rights as collectively held, in contrast to the individual nature of Charter rights. However, this views Charter rights too narrowly, ignoring the collective nature of some Charter rights (e.g., s. 2(d), s. 23) and the actively discussed collective nature of other Charter rights (s. 15, s. 2(a), for example). More importantly, however, the issues at stake in this discussion are structural and about how constitutional rights are implemented and administered by the state. The form of the constitutional protection is more important than the qualities of the rights themselves. Both s. 35 and the Charter are constitutional rights and that must guide and bind government action, and so the argument is that the framework of analysis should be the same (subject to a principled basis for difference).

<sup>143</sup> As B.C.S.C. judge Humphries J. said recently in her decision on the lack of justification for infringements of commercial fishing rights,

I have made a series of findings in respect of unjustified infringements, but the result is not a workable fishery ready to be implemented, because, as I must emphasize, the court cannot design a fishery. The task of allocating fishery resources belongs to the

state privilege to limit rights in a proportionate manner in favour of broader collective interests, take the same form.

If *Haida Nation*; *Sparrow*; *Doré* and *Oakes* were brought into conversation with each other, there is potential to advance not only the coherence across areas of public law, but also ongoing debates about how judicial review conceives of and supports the role of the administrative branch in the implementation and administration of constitutional rights. For example, one of the most contentious points in the debates about the *Doré/Loyola* framework is it embraces both Charter rights and Charter values. In concurring reasons in *LSBC v. TWU* for example, Rowe J. advocated for a strict differentiation of values from rights, reasoning that the former come into play where the Charter has no direct application and play “a supporting role in the adjudication of *Charter* claims” but “have no independent function in the administrative context. ... When courts review administrative decisions for compliance with the *Charter*, *Charter* rights must be the focus of the inquiry — not *Charter* values.”<sup>144</sup> The majority, by contrast, insist that a proportionality analysis is engaged through the reasonableness standard when an administrative decision “engages the *Charter* by limiting *Charter* protections — both rights and values”.<sup>145</sup> As the majority conceives the matter, Charter protections are broader if values are included. As the concurring and dissenting judges conceive of the matter, the broader approach risks the dilution of Charter rights because it is unclear when it is a right or a value at stake, and including both creates uncertainty regarding the issues at stake.

These debates should travel back and forth to the section 35 context, with adaptations and insights from the language of section 35 disputes. The responsibilities arising from “rights claims” in *Haida Nation* map remarkably well onto Charter values, and attendant debates. Charter values have been described as “inchoate”,<sup>146</sup> and subject to further evolution and development. The rights claims at stake in *Haida Nation* are similarly inchoate, and subject to both further evolution and development. In *Haida Nation*, however, an eventual point of determination is foreseen as part of the structure of the pre-proof

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government. ... There is much work still to be done by the Department of Fisheries and Oceans ... and by the plaintiffs.

*Ahousat*, *supra*, note 139, at para. 12. The need to work with rights-holders to achieve their accommodation and the need for courts to be cautious with respect to budgetary implications of their decisions is of course not unique to the s. 35 context.

<sup>144</sup> *Supra*, note 91, at paras. 166-170.

<sup>145</sup> *Id.*, at para. 58.

<sup>146</sup> Sossin & Friedman, *supra*, note 9.

obligations of government to respect these rights as claims. The value of this obligation is thus prospective. As Binnie J. described in *Little Salmon/Carmacks First Nation*, “*Haida Nation* attempted to head off such confrontations [over the consequences of rights infringements] by imposing on the parties a duty to consult and (if appropriate) accommodate” where impacts on claims that may become rights are apparent.<sup>147</sup> Charter values also, minimally, provide prospective guidance in administrative decision-making. Indeed, in relation to adjudicative and other discretionary decisions, a breach of a right cannot usually be established until the decision has been made. As the Supreme Court defined in *Baker*, administrative discretion “must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.”<sup>148</sup> Thus, both section 35 and Charter protections have meaning and offer direction to administrative decision-makers *before* there is a decision that arguably breaches a constitutional right. And as in *Baker* and *Clyde River*, judicial review on the basis of values or “potential” rights claims may, in some cases, be sufficient to provide the necessary remedy.<sup>149</sup>

The difficulty with values and prospective rights is in ensuring that a party has access to adjudication of their constitutional rights where the constitutional weight of a potential right or a guiding value does not provide a remedy, and obscures a dispute about the violation of an actual right. Once the decision is made, and a breach of a right alleged by a party, then the latest discussion of the Charter framework seems relatively clear that on judicial review, courts will examine whether a right is at stake, and not simply a value.<sup>150</sup> On this point, however, *Chippewas*

<sup>147</sup> *Supra*, note 28, at para. 53.

