

9-1-2016

## Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board

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### Citation Information

Hodgson, Matthew. "Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board" *Osgoode Hall Law Journal* 54.1 (2016) : 125-173.

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## Abstract

Environmental assessment within the process of regulatory review is recognized as the preferred means for carrying out the duty to consult and accommodate Aboriginal rights in administrative decisions over proposed resource development. Recent evidence suggests that integrating the duty to consult into National Energy Board (NEB) proceedings and subsuming the law of Aboriginal consultation under principles of administrative justice have not advanced the goal of reconciliation. This article considers whether the statutory mandate of the National Energy Board requires it to have sufficient regard to Aboriginal rights in a manner consistent with the adjudication of constitutional issues in administrative law. The article argues, through an examination of the Board's process and recent decisions of the Federal Court of Appeal, that there is good reason to revisit the Supreme Court of Canada's jurisprudence on the role of administrative expertise in effecting reconciliation in the NEB context. In particular, it submits that both reconciliatory and administrative objectives would be better served if the NEB were to perform a formal consultative role with Aboriginal claimants in accordance with prescribed constitutional standards. This would help to ensure that administrative actors reach rights-compliant decisions in the first instance and provide a more reliable basis for judicial deference to tribunal findings regarding Aboriginal rights.

## Keywords

Indigenous peoples--Legal status, laws, etc.; Indigenous peoples--Government relations; Environmental impact analysis; Natural resources--Co-management; Canada. National Energy Board; Canada

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## Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board

MATTHEW HODGSON\*

Environmental assessment within the process of regulatory review is recognized as the preferred means for carrying out the duty to consult and accommodate Aboriginal rights in administrative decisions over proposed resource development. Recent evidence suggests that integrating the duty to consult into National Energy Board (NEB) proceedings and subsuming the law of Aboriginal consultation under principles of administrative justice have not advanced the goal of reconciliation. This article considers whether the statutory mandate of the National Energy Board requires it to have sufficient regard to Aboriginal rights in a manner consistent with the adjudication of constitutional issues in administrative law. The article argues, through an examination of the Board's process and recent decisions of the Federal Court of Appeal, that there is good reason to revisit the Supreme Court of Canada's jurisprudence on the role of administrative expertise in effecting reconciliation in the NEB context. In particular, it submits that both reconciliatory and administrative objectives would be better served if the NEB were to perform a formal consultative role with Aboriginal claimants in accordance with prescribed constitutional standards. This would help to ensure that administrative actors reach rights-compliant decisions in the first instance and provide a more reliable basis for judicial deference to tribunal findings regarding Aboriginal rights.

Une évaluation environnementale dans le cadre d'un examen réglementaire est réputée être le moyen préféré de s'acquitter du devoir de consulter les Autochtones et d'accommoder leurs droits lors de décisions administratives touchant les propositions de mise en valeur des richesses naturelles. Il a été récemment démontré qu'intégrer le devoir de consulter dans

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\* JD Candidate 2017, Osgoode Hall Law School. I would like to thank Professors Andrée Boiselle, Brian Slattery, Lorne Sossin, and Sari Graben as well as Mr. Anthony Knox for their helpful comments during the early stages of this article. All errors are my own.

les procédures de l'Office national de l'énergie (ONE) et subsumer le devoir de consulter les Autochtones aux principes de la justice administrative n'a pas fait progresser le but de la réconciliation. Cet article se demande si le mandat statutaire de l'Office national de l'énergie l'oblige à prendre suffisamment en considération les droits autochtones d'une manière conforme au traitement des problèmes constitutionnels en droit administratif. Il fait valoir, à la lumière d'une analyse du processus de l'Office et de jugements récents de la Cour d'appel fédérale, qu'il existe de bonnes raisons de revoir la jurisprudence de la Cour suprême du Canada sur la capacité de l'expertise administrative d'arriver à la réconciliation dans le contexte de l'ONE. Il propose en particulier que les objectifs réconciliatoires et administratifs seraient mieux atteints si l'ONE se donnait un rôle consultatif officiel conformément aux normes constitutionnelles en vigueur face aux demandeurs autochtones. Cela permettrait d'abord d'assurer que les arbitres administratifs émettent des jugements conformes aux droits, puis fournissent un fondement plus crédible à la retenue judiciaire par rapport aux conclusions des tribunaux relatives aux droits autochtones.

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**RECENT EVIDENCE SUPPORTS THE CLAIM THAT** integrating the law of Aboriginal consultation with the process of administrative review has done little to advance the goal of reconciliation in the context of National Energy Board (NEB)

proceedings.<sup>1</sup> This article examines the relationship between the constitutional duty to consult Aboriginal peoples and the NEB regulatory process. In particular, the article considers whether the NEB's statutory mandate requires it to have regard to Aboriginal rights in a manner consistent with the adjudication of constitutional issues in administrative law.

It is now accepted practice to integrate Aboriginal consultation with the processes of environmental assessment (EA) and regulatory review (RR) that are delegated to expert administrative bodies. This strategy has become increasingly recognized as the preferred method for the Crown to carry out its duty to consult in the context of natural resource development. Where its regulatory responsibilities are triggered,<sup>2</sup> the NEB, pursuant to the *National Energy Board Act (NEBA)* and the *Canadian Environmental Assessment Act, 2012 (CEAA)*, is required to take Aboriginal concerns about project impacts into account when deciding whether to recommend project approval to the designated statutory authority, or when acting as a final decision maker.<sup>3</sup> The Crown generally views the NEB's hearing process and EA report as the primary vehicles for conducting Aboriginal consultation.

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1. See e.g. Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (2015) 65:4 UTLJ 382 and discussion below in Parts III and IV. This claim is further supported by the ongoing opposition many affected First Nations have shown in regards to recent NEB recommendations for approval of proposed oil and gas pipeline projects. The number of projects where the NEB process is claimed to provide for inadequate consultation continues to grow. See e.g. Shawn McCarthy & Kelly Cryderman, "NEB launches Energy East review as Quebec First Nations signal opposition," *The Globe and Mail* (16 June 2016), online: <[www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/neb-launches-energy-east-review-as-quebec-first-nations-signal-opposition/article30496458](http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/neb-launches-energy-east-review-as-quebec-first-nations-signal-opposition/article30496458)>; Kim Baird, "What's missing from review of Trans Mountain pipeline expansion?" *The Globe and Mail* (21 August 2016), online: <[www.theglobeandmail.com/news/british-columbia/whats-missing-from-neb-review-of-trans-mountain-pipeline-expansion/article31483950](http://www.theglobeandmail.com/news/british-columbia/whats-missing-from-neb-review-of-trans-mountain-pipeline-expansion/article31483950)>.
  2. See *National Energy Board Filing Manual*, revised as of August 2016 (Calgary: NEB, 2004) at 1-1 [*NEB Filing Manual*]: "The National Energy Board's (NEB or the Board) purpose is to promote safety, security, environmental protection and economic efficiency in the Canadian public interest through its regulation of pipelines, energy development and trade as mandated by Parliament."
  3. *National Energy Board Act*, RSC 1985, c N-7, ss 52, 58 [*NEBA*] (section 52 of the *NEBA* governs situations in which the NEB is tasked with making a recommendation related to project approval and section 58 governs situations in which the NEB is acting as the final decision maker); *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, ss 5(1)(c), 28 [*CEAA*] (project impacts on Aboriginal peoples are provided specific consideration under section 5(1)(c) of the *CEAA*).

Since the Crown's common law duty to consult is derived in part from section 35 of the *Constitution*, it represents the Crown's obligation to recognize and affirm "the existing aboriginal and treaty rights of the aboriginal peoples of Canada."<sup>4</sup> The Supreme Court of Canada (SCC) has also interpreted Aboriginal consultation primarily as a "procedural duty,"<sup>5</sup> in which principles of administrative law are thought to ensure adequate protection for Aboriginal rights.<sup>6</sup> The context of Crown consultation, therefore, brings to light many complexities that reside at the intersection of administrative and constitutional law.

The duty's integration with the process of regulatory review has generated significant uncertainty regarding an administrative tribunal's authority to consider section 35 rights in exercising its delegated power as an independent regulator.<sup>7</sup> In particular, the NEB has been a frequent party to litigation concerning its jurisdiction over constitutional matters relating to Aboriginal consultation.<sup>8</sup> These cases typically raise three issues: (1) whether the NEB has the ability to determine the adequacy of Crown consultation; (2) whether the NEB has itself been delegated the power to engage in consultation or to fulfill the duty on behalf

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4. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11, s 35 [*Constitution*]. See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20, [2004] 3 SCR 511 [*Haida Nation*]. Chief Justice McLachlin discusses the Crown's common law duty to consult:

Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises." This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate [citations omitted].

See also *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 74, [2010] 2 SCR 650 [*Carrier Sekani*] highlighting the Crown's "constitutional obligation to consult."

5. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 78, [2014] 2 SCR 257 [*Tsilhqot'in Nation*].

6. See *e.g.* *Haida Nation*, *supra* note 4 at para 41. See accompanying text below in Part I.

7. See Janna Promislow, "Irreconcilable? The Duty to Consult and Administrative Decision Makers" (2013) 22:1 Const Forum Const 63; Kirk N Lambrecht, "Constitutional Law and the Alberta Energy Regulator" (2014) 23:2 Const Forum Const 33 [Lambrecht, "Constitutional"]; Graben & Sinclair, *supra* note 1; David J Mullan, "2015 Developments in Administrative Law Relevant to Energy Law and Regulation" (2016) 4:1 Energy Reg Q [Mullan, "Developments"].

8. See *e.g.* accompanying text and case law as cited in Part III, below. The NEB also maintains an active web-inventory of ongoing litigation. See National Energy Board, "Court Challenges to National Energy Board or Governor in Council Decisions," online: <[www.neb-one.gc.ca/pplctnflng/crt/index-eng.html](http://www.neb-one.gc.ca/pplctnflng/crt/index-eng.html)>.

of the Crown; and (3) whether the Crown's reliance on the NEB regulatory process can be a sufficient means of discharging the duty.

While the SCC has clarified that where authorized by statute, specialized tribunals can have the jurisdiction to evaluate the adequacy of consultation or engage in consultations,<sup>9</sup> it will directly address the NEB's mandate relating to the duty to consult, and to what extent the Crown is able to rely on the Board's process to fulfill its duty in its pending judgments in *Chippewas*<sup>10</sup> and *Clyde River*.<sup>11</sup> The Federal Court of Appeal (FCA) has held that when the Crown is not a party to hearing proceedings, the NEB's jurisdiction does not extend to the question of the adequacy of consultation.<sup>12</sup> However, FCA decisions are inconsistent with respect to the NEB's power to engage in consultation on behalf of the Crown.<sup>13</sup>

The emerging scholarly literature examines the integration of Aboriginal consultation with EA and RR,<sup>14</sup> specifically in the context of NEB proceedings.<sup>15</sup> These accounts vary with respect to the crucial issue of the Board's jurisdiction over the Crown's duty to consult. Some maintain that the NEB mandate excludes jurisdiction over matters relating to consultation, although the Crown may rely on the Board's process to consider potential effects on Aboriginal rights as part of

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9. See *Carrier Sekani*, *supra* note 4 at paras 55-58.
  10. *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* (30 November 2016), 36776 (SCC) [*Chippewas*, SCC].
  11. *Hamlet of Clyde River, et al v Petroleum Geo-Services Inc (PGS), et al* (30 November 2016), 36692 (SCC) [*Clyde River*, SCC].
  12. See *Standing Buffalo Dakota First Nation v Enbridge Pipelines Inc*, 2009 FCA 308 at paras 25-44, [2010] 4 FCR 500 [*Standing Buffalo*]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2015 FCA 222 at paras 22-24, 390 DLR (4th) 735 [*Chippewas*].
  13. The FCA has held that the NEB does not have the power to undertake the fulfillment of any applicable *Haida Nation* duty of the Crown. See *Standing Buffalo*, *ibid* at para 34; *Chippewas*, *ibid* at paras 65-66. But see *Hamlet of Clyde River, et al v Petroleum Geo-Services Inc (PGS), et al*, 2015 FCA 179 at paras 44-46, 64, 474 NR 96 [*Clyde River*] (the FCA held the NEB did have a mandate to engage in consultation, although this did not entail formal delegation of the Crown's duty).
  14. See Kirk L Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina: University of Regina Press, 2013) [Lambrecht, *Aboriginal Consultation*]; Promislow, *supra* note 7; Keith B Bergner, "The Crown's Duty to Consult and the Role of the Energy Regulator" (2014) 2 Energy Reg Q, online: < www.energyregulationquarterly.ca/articles/the-crowns-duty-to-consult-and-the-role-of-the-energy-regulator#sthash.5N4UvUIV.HaoCCO1s.dpbs>; Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) 53:2 Osgoode Hall LJ 632.
  15. See especially Lambrecht, *Aboriginal Consultation*, *ibid*, ch 5; Bergner, *ibid*; Graben & Sinclair, *supra* note 1.

its mandate to consider whether a project is in the public interest.<sup>16</sup> Others argue the NEB's mandate should include the power to determine the existence and adequacy of Crown consultation.<sup>17</sup> In this article, I argue that the NEB's mandate with respect to the duty to consult ought to vary in accordance with the specific statutory provision under which it is exercising its delegated powers. If the NEB has been delegated the statutory power of *decision* under its enabling legislation,<sup>18</sup> then its jurisdiction likely extends to a determination of the existence and adequacy of Crown consultation. In the majority of pipeline cases, however, the NEB does not have the power to decide anything with regard to project approval. The Harper government's 2012 amendments removed this power in relation to the issuance of Certificates of Public Convenience and Necessity for proposed pipelines under section 52 of the *NEBA*. Thus, in line with the SCC's ruling in *Carrier Sekani*, section 52 demonstrates a clear legislative intent to deny the NEB any power of decision and, by extension, any power to decide the adequacy of Crown consultation.<sup>19</sup>

I then argue that the NEB must make its recommendations or decisions in line with the constitutional nature of the duty to consult, irrespective of statutory context, because the NEB plays a vital informational function with respect to the Crown's duty to consult—a role which both the Crown and reviewing courts rely on to ensure adequate protection of section 35 rights. Working from within the judicially-prescribed “reconciliatory administrative framework,”<sup>20</sup> I argue that heightened procedural controls on the NEB's process are warranted to further the prospect for meaningful consultation and to provide a reliable basis for deference to administrative discretion in decisions that may adversely affect Aboriginal rights. A tribunal empowered to make findings regarding a project's potential to adversely affect asserted Aboriginal rights ought to have an implied power to determine the scope and extent of the required consultation. From a practical standpoint, this would require the NEB to integrate a strength-of-claim assessment into its EA reports and its subsequent reasons for recommendation or decision. This enhanced process requirement does not necessarily mean that

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16. See Lambrecht, *Aboriginal Consultation*, *ibid*; Bergner, *ibid*.