<sup>148</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at para. 56 (S.C.C.) [hereinafter “*Baker*”].

<sup>149</sup> With thanks to the anonymous reviewer for the suggestion, it would be productive to also consider similarities and differences with respect to the remedies available for administrative breaches of Charter rights and values and breaches of the duty to consult. While fuller discussion is beyond the coverage in this paper, it can be noted that *Clyde River* confirmed that the quashing of a decision is the appropriate remedy for inadequate consultation, aligning with familiar approaches from administrative law. See Banks, *supra*, note 6, for comment.

<sup>150</sup> For example, *LSBC v. TWU*, *supra*, note 91; *Ktunaxa Nation*, *supra*, note 60, and Promislow 2018, *supra*, note 66. The complaint has been that when a party advances Charter argument, it is unpredictable when a court will pursue a Charter analysis of an administrative law analysis, as the Supreme Court did in *Baker*, *supra*, note 148. See discussion in Fox-Decent & Pless, *supra*, note 8, and Liston, *supra*, note 9. It remains to be seen whether recent clarifications in *LSBC v. TWU* will effectively address this uncertainty and inconsistency.



of the *Thames* demonstrates that the relatively undeveloped section 35 framework falls flat, illustrating the dangers and concerns of the “values” critics that constitutional rights might lose their rights-quality; that is, as a constitutional restraint on government action that calls for rigorous justification when violated.

What remains underdeveloped in both the Charter and section 35 contexts is the sticking point of adjudicating and reviewing decisions that impact the more inchoate Charter values or rights claims that are not yet and may never be recognized as a right. *Haida Nation* offers the view of proportionality in those circumstances, and suggests that the eventual recognition of a right and its violation is not necessary to consider the constitutional interests at stake. If rights claims are capable of preliminary assessments, so is the weight and strength of a Charter value in a given circumstance. As discussed above, the biggest problem with proportionality under the *Haida Nation* analysis is that on judicial review, courts have failed to insist on a specific review of the scoping exercise that embeds proportionality in the articulation of the depth of the obligation to consult and accommodate in a given case. Further, the third step of assessing the adequacy of the consultation process through the reasonableness standard might itself be enriched and strengthened by incorporating a values approach that considers the statutory objectives advanced by the government or tribunal decision in a final balancing with its impacts on the reconciliation objectives of section 35 and the survival and flourishing of Indigenous Peoples, cultures and lands that motivate the individual rights within the section 35 context.<sup>151</sup>

Finally, the section 35 context would benefit from attention to the concerns for accessibility of rights protections that motivate judicial review of the administration of Charter rights. Part of this accessibility is the avoidance of bifurcation of proceedings, directions that are supported by allowing rights disputes to be adjudicated through judicial review proceedings even where the rights dispute was not fully articulated or treated at the first level of decision. Where recent developments in the Charter context suggest that adjudication of the scope and breach of a Charter right is available on judicial review (as noted above), the section 35 context has

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<sup>151</sup> See, e.g., Brian Slattery, “The Generative Structure of Aboriginal Rights” (2007) 38 S.C.L.R. 595. See also *Kainaiwa/Blood Tribe v. Alberta (Minister of Energy)*, [2017] A.J. No. 149, 2017 ABQB 107 (Alta. Q.B.), regarding reconciliation and honour of the Crown in the reasonableness analysis.

moved towards greater bifurcation of proceedings.<sup>152</sup> As the Supreme Court majority stated in *Ktunaxa Nation*, it is “not for courts to make far-reaching constitutional declarations in the course of judicial review proceedings incidental to, and ill-equipped to determine, Aboriginal rights and title claims”.<sup>153</sup>