17. See generally Graben & Sinclair, *supra* note 1.

18. See *NEBA*, *supra* note 3, s 58.

19. *Carrier Sekani*, *supra* note 4 at para 69.

20. The term “reconciliatory administrative law/framework” has not been explicitly invoked in related jurisprudence, although, as described in more detail in Part I, below, it is reasonable to suggest that this is an apt phrase to describe the approach courts have taken to the integration of the Crown's duty to consult in the context of regulatory review of resource development. I wish to acknowledge Anthony Knox for introducing me to this concept.



the Crown's duty has been delegated to the NEB. Rather, it means only that the Board's procedure with respect to Aboriginal issues must comply with the constitutional dimensions of the duty and thus enable the Crown to be adequately informed of the extent of its obligations.

I begin in Part I by briefly outlining the legal framework for the duty to consult and reviewing the jurisprudential alignment of the duty with principles of administrative law, including the role of tribunals in consultation. In Part II I summarize the integration of Crown consultation with EA and RR in general terms and examine the NEB's current policy with respect to consultation in more detail. I then draw attention in Part III to the issue of the NEB's jurisdiction and to two recent appeals heard at the SCC that considered the NEB's role in discharging the Crown's duty.<sup>21</sup> In Part IV I argue that the NEB's authority over consultation depends, in part, on whether it has been delegated the statutory power of decision, and moreover, that when exercising its EA mandate, the NEB should make its findings in accordance with the scope and extent of required consultation. Part V concludes.

## I. OVERVIEW OF THE LEGAL FRAMEWORK FOR THE DUTY TO CONSULT AND ACCOMMODATE

First expressed by Chief Justice McLachlin in *Haida Nation*, the Crown's duty to consult (and, where appropriate, to accommodate) Aboriginal interests arises when all three of the following elements are satisfied: (1) the Crown has knowledge, actual or constructive, of a potential Aboriginal claim or right; (2) the Crown contemplates conduct; and (3) such conduct may adversely affect an Aboriginal right or claim.<sup>22</sup> The duty is prospective and directed towards the consideration of unproven rights of Aboriginal claimants before a government decision is made that may adversely affect them.<sup>23</sup> The nature or content of the Crown's duty "varies with the circumstances" and lies on a "spectrum" informed by two factors: "the strength of the case supporting the existence of the right," and

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21. *Chippewas*, *supra* note 12; *Clyde River*, *supra* note 13.

22. *Carrier Sekani*, *supra* note 4 at para 31.

23. *Ibid* at para 35. One must take care to recognize, particularly in the context of Aboriginal treaty rights, that although specific rights (*e.g.*, hunting, fishing, trapping, and harvesting rights) are established in the treaty text, often the *scope* of those rights is not established, or interpreted only as to be asserted by the Aboriginal claimant. Consultation obligations also arise in relation to proven or settled rights, but are judicially considered under the test for justified infringement. See *Tsilhqot'in Nation*, *supra* note 5 at para 77.

“the seriousness of the potentially adverse effect upon the right or title claimed.”<sup>24</sup> The operative question is always “what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.”<sup>25</sup>

The duty’s guiding precepts, the honour of the Crown and reconciliation, remain vaguely defined, though subsequent jurisprudence<sup>26</sup> and academic commentary<sup>27</sup> have helped to outline their conceptual boundaries. Generally speaking, the “essential legal framework”<sup>28</sup> is meant to protect and facilitate the overarching project of reconciling the pre-existence of Aboriginal societies with the de facto sovereignty of the Crown.<sup>29</sup> Through its legislative and executive action, the Crown is “bound by its honour to balance societal and Aboriginal interests”<sup>30</sup> and to effect compromise in service of reconciliation. This “requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances.”<sup>31</sup> Of course, what counts as “meaningful consultation” is often the very point at issue in litigation over the adequacy of consultation. However, Dwight G Newman, whose work regarding the duty to consult has found favour with the SCC,<sup>32</sup> provides the following definition:

[m]eaningful consultation is ... that which achieves the purpose of the doctrine. ... to maintain honourable Crown conduct and to offer a proactive protection to Aboriginal and treaty rights such that in situations of uncertainty about the scope of

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24. *Haida Nation*, *supra* note 4 at para 39.

25. *Ibid* at para 45.

26. See *e.g. ibid* at paras 32-33, 38 (Chief Justice McLachlin describes the duty as an ongoing constitutional process, and that Crown/Aboriginal reconciliation is neither “a final legal remedy in the usual sense” nor a “distant legalistic goal”). See also *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras 40-43, 104-110, [2010] 3 SCR 103 [*Little Salmon*] (Justice Binnie writing for the majority, discussing the honour of the Crown as a constitutional principle).

27. On theories of legal reconciliation within the context of the duty to consult, see generally Kent McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin” (2003) 2:1 *Indigenous LJ* 1; Mark D Walters, “The Morality of Aboriginal Law” (2006) 31 *Queen’s LJ* 470; Dwight G Newman, “Reconciliation: Legal Conception(s) and Faces of Justice” in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich, 2008) 80.

28. *Little Salmon*, *supra* note 26 at para 69.

29. *Haida Nation*, *supra* note 4 at para 32.

30. *Ibid* at para 45.

31. *Ibid* at para 41.

32. See *e.g. Carrier Sekani*, *supra* note 4 at paras 38, 41, 46; *Little Salmon*, *supra* note 26 at para 103.

Aboriginal rights and treaty rights, there is discussion of that uncertainty in advance of a government decision that may adversely impact them.<sup>33</sup>

It suffices for present purposes to note two procedural obligations that are contained within Newman's definition: (1) meaningful consultation requires discussion of the uncertainty about the scope of the claimed Aboriginal right; and (2) discussion about the scope of the claimed right must occur in advance of a decision that may adversely impact it.

Respected scholars have written that the legal duty of consultation, and where appropriate, accommodation, represents an attempt by the courts to shift the process of recognizing Aboriginal rights away from litigation to one focused on negotiation.<sup>34</sup> This dialogical form of governance,<sup>35</sup> or generative constitutional order<sup>36</sup> emphasizes the active participation of Indigenous peoples in the identification of their rights in modern form.<sup>37</sup> There is, however, considerable uncertainty with respect to when a substantive duty of accommodation may arise, which would oblige the Crown to modify its position.<sup>38</sup> Importantly, courts have been clear that the process of negotiation does not give Aboriginal groups a veto over the regulatory approval process.<sup>39</sup> In order to fulfill their duty, governments are not required to reach agreement with Aboriginal claimants, but rather to effect a reasonable balance between conflicting interests.<sup>40</sup>

Significant opportunity remains to explore the legal complexity surrounding the duty to consult's theoretical underpinnings and its practical application. The foregoing summary is only intended to lay a foundation for subsequent analysis

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33. *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich, 2014) at 86-87.

34. See e.g. Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 433; James [Sa'ke'j] Youngblood Henderson, "Dialogical Governance: A Mechanism of Constitutional Governance" (2009) 72 Sask L Rev 29; Newman, *ibid* at 27-33.

35. See Henderson, *ibid*.

36. See Slattery, *supra* note 34 at 434, 440.

37. *Ibid* at 436. For example, in the context of resource development, consultation is intended to facilitate the negotiation of revenue sharing or impact benefit agreements between affected Indigenous communities and the private sector. See also Newman, *supra* note 33 at 32-33.

38. See Verónica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" (2006) 17:1 J Envtl L & Prac 27 at 38-45; Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 CJALP 93. Both articles argue that the duty to consult and accommodate involves not just a procedural guarantee, but also, importantly, a substantive constraint where it is also necessary to show that the government's substantive position has been modified as a result of the duty. See also discussion in Newman, *supra* note 33 at 103-112.

39. See *Haida Nation*, *supra* note 4 at para 48; *Little Salmon*, *supra* note 26 at para 14.

40. See *Haida Nation*, *ibid* at para 49.

regarding the integration of the doctrine with administrative law principles and the process of regulatory review conducted by the NEB.

#### A. RECONCILIATORY ADMINISTRATIVE LAW—THE JURISPRUDENTIAL FRAMEWORK

This article is not the first to analyze the judicial alignment of the duty to consult with principles of administrative law.<sup>41</sup> However, since the NEB fulfills its mandate, both generally and with respect to Aboriginal rights, within the confines of administrative review, it is important to underscore how the Court has applied familiar legal principles to the unique context of the duty to consult and accommodate. Since the Chief Justice stated in *Haida Nation* that in discharging the duty, “regard may be had to the procedural safeguards of natural justice mandated by administrative law,”<sup>42</sup> both courts and academic commentators have grappled with understanding the nature of administrative decision making when constrained by the constitutional obligation of consultation.

Chief Justice McLachlin’s reference to administrative law in *Haida Nation* followed a line of jurisprudence that found principles of administrative justice applicable to questions of section 35 rights and the duty to consult.<sup>43</sup> This finding was later affirmed in *Little Salmon*, in which Justice Binnie stated unequivocally for the majority of the Court that “Administrative law is flexible enough to give

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41. For extended discussion on the application of administrative law to the duty to consult and accommodate and “the procedural approach,” to the duty specifically, see Thomas Isaac & Anthony Knox, “The Crown’s Duty to Consult Aboriginal People,” (2003) 41:1 *Atla L Rev* 49; Anthony Knox & Thomas Isaac, “Judicial Deference and the Significance of the Supreme Court of Canada’s Decisions in *Haida* and *Taku River*” (2006) 64 *Advocate* 487 [Knox & Isaac]; Potes, *supra* note 38 at 33-38; Sossin, *supra* note 38; David Mullan, “The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?” (2011) 24 *CLAJP* 233 [Mullan, “Fog”]. See also Nigel Bankes, “Who decides if the Crown has met its duty to consult and accommodate?” (6 December 2012), online: <[www.ablawg.ca/2012/09/06/who-decides-if-the-crown-has-met-its-duty-to-consult-and-accommodate/](http://www.ablawg.ca/2012/09/06/who-decides-if-the-crown-has-met-its-duty-to-consult-and-accommodate/)>; Promislow, *supra* note 7; Janna Promislow & Lorne Sossin, “In Search of Aboriginal Administrative Law” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2d ed (Toronto: Emond Montgomery, 2013) 449 [Promislow & Sossin]; Lambrecht, “Constitutional,” *supra* note 7; Lambrecht, *Aboriginal Consultation*, *supra* note 14; Graben & Sinclair, *supra* note 1.

42. *Haida Nation*, *supra* note 4 at para 41.

43. See *Paul v British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585 [*Paul*].

full weight to the constitutional interests of the First Nation.”<sup>44</sup> Since the process of EA and RR is intended primarily as a formal device to both inform and constrain the exercise of Crown discretion, the integration of the duty with RR provides for a natural extension of the tools and procedural safeguards of administrative law to the constitutional objective of protecting section 35 rights. The Court thus appears confident that the Crown’s constitutional duty to consult, and where appropriate accommodate, can be effectively met through a process that adheres to such safeguards, in particular the common law duty of procedural fairness.<sup>45</sup>

It is therefore worth understanding in broad terms how administrative law principles provide an adjudicative framework for duty-to-consult litigation. I examine this framework briefly in four sections: contextual analysis, procedure, standard of review, and tribunal jurisdiction over consultation. These categories are not intended as an exhaustive means to analyze the alignment of administrative law and the law of Aboriginal consultation,<sup>46</sup> although they inform the principal issues in recent SCC appeals involving Aboriginal consultation and the NEB process. Namely, that a determination with respect to a tribunal’s jurisdiction, and what procedural and substantive requirements Aboriginal claimants are due, will vary according to context, and furthermore, that factual findings made by tribunals under an EA mandate that bear on Aboriginal rights will typically be afforded considerable judicial deference.<sup>47</sup>

## 1. CONTEXTUAL ANALYSIS

The duty to consult and administrative law can be said to share a common logic—one driven by contextual inquiry to ensure fair procedure and the exercise of reasonable discretion when such discretion affects the rights of those impacted by Crown actions. The contextual and flexible nature of administrative law is a primary factor driving the integration of the duty with the process of EA and RR. As the duty, EA, and RR are highly contextual, fact driven endeavours. The entire

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44. *Little Salmon*, *supra* note 26 at para 47. For a recent example at the FCA expressing the alignment of the duty to consult with administrative law see Justice Stratas in *Canada (Attorney General) v Long Plain First Nation*, 2015 FCA 177 at para 107, 388 DLR (4th) 209.

45. See *supra* note 41.

46. Additional areas of administrative law relevant to the duty to consult not addressed in this article include consideration of remedies and tribunal impartiality. See *e.g.* Kent Roach, *Constitutional Remedies in Canada* (Toronto: Canada Law Book, 2016) (loose-leaf revision 27), ch 15 at 35-46 (in respect of remedies); Promislow & Sossin, *supra* note 41 (where the authors discuss issues relating to impartiality).

47. See discussion in Part I(A)(3), below, regarding standard of review.

practice of EA is critically dependant on the specific biophysical properties and technical details of a proposed development. When this fact is coupled with the many variants of statutory bodies charged with regulatory review—each adhering to specific provisions or terms of reference that define its mandate for a given project—contextual inquiry becomes a necessity. Indeed, as I will argue, the NEB mandate relating to the Crown’s duty to consult is critically dependent on the particular provision under which it is exercising its delegated powers.

Context also drives the inquiry into the substantive elements of the duty itself: Its triggering conditions, the spectrum analysis that determines its content, and the circumstances that give rise to potential accommodation measures. The preliminary assessment of the strength of the Aboriginal claim and the seriousness of the potential adverse impact on the claimed right will typically vary on a case-by-case basis. In turn, what constitutes “meaningful consultation” will be a discrete function of the factual and legal context.

Moreover, the duty to consult is not restricted to asserted rights, but also arises under conditions of established title, treaty rights, and other formal agreements.<sup>48</sup> As Kirk Lambrecht remarks, “Contextual analysis is brilliant in its conception, for it allows the law to be sufficiently flexible to fit the circumstances of each particular case. This is especially significant given the nuance inherent to appreciation of Aboriginal rights and Treaty rights.”<sup>49</sup> The procedural and remedial flexibility of administrative law makes it well suited to deal with the legal and factual complexity that arises when Aboriginal consultation is integrated with the process of regulatory review. In this setting, courts will seek to rely on the specialized knowledge of administrative decision makers to ensure adequate protection of rights in the application of technical expertise to specific consultation issues.