Section 35 rights are thus peripheral to judicial review of administrative action, and unlike the Charter (and the Supreme Court’s statement in *Paul*), the fact that the machinery of government makes daily decisions that affect and potentially affect Aboriginal rights has no bearing on ability of Indigenous Peoples to pursue the enforcement of their rights before tribunals (as well as courts). Instead, these comments suggest that courts (and tribunals) are fixated on the difficulties and time involved in historical evidence and proofs required by the Aboriginal and treaty rights tests. These “practical” concerns under *Martin* and *Paul* play a role in deciding the constitutional jurisdictions on judicial review (and therefore the record available to the courts on judicial review), but these concerns are expected to be weighed against overriding concerns for accessibility.<sup>154</sup> Moreover, such concerns may be overstated in relation to what may be required of a court to make rights adjudication accessible on judicial review. Not every rights dispute demands adjudication of the proof of a right; judicial review of the scope and nature of a right claimed to be breached may be sufficient to provide direction to administrative decision-makers and to observe on judicial review that a decision is reasonable or unreasonable in its attention to the nature of the rights at stake and therefore what is or is not a proportional impact on those rights. Even if the evidentiary burdens and concerns in the section 35 context are qualitatively different from the Charter context, these features make the adjudication of section 35 rights even *less* accessible than Charter rights, particularly in the continued absence of government and legislative action to create specialized forms for the adjudication and

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<sup>152</sup> See, e.g., the evolution of the *Prophet River* litigation (*supra*, note 58), in which the Treaty 8 communities of Prophet River and West Moberly have now launched civil proceedings seeking a declaration of an unjustified infringement of their Treaty rights and seeking an injunction to stop construction on the Site C dam in the meantime; pleadings available online: Sage Legal, <<https://www.sagelegal.ca/new-page/>>.

<sup>153</sup> *Supra*, note 60, at para. 86. For commentary, see Promislow 2018, *supra*, note 66.

<sup>154</sup> Another potential objection to adjudication of rights disputes not treated by the administrative decision-maker is the limitation of judicial review to review of the record that was before the decision-maker at first instance. Here, there are limited exceptions to allow for new evidence to be entered on judicial review in both constitutional contexts. For discussion, see *Ktunaxa Nation v. British Columbia (Minister of Forests, Lands and Natural Resource Operation)*, [2014] B.C.J. No. 584, 2014 BCSC 568, at paras. 113-134 (B.C.S.C.).

recognition of Aboriginal rights.<sup>155</sup> The answer is not for courts to wait for governments to act; attention to the rights claims and disputes at stake in the section 35 context is required to push governments towards action.

These considerations bolster the arguments for leaning on approaches taken in relation to the administration of Charter rights in the section 35 context. There are many points upon which courts can appropriately intervene on judicial review without overstepping their institutional competence, provided that section 35 protections are understood as full-fledged constitutional rights. If such actions are sufficiently inconvenient for governments, governments might then, finally, be prompted to act to create the forums required to address ongoing disputes about the nature, scope and existence of Aboriginal and treaty rights, and act in concert with Indigenous Peoples who, at least under the United Nations Declaration on Rights of Indigenous Peoples, have a right to be consulted about legislation that will impact them and their rights.<sup>156</sup> In short, there is much to be gained by maintaining the conversation between section 35 and Charter law when it comes to the implementation and administration of rights. While *sui generis* approaches have their place in the section 35 canon,<sup>157</sup> new concepts like “Crown reliance” and avoiding rights frameworks through elliptical and partial borrowings from Charter contexts are not part of the *sui generis* canon. Instead, further development of the judicial review principles that apply in review of government decisions affecting section 35 rights and rights claims, and further attention to the merger of proportionality and reasonableness are called for to serve both reconciliation purposes and strengthen Indigenous parties’ access to the rule of law.

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<sup>155</sup> Government of Canada, “Government of Canada to create Recognition and Implementation of Rights Framework”, Justin Trudeau, Prime Minister of Canada Website (February 14, 2018): <<https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>>. The Trudeau government’s proposal has met with opposition from First Nations and resulted in commitments to continue to work on the framework before introducing legislation: Jorge Barrera, “Promised Indigenous rights recognition legislation won’t be in place before next election” CBC News (November 14, 2018), online: <<https://www.cbc.ca/news/indigenous/fn-rights-framework-1.4905705>>.

<sup>156</sup> 61/295, 107th Plenary Meeting, September 13, 2007, Article 19. The Mikisew Cree’s recent attempt to define a similar obligation under s. 35 failed: *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018] S.C.J. No. 40, 2018 SCC 40 (S.C.C.). It might also be noted that, under the *Sparrow* justification test, government must consult in advance of impacts on (established) rights by legislation in order to justify any resulting infringement.

<sup>157</sup> See, for example, John Borrows & Leonard I. Rotman, “The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36 Alta. L. Rev. 9.