## 2. PROCEDURE

As Jenna Promislow and Lorne Sossin have shown, both the duty to consult and accommodate and the duty of procedural fairness share a common analytical structure that involves two steps: threshold and content.<sup>50</sup> Both duties are easily triggered<sup>51</sup> and the content of their procedural requirements is similar. “While precise requirements will vary with the circumstances,” in many cases, the duty

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48. For an in-depth examination of the duty to consult in its various contextual manifestations, see Newman, *supra* note 33.

49. *Aboriginal Consultation*, *supra* note 14 at 113.

50. *Supra* note 41 at 469-74.

51. See discussion in Newman, *supra* note 33 at 90.

to consult mandates procedural obligations similar to those owed under a duty of fairness, for example notice and disclosure, an opportunity to make submissions, and provision of written reasons.<sup>52</sup> There are, however, some noteworthy differences.<sup>53</sup> For example, whereas *Baker* identified five factors that determine the content of the common law duty of procedural fairness,<sup>54</sup> only two factors determine the content of the duty to consult and accommodate.<sup>55</sup> Although the seriousness of the impact of the decision on the claimant's rights is a factor under *Baker*, an assessment of the strength of the claim that underlies the basis of the asserted right to be consulted is not. Thus, a strength-of-claim analysis is unique to the procedural demands of the duty to consult and serves as one of two factors determining the level of consultation required.<sup>56</sup>

Another difference is that the duty to consult includes, where appropriate, a substantive duty to accommodate.<sup>57</sup> As noted above, a discussion of when the procedural dimensions of consultation blend into substantive rights of accommodation is beyond the scope of this article.<sup>58</sup> However, it suffices for my purposes to note that there is judicial reluctance to order specific accommodation measures.<sup>59</sup> With respect to accommodation, the SCC seems content to embrace what some have termed the "conservative view" of the duty to consult. Promislow and Sossin explain that under this view:

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52. See *Haida Nation*, *supra* note 4 at paras 43-44.

53. See Mullan, "Fog," *supra* note 41 at 241-45. It is worth noting that the SCC has also indicated that "formal participation in the decision-making process" might be a procedural requirement in certain circumstances, although the Court did not elaborate on the meaning or extent of "participation." See *Haida Nation*, *ibid* at para 44.

54. *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-27, 174 DLR (4th) 193.

55. See accompanying text in Part I of this article, above, for factors in spectrum analysis.

56. See *Haida Nation*, *supra* note 4 paras at 43-44. At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.

57. *Ibid* at paras 47-51.

58. See discussion contained in sources cited in *supra* note 38.

59. Promislow & Sossin, *supra* note 41 at 474.

reconciliation is achieved by ensuring that Aboriginal interests are considered within existing decision-making structures and that attention is paid to working out the balance between Aboriginal concerns, third-party interests, and the broader public interests within those decision processes.<sup>60</sup>

This perspective is consistent with the Court's holding that consultation does not entail a duty to agree and that accommodation is directed toward "seeking compromise in an attempt to harmonize conflicting interests."<sup>61</sup> In the Court's view, the duty appears to reflect more of "a mechanism to integrate Aboriginal rights within *existing* administrative structures."<sup>62</sup> It should be noted, however, that at the time of writing, the Canadian government had recently announced its support for the United Nations Declaration on the Rights of Indigenous People (UNDRIP), which includes the principle of Free, Prior, and Informed Consent (FPIC).<sup>63</sup> The degree to which the government's implementation of FPIC will translate into heightened procedural and substantive rights for Aboriginal peoples under the duty to consult—in cases where prospective rights are asserted but not yet legally defined—remains to be seen.<sup>64</sup> Initial policy

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60. *Ibid* at 481. This is in contrast to those who view the duty as one oriented towards *changing* state structures to preserve "Aboriginal interests in advance of ... more complete resolutions of Aboriginal claims" (*ibid* at 480). See also *supra* note 53.

61. *Haida Nation*, *supra* note 4 at para 49.

62. Promislow & Sossin, *supra* note 41 at 481 [emphasis added].

63. *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, 61/295 arts 10-11, 19, 28-29. See The Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs, (Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, 10 May 2016), online: <news.gc.ca/web/article-en.do?nid=1064009&tp=970>.

64. Implementing FPIC in the context of Aboriginal consultation where rights are asserted but not yet established raises many complex questions. See *e.g.* Lorraine Land, "Who's afraid of the Big Bad FPIC? The evolving integration of the *United Nations Declaration on the Rights of Indigenous Peoples* into Canadian law and policy," *Northern Public Affairs* 4:2 (May 2016) 42, online: <www.northernpublicaffairs.ca>.



language, however, appears to limit the application of FPIC to modern treaty and self-government agreements.<sup>65</sup>

### 3. STANDARD OF REVIEW

Guided by general principles of administrative law, the Chief Justice in *Haida Nation* set out a familiar framework for judicial review of government conduct when challenged on the basis of allegations that the Crown failed to adequately discharge its duty to consult.<sup>66</sup> Some commentators have noted, correctly in my view, that *Haida Nation* effectively “remove[s] all notion of the Doctrine existing in some *sui generis* world devoid of guidance from the general common law” and “provides a touchstone to the judiciary for testing any particular implementation

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65. See *supra* note 63. In her speech, Minister Bennett does not reference the duty to consult, observing only that “Canada believes that our constitutional obligations serve to fulfil all of the principles of the declaration, including ‘free, prior and informed consent’. We see modern treaties and self-government agreements as the ultimate expression of free, prior and informed consent among partners.” Recent developments have brought further uncertainty in respect of Canada’s commitment to implementing UNDRIP, with the Minister of Justice stating that the declaration is “unworkable” as Canadian law. See John Invison, “First Nations hear hard truth that UN indigenous rights declaration is ‘unworkable’ as law,” *National Post* (14 July 2016), online: <[news.nationalpost.com/full-comment/john-ivison-first-nations-hear-hard-truth-that-un-rights-declaration-unworkable-as-law](http://news.nationalpost.com/full-comment/john-ivison-first-nations-hear-hard-truth-that-un-rights-declaration-unworkable-as-law)>. One possible option for implementing FPIC in the context of asserted rights, however, may be to calibrate the degree of formal participation in the decision-making process to the strength of claim assessment. Though many questions remain, it may be appropriate to interpret “participation” as implying a degree of decision-making *authority* where the legal claim to Aboriginal title or treaty rights is particularly strong.

66. See *Haida Nation*, *supra* note 4 at paras 61-62:

The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal. ... Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness.

The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action “viewed as a whole, accommodates the collective aboriginal right in question”.

of the Doctrine.<sup>67</sup> Though decided before *Dunsmuir*,<sup>68</sup> this framework is consistent with current interpretation of judicial review, which places significant emphasis on deference to administrative discretion when determinations are made by decision makers acting within the context of their own legislative scheme and largely entail questions of fact or mixed fact and law.<sup>69</sup>

While questions relating to the existence of the duty are to be reviewed on a standard of correctness,<sup>70</sup> in the context of NEB decisions and other expert review panels under federal jurisdiction a reasonableness standard has been applied to review of both the adequacy and process of consultation.<sup>71</sup> Questions concerning a tribunal's jurisdiction over consultation are, however, uniformly considered questions of law reviewable on the standard of correctness.<sup>72</sup>

There is some inconsistency in the SCC's approach in *Haida Nation* and its later ruling in *Little Salmon*, where Justice Binnie found that the question of the adequacy of consultation should be reviewed on a correctness standard.<sup>73</sup> Lower courts have, however, preferred to follow *Haida Nation* and apply a reasonableness standard to this question, due largely to the factual nature of the inquiry<sup>74</sup> and its close connection to the function assigned to the tribunal under its enabling legislation.<sup>75</sup> This interpretation aligns further with cases where considerable

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67. Knox & Issac, *supra* note 41 at 491.

68. *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*].

69. *Ibid* at para 54.

70. See *Haida Nation*, *supra* note 4 at para 61; *Clyde River*, *supra* note 13 at para 34.

71. See *Brokenhead Ojibway First Nation v Canada (Attorney General)*, 2009 FC 484 at para 18, [2009] 3 CNLR 36 [*Brokenhead*]; *Council of the Innu of Ekuanišbit v Canada (Attorney General)*, 2014 FCA 189 at paras 40-41, 376 DLR (4th) 348 [*Innu*]; *Clyde River*, *supra* note 13 at para 34.

72. *Ibid*; *Carrier Sekani*, *supra* note 4 at para 67.

73. Although, Justice Binnie went on to observe that the director's decision to approve the project in question should be reviewed on a standard of reasonableness. See *Little Salmon*, *supra* note 26 at para 48:

In exercising his discretion under the Yukon *Lands Act* and the *Territorial Lands (Yukon) Act*, the Director was required to respect legal and constitutional limits. In establishing those limits no deference is owed to the Director. The standard of review in that respect, including the adequacy of the consultation, is correctness. A decision maker who proceeds on the basis of inadequate consultation errs in law. Within the limits established by the law and the Constitution, however, the Director's decision should be reviewed on a standard of reasonableness.

74. See *e.g. Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 at para 60, 37 BCLR (5th) 49 (where Justice Newbury distinguishes the applicable standard on this basis).

75. See *Clyde River*, *supra* note 13 at para 36.

deference is accorded to administrative expertise when making determinations on questions of mixed fact and law.<sup>76</sup>

Some have also argued that the constitutional dimension of the duty to consult merits review of consultation adequacy according to a correctness standard, suggesting that “an overly deferential treatment of Crown consultation decisions may discourage further Crown action to implement the duty, and thus hinder the protection of the unproven Aboriginal rights the duty was intended to protect.”<sup>77</sup> However, in *Doré*, the SCC signaled the appropriateness of reasonableness review for administrative decisions where constitutional rights have been claimed.<sup>78</sup> There thus appears to be a strong argument that judicial review of Crown consultation tends to conform broadly to general principles of standard of review analysis, including the predominant application of a reasonableness standard to energy regulators generally.<sup>79</sup>

Standard-of-review analysis in duty-to-consult litigation has tended to reinforce the notion that the project of reconciliation is to be undertaken primarily by the executive and legislative branches of government working collaboratively with Aboriginal peoples. The judiciary has tried to limit itself to a supporting role and has expressed an intention to avoid deciding substantive outcomes, instead focusing on the task of “regulating the mischief of Crown dishonour in Aboriginal contexts.”<sup>80</sup> This point underscores the importance of finding a reliable basis for deference to administrative decisions that may adversely impact Aboriginal rights. Put concisely, if courts are generally going to defer to tribunal determinations that bear on asserted Aboriginal rights, then those findings ought to be made in accordance with the doctrine of consultation as judicially prescribed, a point developed further in Part IV.

#### 4. ROLE OF ADMINISTRATIVE TRIBUNALS IN CONSULTATION

The SCC first considered the jurisdiction of administrative tribunals to adjudicate Aboriginal rights in *Paul*, where it recognized that as part of a unitary system of

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76. See *Dunsmuir*, *supra* note 68 at para 53.

77. See Promislow & Sossin, *supra* note 41 at 479. See generally Timothy Huyer, “Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation” (2006) 21 Windsor Rev Legal Soc Issues 33.

78. See *Doré v Barreau du Québec*, 2012 SCC 12 at paras 44-58, [2012] 1 SCR 395.

79. See generally Mullan, “Developments,” *supra* note 7.

80. Jamie Dickson, “*The Honour of the Crown: Making Sense of Crown Liability Doctrine in Crown/Aboriginal Law in Canada*” (LLM Thesis, University of Saskatchewan Faculty of Law, 2014) at 18, online: <ecommons.usask.ca/xmlui/bitstream/handle/10388/ETD-2014-01-1379/DICKSON-THESIS.pdf?sequence=4&isAllowed=y>.

justice, administrative tribunals and decision makers are well placed to address Aboriginal issues.<sup>81</sup> In *Carrier Sekani*, the SCC provided its only guidance regarding the role of an administrative tribunal in specific relation to the Crown's duty to consult.<sup>82</sup> While the SCC has not explicitly invoked the term "*Haida* analysis," this term has been employed in litigation at the FCA to summarize the jurisdictional inquiry a court or tribunal may be required to undertake in relation to the duty to consult. It consists of three questions: (1) whether a duty to consult was owed; (2) the extent and scope of that duty; and (3) whether the Crown has discharged its duty on the appropriate standard.<sup>83</sup>

In *Carrier Sekani* the SCC found that the British Columbia Utilities Commission (BCUC) had correctly asserted its jurisdiction to consider the adequacy of Crown consultation,<sup>84</sup> while also concluding that the BCUC lacked the delegated authority to engage in consultation. The SCC went on to align *Carrier Sekani* with established rules for tribunal jurisdiction over constitutional issues by setting out four guiding principles:<sup>85</sup>

1. The duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal.
2. A legislature is free to delegate to a tribunal the Crown's duty to consult.
3. A legislature is also free to confine a tribunal's power to determinations of whether adequate consultation has taken place, as a condition of its statutory decision-making process.
4. Both the powers of the tribunal to consider questions of law and the remedial powers granted it by the legislature are relevant to determining whether a particular tribunal has a duty to consult, a duty to consider consultation, or no duty at all.

In short, a tribunal's jurisdiction with respect to Aboriginal consultation is a function of the powers the legislature intended to delegate to that particular tribunal. As a condition of its statutory decision-making process, a tribunal may serve one of four roles in the consultation process. It may be delegated the power to (1) engage in consultation; (2) evaluate the adequacy of consultation; (3) fulfill both these roles; or it may (4) fulfill neither of them. Where legislation does not

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81. See *Paul*, supra note 43 at paras 37-38.

82. See *Carrier Sekani*, supra note 4.

83. See *Chippewas*, supra note 12 at para 81.

84. *Ibid* at para 72.

85. *Ibid* at paras 55-58.

explicitly address the duty to consult,<sup>86</sup> any role the tribunal has must therefore be implicit. As guidance for discerning implied legislative intent, the SCC drew a crucial distinction between a constitutional *question* and a constitutional *process*, and clearly situated the issue of a tribunal's power to engage in consultation in the latter category.<sup>87</sup> In the Court's view, a tribunal's power to engage in a constitutional process depends upon the explicit or implicit conferral of such a power in the tribunal's enabling legislation. However, with regard to the issue of the existence or adequacy of consultation—interpreted as a constitutional *question*—a tribunal that has statutory authority to decide questions of law is presumed to have jurisdiction over constitutional questions unless that jurisdiction is specifically removed by statute.<sup>88</sup>

The SCC also seems to suggest that determination of an implied legislative intent to confer a *Haida* duty on a tribunal to engage in consultation may be assisted through an inquiry into the tribunal's remedial powers. What remedial powers would support such an implication would be a contextual matter, but the Court offers little guidance on this subject. Lastly, if a tribunal has the power to determine the adequacy of consultation but not to enter into consultations itself, *Carrier Sekani* suggests that the tribunal should exercise whatever remedial powers it has been conferred so as “to protect Aboriginal rights and interests and to promote the reconciliation of interests called for in *Haida Nation*.”<sup>89</sup>

As explained in Part III below, the FCA has applied the SCC's jurisprudence on tribunal jurisdiction in duty to consult litigation restrictively, especially in the

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86. See *e.g.*, *NEBA*, *supra* note 3 (enacted in 1985, this statute makes no reference to Aboriginal consultation).

87. See the SCC's oft-cited passage in *Carrier Sekani*, *supra* note 4 at para 60:

A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law. Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with the consultation. The remedial powers of a tribunal will depend on that tribunal's enabling statute, and will require discerning the legislative intent.

88. See *Nova Scotia (Workers' Compensation Board) v Martin*, 2003 SCC 54 at para 36, [2003] 2 SCR 504; *Paul*, *supra* note 43 at para 39; *R v Conway*, 2010 SCC 22 at para 77, [2010] 1 SCR 765.

89. *Carrier Sekani*, *supra* note 4 at para 61.

context of NEB proceedings to which the Crown is not a party. Before pursuing this subject in greater detail through an examination of the NEB's consultation policy and its mandate as interpreted by recent FCA decisions, it is worth briefly reviewing the integration of Aboriginal consultation with the process of EA and RR in general terms.

## II. INTEGRATING THE DUTY TO CONSULT WITH THE NEB REGULATORY PROCESS

### A. GENERAL OVERVIEW: ENVIRONMENTAL ASSESSMENT AND ABORIGINAL CONSULTATION

[R]obust environmental assessment and regulatory review of projects comprise a reasonable process for gathering and assessing information on the significance of project impacts on Aboriginal peoples. Integration will foster potential for reconciliation in regard to a project to be served efficiently by project proponents, tribunals, the Crown, the courts, and Aboriginal peoples.<sup>90</sup>

In the companion case to *Haida Nation*, the SCC found in *Taku River* that the Crown's duty to consult and accommodate could be fulfilled within the regulatory process of EA.<sup>91</sup> This holding has been affirmed in subsequent decisions of the SCC and the federal courts.<sup>92</sup> In reference to *Taku River*, Justice Binnie, writing for the majority of the Court in *Little Salmon*, observed that a "forum created for other purposes may nevertheless satisfy the duty to consult if *in substance* an appropriate level of consultation is provided."<sup>93</sup> Both *Taku River* and *Little Salmon* involved regulatory processes overseen by Crown agencies,<sup>94</sup>

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90. Lambrecht, *Aboriginal Consultation*, *supra* note 14 at 110 (as cited by Justice Dawson in *Clyde River*, *supra* note 13 at para 69).

91. *Taku River Tlingit First Nation v British Columbia*, 2004 SCC 74 at para 40, [2004] 3 SCR 550 [*Taku River*] (the legislation governing the EA set out a process that required consultation with Aboriginal peoples affected by the project).

92. See *e.g.* SCC decisions *Little Salmon*, *supra* note 26 at para 39; Quebec (*Attorney General*) *v Moses*, 2010 SCC 17 at para 45, [2010] 1 SCR 557 and federal court decisions *Brokenhead*, *supra* note 71 at paras 25; *Innu*, *supra* note 71 at para 99; *Clyde River*, *supra* note 13 at para 44.

93. *Little Salmon*, *supra* note 26 at para 39 [emphasis in original].

94. In *Taku River*, consultation was undertaken by the BC Environmental Assessment Office in the course of a provincial EA requiring Ministerial approval in which the provincial and federal governments was invited to participate, including the government of BC (see *Taku River*, *supra* note 91 at para 7). *Little Salmon* involved an application submitted by a Yukon resident to the Yukon government's Land Application Review Committee.

as opposed to decision processes undertaken by an independent, quasi-judicial tribunal such as the NEB, in which the Crown is not typically a party.

In the context of major resource extraction projects that engage federal jurisdiction under the *NEBA* or the *CEAA*, the applicable legislation specifically requires consideration of impacts on Aboriginal peoples.<sup>95</sup> In the event of overlapping federal and provincial jurisdiction, the *CEAA* also provides for the creation of a joint review panel (JRP) to carry out the EA process and assess the significance of adverse effects on Aboriginal communities.<sup>96</sup> The federal Crown's policy is to integrate Aboriginal consultation "into the environmental assessment and regulatory process to the greatest extent possible."<sup>97</sup> Provincial ministries have similar policies where an EA is triggered for project evaluation.<sup>98</sup> The federal government has also developed Aboriginal Consultation Frameworks that describe how to conduct consultation in complex regulatory proceedings involving such delegated panels.<sup>99</sup> Importantly, the federal government is currently involved in an extensive review of its environmental and regulatory

95. *CEAA*, *supra* note 3, s 5(1)(c):

With respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

- (i) health and socio-economic conditions,
- (ii) physical and cultural heritage,
- (iii) the current use of lands and resources for traditional purposes, or
- (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

96. *Ibid*, ss 38, 40. The JRP process, established pursuant to a complex legislative scheme that combines elements of both the *CEAA* and the *NEBA*, is a distinct and isolated process from the operating process under the CEA Agency. This scheme was considered recently by the FCA in *Gitxaala Nation v Canada*, 2016 FCA 187, 485 NR 258 [*Gitxaala Nation*] and is discussed further below in Part VI of the article.

97. Canada, Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (Ottawa: Government of Canada, 2011) at 25 [Federal Consultation Policy].

98. See *e.g.* British Columbia Environmental Assessment Office, *Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process*, (BC Environment Assessment Office, December 2013); Alberta Energy Regulator & Aboriginal Consultation Office, *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* (Procedures), (Alberta Energy Regulator, 10 June 2015).

99. See *e.g.* Canadian Environmental Assessment Agency, "Aboriginal Consultation Framework for the Northern Gateway Pipeline Project," online: <[www.ceaa-acce.gc.ca/050/documents/40861/40861E.pdf](http://www.ceaa-acce.gc.ca/050/documents/40861/40861E.pdf)>.

processes, with a particular emphasis on Indigenous engagement in EA and “modernization” of the NEB.<sup>100</sup>

There is of course a strong pragmatic argument for integrating Aboriginal consultation with EA, as information and analysis relevant to the environmental effects of a proposed development will be required to assess the impacts of the development on Aboriginal rights.<sup>101</sup> Thus, efficiency and the reduction of duplicative regulatory processes provide a good rationale for integration.<sup>102</sup> A further emphasis is placed on the benefits of early Crown engagement. While consultation activities should occur across all phases of the project approval process, facilitating Aboriginal involvement in the early planning stages of development through EA can serve to strengthen relationships between the various parties and “foster potential for reconciliation.”<sup>103</sup>

Neil Craik has recently argued that integrating the duty to consult with EA could foster reconciliation if certain elements in the process that better align with the purpose of the duty were institutionalized.<sup>104</sup> For example, he highlights the potential for sustainability assessment,<sup>105</sup> consideration of alternatives,<sup>106</sup> cumulative impacts assessment,<sup>107</sup> and Aboriginal participation in strategic EA<sup>108</sup> to promote the inclusion of Aboriginal values. According to Craik, this approach

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100. See Government of Canada, “Review of Environmental and Regulatory Processes,” online: <[www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews.html](http://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews.html)>; Government of Canada, “National Energy Board Modernization,” online: <[www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/national-energy-board-modernization.html](http://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/national-energy-board-modernization.html)>.

101. For a more detailed look at the process of integrating consultation with EA and RR see Lambrecht, *Aboriginal Consultation*, *supra* note 14; Craik, *supra* note 14.

102. Lambrecht, *ibid* at 43-45.

103. *Ibid* at 110.

104. See Craik, *supra* note 14.

105. See e.g. Robert B Gibson, Meinhard Doelle, & A John Sinclair, “Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment” (2016) 29 J Evtl L & Prac 257.

106. Assessment of alternatives was a factor to be considered under the now repealed *Canadian Environmental Assessment Act*. See SC 1992, c 37, s 16(e), as repealed by 2012, c 19, s 66 [CEAA, 1992].

107. The CEAA expressly provides for “the study of cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments.” See CEAA, *supra* note 3, ss 4(1)(i), 73-74.

108. *Carrier Sekani* affirms the principle that the duty to consult can be engaged at an early, strategic stage of decision making: “the duty to consult extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal claims and rights.” See *supra* note 4 at para 44. See also Robert B Gibson et al, “Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options” (2010) 20:3 J Evtl L & Prac 175.



holds promise for the “transformational” potential of EA to implement the duty to consult. In the context of sustainability assessment, he states:

While reconciliation itself is often described in oppositional terms (*i.e.*, as balancing Aboriginal interests with those of non-Aboriginals), the critical opportunity that the integrative orientation of sustainability assessment provides is the opportunity for the Crown and Aboriginal groups to deliberate over a shared development vision.<sup>109</sup>

Including evaluative criteria, which Indigenous people would be more likely to approve in the scope of EA, and justifying government decisions in light of those criteria, could help to advance notions of shared understanding with an aim of reconciliation. However, since the Crown’s discretionary power remains operative in determining the significance and weight of the selected criteria in the process of justifying its decision, one is again left with the task of balancing competing interests and reaching compromise.<sup>110</sup> To what extent Craik’s approach would lead to greater protection for Aboriginal rights is therefore an uncertain proposition, but one deserving of serious consideration.

It is important to recognize that any approach—including Craik’s and my own—that seeks to reform the regulatory review process without a corresponding devolution of the Crown’s discretionary powers to First Nations will be resisted by many First Nations who claim jurisdiction over the impacted areas. They maintain that unless the process of consultation is directed towards a restructuring of sovereign jurisdictions wherein Aboriginal peoples exercise their own collective control over their lands and resources, peripheral attempts to effect reconciliation through EA have little chance of success.<sup>111</sup>

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109. Craik, *supra* note 14 at 678-79.

110. One should always bear in mind, that at the end of the day, any discretionary decision about project approval in the face of uncertain risk will entail an irreducibly normative judgment regarding what level of risk is acceptable. Conflicting tolerances for risk between affected Indigenous communities and government agendas, with respect to resource development, will thus be a frequent and central point of contention. See Part IV, below, for extended discussion on this point.

111. See *e.g.* Gordon Christie, “A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*” (2005) 23 Windsor YB Access Just 17; Potes, *supra* note 38 at 39-40; See also E Ria Tzimas, “To What End the Dialogue?” (2011), 54 SCLR 493 at 514-518.

Although the SCC has cautioned that Aboriginal consent may be required under conditions of established title,<sup>112</sup> it has not, as noted above, gone so far as to suggest that consent is operative at the level of *asserted* claims. Therefore, it is important to emphasize that while I recognize that the doctrine of consultation is subject to serious opposition that rejects its legitimacy, it is nevertheless what has been judicially prescribed. My intent in the latter half of the article is to work within the confines of the doctrine to examine how administrative discretion might be structured so that the integration of the duty with the NEB process may be better placed to protect the constitutionally-entrenched rights of Indigenous Canadians.<sup>113</sup>

## B. NEB ABORIGINAL CONSULTATION POLICY

Issues pertaining to Aboriginal consultation that arise under the NEB's mandate are firmly situated within the administrative framework outlined in Part I(A). Whether acting under shared jurisdiction with the Canadian Environmental Assessment (CEA) Agency<sup>114</sup> or alone as the sole regulatory authority,<sup>115</sup> the NEB will conduct its own federal EA under the *NEBA*. The NEB asserts that its

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112. See *Tsilhqot'in Nation*, *supra* note 5 at para 92. Chief Justice McLachlin writes at para 92:

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.

113. This work serves primarily as a complement, rather than an alternative to the approach advanced by Craik. They are similar to the extent that they both advocate for process constraints to be placed on the discretion of regulators; however, they differ in respect of the nature of the constraints. Craik directs his ideas for reform to the content of statutes mandating EA. My position seeks to introduce process requirements derived from the common law on the exercise of statutorily-conferred discretion.

114. *Ibid*, s 52(3). It is important to note that there is now reason to question whether regulatory overlap with the NEB process is restricted to other federal bodies, or may also include shared regulatory jurisdiction with the provinces. See *Coastal First Nations v British Columbia (Environment)*, 2016 BCSC 34, 85 BCLR (5th) 360 (the court struck down a provision in an Equivalency Agreement between the British Columbia Environmental Assessment Office and the NEB that permitted BC to abdicate its ultimate decision-making authority to determine whether to approve the Project after an environmental assessment).

115. *Ibid*, s 58(6).

EA process “fully complies” with the *CEAA*,<sup>116</sup> presumably including provisions relating specifically to Aboriginal peoples.<sup>117</sup>

Much of the NEB’s process relating to consultation is achieved through oversight of the proponent’s consultation protocol and project application. Aboriginal concerns are considered as part of the scoping phase of the Environmental and Socio-Economic Assessment (ESA), which is submitted by the proponent for review by the Board. According to the NEB Filing Manual:

Where the project may impact Aboriginal communities and affect the use of traditional territory or potential or established treaty or Aboriginal rights, applicants must identify the potentially-affected Aboriginal groups and carry out effective consultations with them to determine their views and concerns.<sup>118</sup>

The level of detail the applicant is required to provide regarding Aboriginal concerns is determined by the “nature and extent of the impacts, the nature of the rights or interests affected and the degree of concern expressed by Aboriginal groups.”<sup>119</sup> Once the proponent’s application is filed, Aboriginal groups that may be impacted by the project are able to participate in the NEB hearing and bring forward their concerns. The elements and scope of the ESA may change over the course of the proceedings to reflect concerns voiced during the hearing.<sup>120</sup> The NEB will also review the adequacy of the applicant’s proposed mitigation measures to address impacts on the asserted rights.

Some observers characterize the NEB’s hearing process as an effective means to assess project impacts on Aboriginal rights and treaty rights.<sup>121</sup> Craik calls it “the central vehicle for consultation.”<sup>122</sup> The NEB is limited, however, to the extent that it only considers matters that are within its jurisdiction and are brought forward during the course of the hearing. Matters unrelated to the project application will not be considered. This includes a legal determination regarding the existence and scope of claimed Aboriginal rights. The Board will consider the nature of the interests potentially impacted, but its process is “not tantamount to the process undertaken to determine the definitive scope of a right through a claims process or a court proceeding aimed at confirming the

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116. See National Energy Board, “FAQs on Environmental Assessments,” online: <[www.neb-one.gc.ca/bts/nws/fqs/nvsssmntfq-eng.html](http://www.neb-one.gc.ca/bts/nws/fqs/nvsssmntfq-eng.html)>.

117. *CEAA*, *supra* note 3, ss 4(1)(c), 5(1)(c), 19(3), 105(g).

118. See *NEB Filing Manual*, *supra* note 2 at 4A-21.

119. *Ibid* at 4A-22.

120. *Ibid* at 4A-20.

121. See Lambrecht, *Aboriginal Consultation*, *supra* note 14 at 113-14.

122. Craik, *supra* note 14 at 654.

existence and parameters of an asserted Aboriginal right.”<sup>123</sup> The Board will look at the claimed or established interest in the context of how it may be impacted, what measures can be employed to mitigate that impact and how any impact should be considered in light of other interests. It will then consider all of the benefits and costs associated with the project and balance Aboriginal concerns with other interests and factors before determining whether the project is in the public interest.<sup>124</sup>

The NEB has also committed to an “Enhanced Aboriginal Engagement initiative” that aims to “provide proactive contact with Aboriginal groups that may be affected by a proposed project that requires a public hearing.”<sup>125</sup> The Initiative includes a participant funding program and “Process Advisors” who provide assistance to Aboriginal participants navigating the hearing process.

### III. APPLYING *CARRIER SEKANI* TO THE NATIONAL ENERGY BOARD REVIEW PROCESS

#### A. JURISPRUDENTIAL BACKGROUND

The jurisdiction of the NEB in relation to Aboriginal rights when carrying out its mandate was first considered by the SCC in *Quebec v Canada (National Energy Board)*.<sup>126</sup> In that case, the Court declined to impose on the NEB a

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123. National Energy Board, *National Energy Board Report - Trans Mountain Expansion Project*, OH-001-2014 (May 2016) at 47.

124. *Ibid* at 48. There are compelling reasons to doubt that the NEB’s mandate to consider the “public interest” as an overriding concern is consistent with the approach taken by courts in considering issues related to section 35. See *e.g.* Robert Freedman & Sarah Hansen, “Aboriginal Rights vs The Public Interest” (Paper presented at conference held by Pacific Business and Law Institute, Vancouver, 26-27 February 2009), online: <[www.millertthomson.com/assets/files/article\\_attachments/Aboriginal\\_Rights\\_vs\\_The\\_Public\\_Interest.pdf](http://www.millertthomson.com/assets/files/article_attachments/Aboriginal_Rights_vs_The_Public_Interest.pdf)>; Graben & Sinclair, *supra* note 1 at 418-21 (discussing a “dissonance in rationality” as regards the Board’s public interest mandate and the objectives of the courts in adjudicating Aboriginal rights). While it is likely true that a public interest mandate does not align well with consideration of Aboriginal rights as required under a section 35 analysis, the Court has clearly favored a balancing approach when considering asserted rights under the *Haida* doctrine.

125. See National Energy Board, “Factsheet: Engagement of and Participation by Aboriginal Peoples - Enhanced Aboriginal Engagement,” online: <[www.neb-one.gc.ca/prtcptn/nfrmtn/brgnlpplfs-eng.html](http://www.neb-one.gc.ca/prtcptn/nfrmtn/brgnlpplfs-eng.html)>.

126. *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159, 112 DLR (4th) 129 [*Quebec* cited to SCR].

fiduciary obligation to consult Aboriginal peoples.<sup>127</sup> Despite pointed criticism,<sup>128</sup> this holding has also been applied in the context of the duty to consult and accommodate.<sup>129</sup> Courts have been hesitant to accept any formal consultative role for judicial or quasi-judicial tribunals such as the NEB, since to impose such a duty on a tribunal would be contrary to its adjudicative independence.<sup>130</sup> In other words, “the imposition of that duty on tribunals would be inconsistent with the obligations of neutrality towards the parties to proceedings,” as one party would be owed a “different level of consideration than others.”<sup>131</sup>

The federal courts have consistently found the NEB process to be a sufficient means of discharging the duty to consult,<sup>132</sup> going so far as to suggest that “it should not matter whether a problem is solved in the Board’s consultation process or the Crown’s *Haida* duty consultation process.”<sup>133</sup> These decisions are uniform in finding that Crown reliance on the Board’s process does not constitute delegation of the Crown’s duty, but they are inconsistent with respect to the Board’s mandate to engage in consultation.<sup>134</sup>

On the issue of the NEB’s mandate to evaluate the adequacy of Crown consultation, the FCA has ruled that the NEB does not have jurisdiction to determine whether the duty to consult has been fulfilled in a private application to which the Crown is not a party.<sup>135</sup> By denying leave to appeal in *Standing Buffalo*<sup>136</sup> just weeks after releasing its judgment in *Carrier Sekani*, the SCC seems to have suggested that the result in *Standing Buffalo* was consistent with the principles as delineated in *Carrier Sekani*, even though in *Carrier Sekani*, the BC government was the party seeking approval from the provincial utilities commission.

One should take care to recognize that the NEB often shares regulatory authority for assessment of a proposed pipeline. Under section 52 of the *NEBA*, the Board will only make recommendations to the Governor-in-Council (GIC), who is then authorized to direct the Board to issue a certificate of approval.<sup>137</sup> In these circumstances, a concurrent process undertaken by the CEA Agency

127. *Ibid* at 184.

128. See *e.g.* Mullan, “Fog,” *supra* note 41.

129. See examples in *supra* note 12. But see *Clyde River*, *supra* note 13.

130. See *Quebec*, *supra* note 126 at 183-84.

131. Mullan, “Fog,” *supra* note 41 at 251.

132. See *Brokenhead*, *supra* note 71; *Chippewas*, *supra* note 12; *Clyde River*, *supra* note 13.

133. *Ibid*, *Chippewas* at para 63.

134. See *e.g.* *Clyde River*, *supra* note 13 at para 65.

135. See *e.g.* *Standing Buffalo*, *supra* note 12; *Chippewas*, *supra* note 12.

136. *Ibid*, *Standing Buffalo* leave to appeal to SCC refused 33482 (2 December 2010): (2010), 413 NR 399 (note), 2010 CarswellNat 4498 (WL Can) (SCC).

137. See *NEBA*, *supra* note 3, s 54(1). See extended discussion on this point in Part IV(A), below.

may occur, in which Aboriginal consultation is conducted in accordance with the spectrum analysis in *Haida*.<sup>138</sup> This process runs parallel to NEB proceedings, but remains separate. Communication between Crown consultation coordinators and NEB panel members is prohibited. Both the CEA Agency and the NEB submit their own information with regard to consultation to the Governor-in-Council who then considers the adequacy of consultation before issuing the order.<sup>139</sup>

In other scenarios, however, the NEB operates as the sole regulatory authority and issues final decisions, for example under section 58 of the *NEBA*,<sup>140</sup> or when there is no concurrent CEA Agency consultation process under section 52. In these cases, the extent of Crown consultation outside the NEB process is not well understood, nor is there any evidence that other consultation occurs outside of the proponent's engagement with the affected First Nations. In this context, the Crown appears to rely solely on the NEB process to discharge its constitutional obligation.

Regardless of the regulatory context, the NEB's process has been the subject of a number of recent applications for judicial review contesting the adequacy of consultation.<sup>141</sup> The main issues in these applications are the extent to which the Crown is able to rely on the NEB's regulatory process to discharge the duty to consult, and the NEB's jurisdiction to evaluate Crown Consultation, engage in it, or both. What is clear from this litigation is that courts are commonly tasked with reviewing the exercise of administrative discretion and expertise that bears on Aboriginal rights. By adopting a deferential standard of review of the NEB's factual findings, as prescribed by *Haida Nation* and *Dunsmuir*, the courts typically accord significant weight to the NEB's determination of the degree of consideration due to the asserted rights of Aboriginal claimants. The extent to which the NEB's process and reasons provide a sufficient basis for curial deference in these cases is, therefore, critically important to ensure just outcomes for Aboriginal claimants.

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138. This was the framework applied for regulatory review of the Northern Gateway project. See National Energy Board & Canadian Environmental Assessment Agency, *Considerations: Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, vol 2 (Calgary: National Energy Board Publication Office, 2013).

139. See *e.g.* the operative legislative scheme in *Gitxaala Nation*, *supra* note 96 at paras 119-27.

140. See *NEBA*, *supra* note 3, s 58.

141. See *e.g.* *Clyde River*, *supra* note 13; *Chippewas*, *supra* note 12. The NEB also maintains an active web-inventory of ongoing litigation. See National Energy Board, "Court Challenges to National Energy Board or Governor in Council Decisions," online: <[www.neb-one.gc.ca/pplctnflng/crt/index-eng.html](http://www.neb-one.gc.ca/pplctnflng/crt/index-eng.html)>.

The Supreme Court has recently reserved its judgement in two appeals where First Nations have challenged an NEB decision on the basis that the Crown's duty to consult was not adequately fulfilled.<sup>142</sup> In these cases the SCC was asked for the first time to apply its ruling in *Carrier Sekani* to the NEB's mandate. The two appeals share a common thread in that the NEB was the final authorizing body for project approval and the only agency to provide an EA report. Aboriginal consultation was conducted solely through the NEB process and its screening of the applicants' engagement with the affected First Nation communities. The appeals raise several outstanding questions, but most of them can be reduced to an inquiry into the NEB's jurisdiction to evaluate the Crown's duty to consult, to fulfill it, or both.

#### B. HAMLET OF CLYDE RIVER, ET AL V PETROLEUM GEO-SERVICES INC (PGS), ET AL

In *Clyde River*, an Inuit hamlet located on the northeast coast of Baffin Island contested a Geophysical Operations Authorization (GOA) issued by the NEB for a marine seismic survey under the terms of the *Canada Oil and Gas Operations Act*.<sup>143</sup> This *Act* confers jurisdiction on the NEB to authorize the activity and to hear and otherwise determine all matters under the *Act* "whether of law or of fact." As the responsible authority under the version of the *CEAA* then in force,<sup>144</sup> the NEB was required to complete an EA and either permit the project to proceed or decline to exercise its authority to permit the project. Under this scheme, the Board was further required to consider any effects the project might have on "the current use of lands and resources for traditional purposes by aboriginal persons."<sup>145</sup> Additionally, Ministerial approval or waiver of a statutorily required benefits plan in respect of the project was also necessary prior to NEB authorization.<sup>146</sup>

The Nunavut Land Claims Agreement (NLCA) recognizes an Inuit treaty right to continue hunting, fishing, and harvesting in the Nunavut settlement area, and to participate in decision making concerning wildlife harvesting.<sup>147</sup> The Clyde River community's main concern was that the seismic testing would

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142. *Clyde River*, SCC, *supra* note 11; *Chippewas*, SCC, *supra* note 10.

143. The GOA is issued under the terms of the *Canada Oil and Gas Operations Act*, RSC 1985, c O-7, s5(1)(b) [*COGOA*].

144. See *CEAA, 1992*, *supra* note 106, ss 5(1)(d), 37(1).

145. *Ibid*, *CEAA*, ss 2(1)(b)(iii).

146. *COGOA*, *supra* note 143, s 5.2(2).

147. See *Nunavut Land Claim Agreement Act*, SC 1993, c 29.

harm the marine mammals that live in Baffin Bay and the Davis Strait, and thus, directly affect the food sources and livelihood of the Inuit.

In issuing the authorization, the NEB concluded that concerns regarding the project's potential environmental effects on traditional resource use were addressed by the mitigation measures developed by the proponent and set out in the EA report.<sup>148</sup> The principal arguments advanced by the applicant Inuit community in respect of inadequate consultation stem from alleged procedural deficiencies in the NEB's review process. The community pointed to the Crown's rejection of a request for a Strategic Environmental Assessment (SEA) and argued that community meetings with the proponent were not an adequate substitute for formal consultation.<sup>149</sup> The main issues before the FCA were whether the Crown's duty to consult with the Inuit community in respect of the project was adequately fulfilled and whether the NEB failed to consider Aboriginal and treaty rights.

Justice Dawson, writing for the FCA, applied *Carrier Sekani* and found that the NEB had a mandate to engage in consultation "such that the Crown may rely on that process to meet, at least in part, its duty to consult."<sup>150</sup> This finding appears to follow primarily from a legislative duty to consider environmental effects that may impact Aboriginal rights and from the principle that decisions must be made in accordance with section 35 of the *Constitution*.<sup>151</sup> Justice Dawson also held that the Board's process had afforded meaningful consultation and was sufficient to discharge the Crown's duty, and that this finding was consistent with the line of SCC rulings that have affirmed the duty to consult may be integrated into robust environmental assessment and regulatory review processes.<sup>152</sup> She also concluded, however, that the Crown's reliance on the EA and RR process did not entail the delegation of the Crown's duty.<sup>153</sup> The EA and the conditions imposed on the GOA were found to provide reasonable accommodation of Aboriginal concerns.<sup>154</sup> In addressing the specific procedural concerns of the applicants, the court found that since a SEA was outside the NEB's mandate, it was not unreasonable to understand why one was not completed. The FCA held that the nature and scope of participation afforded by the Board's process "was sufficient to uphold the honour of the Crown."<sup>155</sup>

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148. See *Clyde River*, *supra* note 13 at para 6.

149. *Ibid* at para 75.

150. *Ibid* at para 65.

151. *Ibid* at paras 51-64.

152. *Ibid* at para 65-69.

153. *Ibid* at para 46.

154. *Ibid* at para 100.

155. *Ibid* at para 92.



It is significant that the NEB did not provide reasons for its authorization aside from those inferred from its EA report, which did not reference Inuit rights, treaty rights, or the duty to consult. In applying a standard of reasonableness to determine the adequacy of consultation, Justice Dawson cited *Newfoundland and Labrador Nurses' Union*<sup>156</sup> and concluded: “When the GOA is read in the light of the environmental assessment, the terms and conditions imposed upon the GOA and the entirety of the Board’s record, this Court is well able to understand why the GOA was issued.”<sup>157</sup> Presumably, the NEB’s finding that the proponent’s mitigation measures and procedures meant to protect the environment were sufficient to negate the risk that the project would cause “significant adverse environmental effects” was adequate, in Justice Dawson’s view, to infer that explicit recognition of the Aboriginal rights at stake was not required.

The issues argued at the SCC included whether the NEB had the implied authority to engage in consultation under its mandate as a quasi-judicial body, how this implied power, if it exists, might be distinct from being delegated the Crown’s duty, and whether enhanced process requirements may accompany a mandate to consult. Also at issue was whether the Board’s regulatory process was sufficient—given the specific legal and factual context—to fulfill the Crown’s constitutional obligation. Of particular importance to the latter point will be an appraisal of the procedural entitlements afforded to the community by the NEB process—and the limited extent of Crown involvement—in light of the Inuit’s established treaty rights. However, it should also include a discussion regarding the degree to which a tribunal’s EA report can serve as the sole justification for project authorization without explicit acknowledgement by an independent statutory tribunal of the *Haida* requirements. Or in other words, whether the Board was mandated to assess the existence, scope, and adequacy of Crown consultation prior to authorizing the project given that it retained final decision-making power under the legislative scheme.

In my view, the issues in *Clyde River* can be framed by a more general inquiry into whether the constitutional nature of the duty places any formal constraints on the “substance”<sup>158</sup> of a regulatory process and the subsequent decision when the Crown relies on that process and decision to fulfill its duty to consult, and when the courts review the process and decision on a deferential basis. I examine this issue in Part IV.

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156. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708.

157. *Clyde River*, *supra* note 13 at para 103.

158. See *Little Salmon*, *supra* note 26 at para 39.

### C. CHIPPEWAS OF THE THAMES FIRST NATION V ENBRIDGE PIPELINES INC

The second case on the SCC docket was *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, in which the appellant First Nation applied for judicial review of an NEB decision to approve an application by Enbridge for the Line 9B Reversal and Capacity Expansions. Part of the project will be carried out on the traditional territory of the Chippewas of the Thames First Nation (COTTFN). The COTTFN “have Aboriginal and treaty rights in the Thames watershed, and assert an undetermined claim of title over the bed of the Thames River and its resources.”<sup>159</sup> They argue that the proposed changes to Line 9, including the rate of flow and the new composition of the oil, would increase the severity of harm associated with any spill within their traditional territory. The COTTFN claimed that the NEB had no jurisdiction to issue exemptions and authorizations to Enbridge prior to the Crown fulfilling its duty to consult.<sup>160</sup>

In *Chippewas*, the NEB was acting as the final decision maker under section 58 of the *NEBA*. The NEB provided the ESA report, screened the proponent’s engagement with affected First Nations, and held hearings at which Aboriginal concerns were presented. It is clear from the FCA’s judgment that the Crown did not engage in any form of consultation outside the Board’s regulatory process.<sup>161</sup> The two main issues in the case are (1) whether the NEB had jurisdiction to undertake the fulfillment of the *Haida* duty on behalf of the Crown, and (2) whether the NEB was required to determine whether a duty existed and whether the Crown had discharged that duty.

On the latter issue, Justice Ryer, writing for the majority of the FCA, affirmed his previous ruling in *Standing Buffalo* and concluded that despite its jurisdiction to determine questions of law arising in proceedings before it, the NEB had no authority, on an application to which the Crown was not a party, to determine whether the Crown had met its constitutional duty to consult.<sup>162</sup> Justice Ryer distinguished *Carrier Sekani* on the basis that in that case, the Crown was a participant to proceedings and the BCUC was able to make the factual

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159. *Chippewas*, *supra* note 12 at para 86.

160. *Ibid* at para 2.

161. *Ibid* at para 67 (in a response letter drafted by the Minister of Natural Resources, the Line 9 NEB process is identified as one that provides a “comprehensive” venue for all affected parties to express their project-related concerns and interests, and that “[t]he Government relies on the NEB process to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate.”)

162. *Ibid* at paras 35-49.

findings required to determine the existence and adequacy of consultation. Moreover, Justice Ryer indicated that if the NEB were to conclude that the Crown did not fulfill its *Haida* duty, its only recourse would be to deny the proponent's application. And this, according to the majority, would be unfair to the proponent.<sup>163</sup>

In dissent, Justice Rennie distinguished *Standing Buffalo* on the basis that in *Chippewas*, the NEB was acting as a final decision maker for the project and GIC approval was not required. He argued that in the context of a section 58 decision, the majority's reasoning would contradict existing jurisprudence, which holds that "[t]he duty to consult must be discharged prior to carrying out the action that could adversely affect the right."<sup>164</sup> In his view, the duty should have been discharged before the issuance of the order, and this could have been achieved if the NEB were to ask itself the questions required by *Carrier Sekani*, *i.e.*, whether a duty to consult existed, and whether or not the Crown had discharged that duty.<sup>165</sup> For the Aboriginal claimant, after-the-fact judicial review would come too late and, if successful, result in an "empty remedy."<sup>166</sup>

With respect to the issue of whether the Crown's duty had been delegated to the Board itself, the majority answered in the negative:

While it is within the power of Parliament to require the Board to discharge the Crown's *Haida* duty, mandating the Board to perform such additional duties would require it to function outside its core areas of technical expertise. Moreover, it seems to me that requiring the Board to consult with First Nations on behalf of the Crown would make it very difficult, if not impossible, for the Board to then adjudicate – in its capacity as a quasi-judicial tribunal and a court of record – upon the issue of the adequacy of those consultations. Perhaps these observations explain why Parliament has not taken legislative steps to expand the jurisdiction of the Board by adding such additional duties.<sup>167</sup>

Although Justice Ryer did not delineate clearly what he meant by "additional duties," he appeared to base his conclusion that the NEB ought not to assume the Crown's duty on the Board's apparent lack of expertise pertaining to certain (unspecified) issues arising from consultation. Furthermore, he suggests that if it were to assume this duty, the NEB would not then be able to act as an impartial

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163. *Ibid* at paras 46, 113.

164. *Tsilhqot'in Nation*, *supra* note 5 at para 78.

165. See *Chippewas*, *supra* note 12 at para 125.

166. *Ibid* at para 123.

167. *Ibid* at para 66. Justice Rennie did not dissent on this point, observing: "[i]t is a point of agreement between myself and the majority, and indeed between the parties, that the Board is incapable of actually fulfilling the duty to consult" (*ibid* at para 120).

quasi-judicial body to adjudicate the adequacy of consultation. Presumably, in a case where the NEB's process is relied on exclusively by the Crown to discharge its duty, the NEB would be asked, in effect, to adjudicate the adequacy of its own process. This would call into question its capacity for impartial adjudication.

The issues argued on appeal at the SCC were similar to those in *Clyde River* in respect of the Board's jurisdiction to adjudicate the adequacy of consultation when acting as final decision maker, and the extent to which the Crown may rely exclusively on the regulatory process of an independent tribunal to fulfill its duty to consult. Yet, there are significant differences between the two cases. First, it is not in clear in *Chippewas* that a duty to consult was triggered, since the Board concluded that any impacts on the appellant's rights would be minimal and appropriately mitigated.<sup>168</sup> There was also uncertainty as to what the contemplated Crown conduct actually was, and whether it was sufficient to trigger to the duty.<sup>169</sup>

In both cases, the FCA found that the Crown had not delegated its duty to the NEB, and that the Crown may rely on the NEB process to discharge its duty. The decisions vary, however, in terms of their interpretation of the NEB's mandate to engage in consultation. The SCC will need to address this inconsistency when it interprets the NEB's mandate under each respective scheme.

#### IV. STATUTORY CONTEXT AND NEB AUTHORITY ANALYSIS

Recall that according to *Carrier Sekani*, a legislature may delegate to a tribunal one of four roles in consultation,<sup>170</sup> and the relevant inquiry is one of legislative intent. In this Part, I advance two arguments related to these delegated powers. The first relates to the power to assess the adequacy of consultation and to remedy inadequate consultation. If a tribunal has been delegated this power, it must exercise it. I argue that the NEB's authority to assess consultation adequacy is determined by the statutory context under which it is exercising its delegated power. In my view, the NEB does not retain a blanket power under its enabling legislation to evaluate the adequacy Crown consultation. Rather, it has

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168. Canada, National Energy Board, *Reasons for Decision in the Matter of Enbridge Pipelines Inc.*, OH-002-2013 (Calgary: National Energy Board Publications Office, March 2014) at 97-99 [NEB, *Enbridge Reasons for Decision*].

169. Justice Ryer refers to enactment of the *NEBA* as conduct triggering the duty. See *Chippewas*, *supra* note 12 at para 69. The applicants argue it was "the contemplated exercise by the Board of its delegated authority" to issue final approval under section 58 of the *NEBA* that triggered the duty. See *ibid* (Factum of the Appellant at para 54).

170. See *supra* Part I(A)(4).

this power only where it has statutory authority to issue a final decision over project approval.<sup>171</sup>

The second argument I advance is that the NEB's power to engage in consultation ought to be implied whenever it is obligated, under the operative legislative scheme, to be the exclusive means by which Aboriginal interests are taken into account. This conclusion follows from the fact the NEB's EA report, which purports to evaluate the sufficiency of conditions imposed on project proponents to protect Aboriginal interests, is the primary justification for approval of a project that may adversely impact Aboriginal rights. Where no other process is undertaken by the Crown to assess the effects of a given project on Aboriginal rights, it is imperative that the process upon which the Crown relies to ensure that it has discharged its duty to consult complies with the constitutional nature of the obligation. This need not imply delegation of the duty to the NEB, but it requires the application of certain formal constraints to the NEB's regulatory process. In particular, it requires that the NEB's process and reasons for decision explicitly include an assessment of the strength of the claim that represents the basis of the assertion of the Aboriginal right.

#### A. JURISDICTION TO ASSESS CONSULTATION ADEQUACY

In an extensive empirical study of the NEB regulatory process and the duty to consult, Sari Graben and Abbey Sinclair argue that the approach adopted in *Standing Buffalo* should be reconsidered and tribunals be permitted to undertake a *Haida* analysis.<sup>172</sup> The authors premise their argument on evidence that the NEB does not evaluate the sufficiency of consultation against any legal standard, and thereby "effectively does what the Crown may not: it plays a role in authorizing conduct that infringes rights."<sup>173</sup> They suggest, that "*if* tribunals' findings are used to draw conclusions about the relative importance or unimportance of Aboriginal rights in any given case (which they are), then, ... those findings must be consistent with the constitutional standards upon which Aboriginal peoples rely."<sup>174</sup>

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171. Others have also argued the NEB has jurisdiction to evaluate consultation adequacy if delegated final decision making authority. See Promislow, *supra* note 7; Bankes, *supra* note 41; Justice Rennie's dissent in *Chippewas*, *supra* note 12 at para 111-12. See also discussion in Part III(C), above.

172. See Graben & Sinclair, *supra* note 1.

173. *Ibid* at 385 [emphasis original].

174. *Ibid* at 385.

I agree with the authors' statement that tribunal findings must be aligned with constitutional standards, and I propose a novel argument to that effect in the following section. Graben and Sinclair fail, however, to differentiate between circumstances in which the NEB has decision-making powers and those in which it is charged with making recommendations. Under certain provisions of the *NEBA*,<sup>175</sup> the NEB has final approval authority over projects that may adversely affect Aboriginal rights. In this context, the NEB may have implied power to undertake a *Haida* analysis and to evaluate whether Crown consultation has been adequate, as the authors argue. However, the role the NEB plays in authorizing conduct under section 52 of the *NEBA* does not entail a delegated power of decision. Rather, in these cases the NEB process is only a means by which the Crown can be informed with respect to a project's potential effects on Aboriginal rights.

It is crucial to recognize that the Harper government's 2012 Budget legislation changed the NEB's role when issuing Certificates of Public Convenience and Necessity for pipelines pursuant to section 52 of the *NEBA* from one of issuing a decision to that of making a recommendation.<sup>176</sup> Prior to the 2012 amendments, section 52 required the NEB to obtain GIC approval, but the GIC's authority was restricted to approving or rejecting a final decision that had already been made by the Board. The GIC had no authority to issue any direction to the NEB with respect to the issuance or denial of a certificate.<sup>177</sup> Under the amended legislation, it is now possible that a recommendation made by the Board to deny an application could be rejected by the GIC, which could order the NEB to

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175. See *e.g. supra* note 3, s 58.

176. The current *NEBA*, *supra* note 3, s 52(1) reads:

If the Board is of the opinion that an application for a certificate in respect of a pipeline is complete, it shall prepare and submit to the Minister, and make public, a report setting out

- (a) its recommendation as to whether or not the certificate should be issued for all or any portion of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that recommendation; and
- (b) regardless of the recommendation that the Board makes, all the terms and conditions that it considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate, including terms or conditions relating to when the certificate or portions or provisions of it are to come into force.

177. See Rowland J Harrison QC "The Elusive Goal of Regulatory Independence and the National Energy Board: Is Regulatory Independence Achievable? What does Regulatory 'Independence' Mean? Should We Pursue It?" (2013) 50:4 *Alta L Rev* 757 at 763.

issue a certificate contrary to its recommendation.<sup>178</sup> It is also possible under the amended *NEBA* for the GIC to “refer the Board’s recommendation, or any of the terms or conditions, set out in the report, back to the Board for reconsideration.”<sup>179</sup> Therefore, the GIC is able to influence the terms and conditions contained in the Board’s initial report through the reconsideration provision.

These amendments are a clear indication from the legislature that the NEB’s decision-making authority with respect to the issuance of certificates of approval under section 52 has been effectively removed and transferred to Cabinet. In the recent case *Gitxaala Nation*, the FCA quashed an order from the NEB that approved the Northern Gateway Project on the basis that Canada had not fulfilled its duty to consult. In so holding the FCA stated that the NEB, when acting pursuant to section 52, “does not really decide anything, except in a formal sense.”<sup>180</sup> As one informed commentator has written, the fact that the NEB now makes recommendations rather than decisions with respect to the issuance of pipeline certificates has resulted in “a complete negation of the Board’s independence” from the political level of government.<sup>181</sup>

Through its EA report, the NEB still retains a critical informational and advisory function in respect of whether adequate consultation is taking place within the specific procedures it oversees.<sup>182</sup> Nevertheless, for the purposes of review, the only meaningful decision maker under section 52 is the GIC. Although the recent *Gitxaala Nation* case involved a decision made by a JRP, the FCA’s analysis is applicable to the NEB’s own process under a section 52 order, as the JRP was acting pursuant to the same provisions of the *NEBA* and the *CEAA* that would apply to the NEB if it were the only responsible authority under an application for project approval.<sup>183</sup> In observing that the GIC retained exclusive decision-making authority over consultation matters, the court stated:

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178. See *NEBA*, *supra* note 3, s 54(1).

179. *Ibid*, s 53(9).

180. *Gitxaala Nation*, *supra* note 96 at para 126.

181. Harrison, *supra* note 177 at 776.

182. For example, through evidence presented in a hearing, and its oversight of the proponent’s consultation.

183. Although the FCA analysis is relevant for present purposes, some commentators have argued the court actually applied the wrong *CEAA* provisions in reviewing the legislative scheme governing the JRP process. See Martin Olszynski, “Northern Gateway: Federal Court of Appeal Applies Wrong *CEAA* Provisions and Unwittingly Affirms Regressiveness of 2012 Budget Bills” (5 July 2016), online: <[ablawg.ca/2016/07/05/northern-gateway-federal-court-of-appeal-wrong-ceaa-provisions](http://ablawg.ca/2016/07/05/northern-gateway-federal-court-of-appeal-wrong-ceaa-provisions)>.

The Governor in Council's ability to consider whether Canada has fulfilled its duty to consult and to impose conditions is a power necessary for the Governor in Council to exercise its power under sections 53 and 54 of the *National Energy Board Act*. Similarly, the activities of the coordinating Minister and other Ministers concerning the duty to consult are necessary matters that they can exercise in accordance with subsection 31(2) of the *Interpretation Act*.

We are fortified in this conclusion by the relationship between the Crown and the Governor in Council. The duty to consult is imposed upon the Crown. ... the Governor in Council is frequently the initiator of the Crown's exercise of executive authority. Given the Governor in Council's relationship with the Crown, it stands to reason that that Parliament gave the Governor in Council the necessary power in section 54 of the *National Energy Board Act* to consider whether the Crown has fulfilled its duty to consult and, if necessary, to impose conditions.

Thus, we are satisfied that under this legislative scheme the Governor in Council, when considering a project under the *National Energy Board Act*, must consider whether Canada has fulfilled its duty to consult. Further, in order to accommodate Aboriginal concerns as part of its duty to consult, the Governor in Council must necessarily have the power to impose conditions on any certificate it directs the National Energy Board to issue [*sic*].<sup>184</sup>

The GIC's powers under sections 53 and 54 of the *NEBA*, and the attenuated power of the NEB under section 52, are sufficient, in my view, to support the inference that the legislature did not intend the NEB to make any legal determinations concerning project approval, including whether the Crown has discharged its duty to consult in the issuance of Certificates of Public Convenience and Necessity for pipelines.

As noted in *Clyde River* and *Chippewas*, there are scenarios where the NEB is required to complete an EA that accounts for Aboriginal concerns and where it retains exclusive power to issue final orders exempting certain projects from requiring other permits and approvals under the *NEBA*.<sup>185</sup> In this context, if the project under review triggers the Crown's duty to consult, I argue that the NEB also has the implied authority to undertake a *Haida* analysis and to determine whether Crown consultation has been adequate.

Justice Rennie's dissent in *Chippewas* appears sound insofar as he emphasized that the NEB was the final decision maker. While the SCC in *Carrier Sekani* was silent on the issue of whether a tribunal has jurisdiction to assess consultation adequacy only if the Crown is a party to the proceeding, the NEB should be presumed to have jurisdiction over constitutional questions where it is the

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184. *Gitxaala Nation*, *supra* note 96 at paras 166-68.

185. See *e.g.* *NEBA*, *supra* note 3, s 58.



final authorizing body and has authority to decide questions of law.<sup>186</sup> Unlike the amended section 52, when the Board is acting pursuant to section 58, the legislature has not provided any indication that it intends to limit the Board's jurisdiction over constitutional questions, and therefore, to consider the adequacy of consultation, regardless of Crown involvement.<sup>187</sup>

The real point at issue between the majority and dissent in *Chippewas* appears to be the balance struck between the procedural fairness requirements owed to proponents in a regulatory process that adheres to a consistent and traditional set of rules, and the procedures that are required to satisfy a constitutional duty and uphold the honour of the Crown. According to Justice Ryer, if the Crown does not participate in an application, it would be unfair to the proponent and would not “promote reconciliation” for the tribunal to delay a decision on the application so as to force the Crown to become a participant.<sup>188</sup> In stark contrast, Justice Rennie contends that any “inconvenience to the proponent pales when measured against the principle[s]” that give rise to the duty.<sup>189</sup>

It will be interesting to see how the SCC resolves this issue, but since there is no express intent to deny the NEB the authority to address questions of law under the relevant provision, Justice Ryer's concerns should not be sufficient to rebut the general presumption of jurisdiction over constitutional questions. The Board itself maintains that when making decisions under the *NEBA*, it exercises its authority “in a manner consistent with all applicable laws, including Section 35 of the *Constitution Act*.”<sup>190</sup> The Board has, for example, ruled that it has authority to decide constitutional questions relating to the division of powers.<sup>191</sup> It is also worth noting that the revised guidelines for the Ontario Energy Board

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186. See *Carrier Sekani*, *supra* note 4 at para 72. See also *NEBA*, *ibid* s 12(2), which grants the Board “full jurisdiction to hear and determine all matters, whether of law or of fact.” During the course of oral argument in the recent appeals, *supra* note 142, Chief Justice McLachlin inquired as to whether s 12 was sufficient to determine the Board's jurisdiction over the Crown's duty to consult.

187. See *Chippewas*, *supra* note 12 at para 105. Justice Rennie remarked, “[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet.” See also Promislow, *supra* note 7.

188. *Chippewas*, *ibid* at paras 46, 113.

189. *Ibid* at para 114.

190. See *ibid* (Factum of the Respondent at para 49).

191. See National Energy Board, TransMountain Expansion Project, OH-001-2013, Ruling No 40 (23 October 2014), online: <<http://docs.neb-one.gc.ca>> (the NEB found that bylaws enacted by the City of Burnaby were inoperative and inapplicable to the extent that they impaired TransMountain from exercising its powers under section 73(a) of the *NEBA*. Applying the doctrine of federal paramountcy, the bylaws were rendered inoperative in relation to TransMountain's necessary work).

(OEB) require the OEB to assess the adequacy of the Crown's consultation efforts as part of the leave to construct hearing process.<sup>192</sup> It is not clear why the NEB would not be under a similar obligation if acting as the final decision maker over project approval.

#### B. NEB MANDATE TO ENGAGE IN CONSULTATION

In my view Justice Dawson's finding in *Clyde River* that the NEB had a mandate to engage in consultation is essentially correct. This mandate can be inferred from its legislative obligation to take account of Aboriginal rights and claims. Although the enabling legislation does not confer this power to engage in consultations expressly on the Board, *Carrier Sekani* confirms that the intent to grant such authority may be implied.<sup>193</sup> The NEB's remedial powers support such an implication. When acting as the final authorizing body, the NEB may impose whatever conditions it deems necessary to effect reasonable compromise, including delaying or denying project authorization if necessary. When only issuing recommendations, the NEB may lack authority to issue a particular remedy, but it has delegated powers to make findings regarding appropriate measures to be imposed on applicants in order to avoid or mitigate potential adverse impacts on Aboriginal rights. These powers play a critical role in informing the Crown in respect of what remedial measures may be appropriate to fulfill its duty.

Whether engaging in consultation constitutes formal delegation of the Crown's duty is a question the SCC needs to resolve and will likely require the Court to revisit its previous ruling in *Quebec*, which held that the Crown's fiduciary duty could not be delegated to the NEB.<sup>194</sup> It is important to note that the SCC's ruling in *Quebec* predates *Haida Nation* by approximately ten years. The emergence of a common law duty whose very purpose is to provide proactive protection for unproven or asserted Aboriginal rights claims in advance of decisions that may adversely affect them, may require the Court to question its previous ruling.

One particular area of uncertainty that was evident in oral argument for the appeals at the SCC, was whether the NEB, for the purposes of consultation, can be considered the Crown or the Crown's agent. Although the NEB, in its role as an

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192. Ontario, Ontario Energy Board, "Revisions of the OEB Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario," (11 August 2016), online: <[www.ontarioenergyboard.ca/oeb/\\_Documents/Regulatory/OEBltr\\_Guidelines\\_Duty\\_to\\_Consult\\_20160811.pdf](http://www.ontarioenergyboard.ca/oeb/_Documents/Regulatory/OEBltr_Guidelines_Duty_to_Consult_20160811.pdf)>.

193. See *Carrier Sekani*, *supra* note 4 at para 60.

194. See *Quebec*, *supra* note 126 at 184.

independent quasi-judicial body, may not technically be considered an “agent of the Crown,”<sup>195</sup> it is nonetheless a creature of statute charged with implementing a government program. The SCC has ruled that a government may not establish a statutory regime that allows it to circumvent constitutional scrutiny,<sup>196</sup> although other courts have not found this line of argument convincing. For example, in *Neskonlith Indian Band*,<sup>197</sup> the British Columbia Court of Appeal held that the Crown’s duty to consult could not be delegated to a municipal council when issuing a development permit. Writing for the court, Justice Newbury observed that “local governments lack the authority to engage in the nuanced and complex constitutional process involving ‘facts, law, policy and compromise’” that consultation implies.<sup>198</sup> She also referred to the unreasonable delay in the daily activities of municipal council that would result if it were required to undertake strength of claim assessments.<sup>199</sup> It is significant to note the difference in context, however, between a municipal government being delegated a duty to consult First Nations in the day-to-day operations of council, and a statutory body being granted an explicit legislative mandate to take into account Aboriginal concerns as part of its regulatory process for large scale resource development. This difference may be one reason to question the applicability of the *Neskonlith Indian Band* ruling to the NEB.

In any event, whether or not there is some recognizable shift or transfer in legal responsibility is, in my view, of secondary importance to upholding the honour of the Crown and ensuring fulfillment of the duty in the process of regulatory review. The honour of the Crown dictates that some assessment of the strength of the asserted right must be performed prior to an action that could adversely affect the right in order for the Crown to fully discharge its constitutional obligation.<sup>200</sup> It would, therefore, be inconsistent with the honour of the Crown for the legislature to establish a regime that allowed the Crown to misinterpret the level of consultation required.

195. See discussion in Morris Popowich, “The National Energy Board as Intermediary Between the Crown, Aboriginal Peoples, and Industry” (2007) 44 *Alta Lev* 837 at 840.

196. See *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 at para 40 (a case involving consideration of section 7 *Charter* rights); *Carrier Sekani*, *supra* note 4 at para 62.

197. *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379, 37 BCLR (5th) 49 [*Neskonlith Indian Band*].

198. *Ibid* at para 68.

199. *Ibid* at para 72. Justice Newbury wrote: “Daily life would be seriously bogged down if consultation – including the required ‘strength of claim’ assessment – became necessary whenever a right or interest of a First Nation “might be” affected.”

200. See *Haida Nation*, *supra* note 4 at para 68.

Should engaging in consultations on which the Crown relies, without being delegated the Crown's duty to consult, require the NEB to adopt constraints on its existing procedure? I argue that if the NEB's EA report serves as the primary means by which Aboriginal rights are given due consideration in a decision for project approval, then the Board ought to make its findings in accordance with the strength of the asserted Aboriginal claims. The more subtle but important point is that a strength-of-claim assessment should be reconceived as not only a prescribed analysis that precedes and determines the depth of consultation, but also as a requirement that is further integrated into the EA process itself.

Recall from Part III above that the only question the NEB will ask itself about asserted rights is whether they are credibly asserted.<sup>201</sup> The Board will not ask itself whether the asserted rights exist at law. Lambrecht argues that since the tribunal's purpose is to protect Aboriginal and treaty rights as part of planning and controlling for project impacts, once tribunals have received evidence of the asserted rights, they are to assume that some or all of the asserted rights exist in order to assess potential impacts and the adequacy of mitigation measures.<sup>202</sup> This point has led some to conclude that "the strength of claim will be assumed, rather than assessed at this stage of consultation."<sup>203</sup> While the existence of the right may be presumed, the degree of consideration afforded the credibly asserted right should vary according to the NEB's assessment of whether the claim to the right was a "weakly" or "strongly" asserted claim.<sup>204</sup> In effect, the Board is purported to undertake a credibility assessment relating to Aboriginal claims.

The degree of consideration the Board affords the credibly asserted right should translate into the imposition of a proportionate level of mitigation requirements on the project applicant if a probable adverse impact on the right exists.<sup>205</sup> A more credibly asserted right should warrant a higher degree of consideration and consultation than one less credibly asserted. This determination resembles the strength-of-claim assessment undertaken as part of the spectrum analysis,

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201. This is a very low threshold. See *Carrier Sekani*, *supra* note 4 at para 40.

202. See Lambrecht, *Aboriginal Consultation*, *supra* note 14 at 120-21. See also Canadian Environmental Assessment Agency, "Aboriginal Consultation and Environmental Assessment Handout," (November 2014), online: <[www.ceaa.gc.ca/050/documents/p80054/100180E.pdf](http://www.ceaa.gc.ca/050/documents/p80054/100180E.pdf)> (handout developed in relation to Roberts Bank Terminal 2 Project).

203. Craik, *supra* note 14 at 659.

204. *Haida Nation*, *supra* note 4 at paras 43-44.

205. It is also reasonable to suggest in light of the SCC's language in *Tsilquot'in Nation*, that if the Aboriginal right at stake were one of title, and that right was "strongly" asserted, (*i.e.*, very credible), then the Board ought to consider consent as a condition for approval. See *Tsilquot'in Nation*, *supra* note 5 at para 92.

yet the NEB does not consider itself obliged to undertake a *Haida* analysis to determine the scope of consultation or to evaluate whether the proponent's engagement has met that standard.

In my view, the NEB appears to be engaging in somewhat of an interpretive sleight of hand with respect to its EA mandate. Although one can appreciate that the Board's mandate does not extend to a final legal determination of the scope of the claimed right, one wonders how it is possible to evade a judgment concerning the parameters of an asserted right, given that the Board is required to evaluate the sufficiency of the proposed mitigation of impact on that right. As tempting as it may be to believe that the Board's expert reasoning can make risk determinations based solely on "the science" that would trigger the taking of precautions sufficient to protect Aboriginal rights, the logical structure of risk determinations necessitates the inclusion of non-scientific, evaluative choices. As professor Vern Walker has explained, "[I]nherent in the evidentiary warrant for the finding [of risk] are scientific uncertainties, which require decisions about acceptability that cannot be 'purely scientific'."<sup>206</sup> The essence of the claims made by the appellants in both *Clyde River* and *Chippewas* was that the uncertainty linked to the scientific evidence (or lack thereof) meant that the risk the projects presented to the claimants' rights was unacceptable. The NEB, in each case, took

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206. See "The Myth of Science as a Neutral Arbiter for Triggering Precautions" (2003) 26 BC Int'l & Comp L Rev 197 at 198. See also David Lawrence, "Impact Significance Determination: Back to Basics" (2007) 27:8 Envtl Impact Assess Rev 755 (explaining the subjective, normative and value-dependent properties of significance determinations in EA); Heather Douglas, "Inductive Risk and Values in Science" (2000) 67 Phil of Sci 559 (noting that if decisions about whether to accept or reject hypotheses can have implications for practical action, then those decisions about acceptance should depend in part on non-epistemic value judgments about the cost of error); Elizabeth Fisher, Pasky Pascual & Wendy Wagner, "Understanding Environmental Models in their Legal and Regulatory Context" (2010) 22:2 J Envtl L 251 (noting that while environmental models govern much of what is understood as legitimate regulatory action, they are contingent on numerous policy-relevant assumptions and framing decisions); Brian H MacGillivray, "Heuristics Structure and Pervade Formal Risk Assessment" (2014) 34:4 Risk Analysis 771 (observing that the methods and conclusions drawn from risk assessment are highly sensitive to the choices of individual analysts).

the opposite view.<sup>207</sup> But judgments about evidentiary sufficiency are, in both law and science, subjective, value-laden decisions.<sup>208</sup> The difference between the claimants' and the NEB's positions does not reflect a disagreement over an objective set of facts, but rather, an expression of conflicting tolerances for risk. I submit that the practical consequence of this for an EA that takes into account Aboriginal concerns, where a non-trivial degree of scientific uncertainty is typically the rule and not the exception, is that a claimant's risk tolerance should be afforded more or less weight in the Board's decision-making process depending on the strength of the claim and the nature of the right in question, and that this factor should be communicated in a meaningful and transparent way through the NEB's reasons. Recall that meaningful consultation, as defined by Newman, requires discussion of the uncertainty of the scope of the claimed rights in advance of a decision that may adversely affect them. Arguably, by determining the sufficiency of imposed conditions and mitigation requirements without reference

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207. As Graben & Sinclair observe, the Board's equating of the absence or mitigation of impact(s) on Aboriginal rights with to an absence of "adverse effects" on Aboriginal rights is a primary justification it employs to avoid evaluating consultation adequacy. The NEB also tends to find little or no "impact" on land where it has been previously disturbed in some way, suggesting that the duty to consult is not triggered in these circumstances (see *supra* note 1 at 413-15). See *e.g.* NEB, *Enbridge Reasons for Decision*, *supra* note 168. Moreover, since it is well recognized that the source of Aboriginal concerns is often spiritual in nature, wherein there is an indivisible link between individual, cultural and ecological identity (see *e.g.* John Burrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 239-248; James [Sa'ke'j] Youngblood Henderson & Jaime Battiste, "How Aboriginal Philosophy Informs Aboriginal Rights" in Sandra Tomsons & Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Toronto: Oxford University Press, 2013) at 66) the Board's exclusive reliance on biophysical markers for estimating impact significance very likely underestimates the degree of cultural loss and psychological harm affected Aboriginal communities encounter with cumulative development. See *e.g.* Robin Gregory & William Trousdale, "Compensating Aboriginal Cultural Losses: An Alternative Approach to Assessing Environmental Damages" (2009) 90:8 J Envtl Mgmt 2469; Sari Graben, "Resourceful Impacts: Harm and Valuation of the Sacred" (2014) 64:1 UTLJ 64. This problem is especially acute in the context of the cumulative effects of development on treaty rights. See *e.g.* Nigel Bankes, "The Implications of the *Tsilhqot'in* (William) and *Grassy Narrows* (Keewatin) Decisions of the Supreme Court of Canada for the Natural Resources Industries" (2014) 33:3 J Energy Nat'l Res L 188 at 213-15.

208. Scholars of science have long discarded the conception of the scientific method as a "logic-machine" for generating descriptive truths from data. See *e.g.* Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* (London: Routledge and Kegan Paul, 1972); Paul Feyerabend, *Against Method: An Outline of an Anarchist Theory of Knowledge* (London: Verso, 1978); Clifford A Hooker, *Reason, Regulation and Realism: Toward a Naturalistic, Regulatory Systems Theory of Reason and Evolutionary Epistemology* (Albany: State University of New York Press, 1995).

to the strength of the claim to the asserted rights, the NEB is, in essence, defining the de facto parameters of the asserted rights in their modern form<sup>209</sup> rather than merely presuming their existence, whatever such a presumption may entail.

When issuing its reports in the *Clyde River* and *Chippewas* cases, the NEB omitted any explicit reference to the credibility of the asserted rights or to how it factored their strength or nature into its decision to impose (or refrain from imposing) mitigating conditions on applicants.<sup>210</sup> This omission does not imply that the NEB does not, at some level, factor the credibility of Aboriginal claims into its decisions, but rather that it does not do so in a transparent or observable way. If an NEB report fails to communicate to Aboriginal claimants that a strength-of-claim assessment has been completed, and the Crown relies on the NEB's process to exhaust its duty, it stands to reason that where a significant level of consultation is required, the Crown has not met its *Haida* duty.<sup>211</sup>

Canada's failure to share its strength-of-claim assessments with the First Nations concerned was a significant reason why the FCA found that the Crown failed to meet its duty in *Gitxaala Nation*. Although the majority ruled that Canada was not required to share its legal analyses, it was obliged to disclose information and discuss its assessment of Aboriginal title and rights claims with affected First Nations.<sup>212</sup> The FCA further held that "it was not consistent with the duty to consult and the obligation of fair dealing for Canada to simply assert the Project's impact would be mitigated without first discussing the nature and extent of the rights that were to be impacted."<sup>213</sup>

The FCA made the above finding in *Gitxaala Nation* in respect of a case in which Canada was engaging in consultations with affected First Nations in a separate, yet concurrent process to the one overseen by the JRP. The NEB,

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209. Some have argued that, despite a tribunal's limited mandate, it is *effectively* ruling on the existence and strength of Aboriginal rights or title in balancing the "benefits versus the costs" when issuing their recommendations to the responsible authority. See David Laidlaw, "Challenges in Using Aboriginal Traditional Knowledge in the Courts" (Paper delivered at the Environment in the Courtroom Symposium, University of Calgary, 6-7 March 2015) at 13-14, online: <[www.cirl.ca/files/cirl/david\\_laidlaw-en.pdf](http://www.cirl.ca/files/cirl/david_laidlaw-en.pdf)>.

210. See Graben & Sinclair, *supra* note 1.

211. See *e.g. Louis v British Columbia (Minister of Energy, Mines and Petroleum Resources)*, 2011 BCSC 1070 at para 167, 338 DLR (4th) 658, *aff'd* 2013 BCCA 412, 49 BCLR (5th) 302 (the BC Supreme Court found that the BC Ministry "was required to make a preliminary assessment of the strength of Stelat'en's asserted claims to Aboriginal title and rights in a timely and transparent way so that a proper determination of the scope and content of its duty [could] inform the permitting process").

212. See *Gitxaala Nation*, *supra* note 96 at para 225.

213. *Ibid* at para 308.



however, is not empowered to enter bilateral consultations with affected Aboriginal communities outside the hearing process. This limitation likely precludes a one-on-one dialogue with affected First Nations regarding the strength of their claims. I would respond to this concern by suggesting that the NEB may still enter into a form of dialogue to the extent it considers claimants' evidence, and provides reasons to that effect, in its EA report. That is to say, the Board can explain, through its report, how mitigation measures were determined and project approval justified (or not) in light of the strength-of-claim assessment it conducted with respect to affected First Nations.

Lastly, if the NEB has jurisdiction to assess the adequacy of consultation when acting as an independent final decision maker, does this preclude it from also engaging in consultation, as stated by Justice Ryer in *Chippewas*? The short answer is no, because the NEB is already assuming both roles in practice, although—as Graben and Sinclair make eminently clear through their work—the NEB is not assessing or engaging in consultation against the legal standard prescribed under *Haida*.<sup>214</sup> Rather, the Crown and reviewing courts are relying on the NEB's findings, made in accordance with its overriding public interest mandate, to determine whether the duty to consult has been satisfied.<sup>215</sup> Consultation, understood in doctrinal terms under *Haida*, is not always equivalent to a one-on-one process of negotiation. Rather, practically speaking, consultation may range in one context from a simple duty of notice and comment, to requiring substantive acts of accommodation approaching consent in another. Under *Taku River* and *Little Salmon*, the regulatory process itself is recognized as a form of consultation, the important question being whether under the particular circumstances the substance of the process is sufficient to discharge the Crown's duty.

The Court has yet to answer the question of whether undertaking a spectrum analysis would imply that the NEB was delegated the Crown's duty. One way to approach the issue without deciding whether delegation of the duty occurs or not would be to suggest that if the NEB has exclusive jurisdiction over the approval process required for a project,<sup>216</sup> or if the Crown relies on the Board's process to exhaust its duty with respect to approval for a given project, then the

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214. See Graben & Sinclair, *supra* note 1.

215. See *supra* note 124 in Part II(B), above.

216. See also Nigel Bankes, "The Federal Crown Fulfilled its Consultation Obligations when the National Energy Board Approved a Seismic Program in Baffin Bay" (3 September 2015), online: <[ablawg.ca/2015/09/03/the-federal-crown-fulfilled-its-consultation-obligations-when-the-national-energy-board-approved-a-seismic-program-in-baffin-bay](http://ablawg.ca/2015/09/03/the-federal-crown-fulfilled-its-consultation-obligations-when-the-national-energy-board-approved-a-seismic-program-in-baffin-bay)>.



honour of the Crown should require either that (1) the NEB determine the scope and extent of consultation in accordance with *Haida*,<sup>217</sup> or alternatively, that (2) the Board's role in conducting an EA, which requires it to consider and mitigate Aboriginal concerns, should be struck from its mandate. It would then be open to the Crown to set up a concurrent process to undertake the EA and perform consultations, as it does when JRPs are established.<sup>218</sup> How this option would further the rationale of regulatory efficiency, however, is difficult to see.

The point of this section is to argue that if the NEB is mandated to engage in consultation, it should be required to enhance its process by integrating a strength-of-claim assessment into its EA report. Reconciliation, in the wake of *Haida Nation* and *Taku River*, is now understood as "something that structures the process of current interaction between the Crown and Aboriginal peoples."<sup>219</sup> In a way, this requires substance to cede to form, though arguably, the form in question is that derived from a legal standard prescribed by a constitutional doctrine that ought to bind administrative authority.

## V. CONCLUSION: PURSUING A RECONCILIATORY ADMINISTRATIVE LAW

The discharge of the duty to consult and accommodate through the administrative process raises complicated questions about how to ensure adequate protection for constitutional rights and to regulate in accordance with a public interest mandate. My basic thesis in this article is that if the courts accept the integration of the duty to consult with the process of regulatory review under the assumption that the constitutional rights of Aboriginal peoples will be afforded adequate protection, then the regulatory review process ought to be tailored to constitutional standards. If courts will generally defer to the findings made by expert tribunals like the NEB about compliance with the duty to consult, it is important that

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217. If the Board retains final decision-making authority over project approval, it would also be required to assess the adequacy of Crown consultation. See discussion in Part IV(A), above.

218. The Trudeau government appears to have opted for an interim middle option in which an additional independent expert panel is established to review the NEB process, and in particular, whether Indigenous peoples were meaningfully consulted. See e.g. Chris Hall, "Trudeau government names Trans Mountain environmental review panel," *CBC News* (17 May 2016), online: <[www.cbc.ca/news/politics/trans-mountain-kinder-morgan-pipeline-review-panel-1.3585154](http://www.cbc.ca/news/politics/trans-mountain-kinder-morgan-pipeline-review-panel-1.3585154)>.

219. Dwight G Newman, "Reconciliation: Legal Conception(s) and Faces of Justice," in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich, 2008) 80 at 85.

such tribunals give adequate weight—and provide sufficient evidence to that effect in their reasons—to the constitutional nature of the duty and the rights it serves to protect. As Tom Hickman has observed, administrative law has a “special value” in protecting distinct interests “indirectly through imposing process requirements on administrators, and it brings this established function to bear in the context of constitutional rights protection through the recognition of *enhanced* requirements of process.”<sup>220</sup> In this way, administrative discretion still exists, but it is constrained in accordance with constitutional norms.

Reliable curial deference is difficult to achieve when complex issues of fact and law are further entwined with moral and legal obligations to uphold specific rights, given a tribunal’s overriding public interest mandate. If the reasons for reaching certain conclusions about impacts on Aboriginal rights include a clear and transparent discussion about the nature and strength of the claimed rights, courts (as well as affected communities and the public at large) will be better placed to review administrative decisions on a reasonableness standard, and afford (or not) a more confident basis for deference to decisions where the constitutional rights of Aboriginal peoples may be infringed.

By itself, however, this approach can only advance the reconciliatory administrative project so far. Additional legislative reform may follow the SCC’s suggestion in *Haida Nation* that “[i]t is open to governments to 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>221</sup> If, as I have argued, the reconciliatory framework is going to operate in a climate of deference to administrative expertise, it is worth considering the option of a specialized tribunal dedicated exclusively to evaluating the adequacy of consultation,<sup>222</sup> and including Indigenous members as adjudicators. Such a tribunal could be relied on by courts to draw on more than a decade of experience with the implementation of the *Haida* doctrine.

The SCC has decided to embed a substantial part of the reconciliation process in the framework of administrative law. For better or worse, the duty

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220. “Adjudicating Constitutional Rights in Administrative Law” (2016) 66:1 UTLJ 121 at 128 [emphasis added].

221. *Haida Nation*, *supra* note 4 at para 51.

222. See *e.g.* Mara Morellato, “Crown Consultation Policies and Practices Across Canada” (April 2009) National Centre for First Nations Governance at 8-9, online: <[fngovernance.org/publication\\_docs/NCFNG\\_Crown\\_Consultation\\_Practices.pdf](http://fngovernance.org/publication_docs/NCFNG_Crown_Consultation_Practices.pdf)>; Knox & Isaac, *supra* note 41; Bradford W Morse & Manon Lavoie, “When Should Courts Defer to Administrative Tribunals - The Consultation Doctrine Spectrum” (17 November 2005) at 33-37, online: <[www.ssrn.com/abstract=880141](http://www.ssrn.com/abstract=880141)>.

to consult has now been integrated to varying degrees with regulatory review of resource projects. Structuring the discretion of independent regulators like the NEB to ensure that procedures and decisions are rights-compliant is consistent with both administrative law principles and the underlying basis for the duty to consult, *i.e.*, to uphold the honour of the Crown in recognition and respect of Aboriginal rights.<sup>223</sup> In closing, it is worth noting the irony in the federal government's current push to 'modernize' the NEB process through an emphasis on Indigenous engagement, which, if I am correct, requires explicit recognition of the rights Aboriginal peoples have held long before any statutory body was given the power to regulate them.

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223. See *Haida Nation*, *supra* note 4 at para 25.

