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## Judicial Influence on the Duty to Consult and Accommodate

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## Judicial Influence on the Duty to Consult and Accommodate

### Abstract

The duty to consult and accommodate has increasingly become front and centre in a wide range of resource and development projects and the related litigation. The Supreme Court of Canada has stated that it seeks to foster negotiation and limit litigation through its approach to the duty. This article examines, from a theoretical perspective, whether the Court is furthering this objective. It builds on a simple model of how the legislature and courts interact in the administrative law context and discusses how the relationship changes with the addition of Indigenous peoples seeking enforcement of the government's constitutional duty to consult and accommodate. It examines both decisions made by Cabinet and by an "independent" body such as the Canada Energy Regulator (CER). The model points to the importance of both the approach taken by the reviewing court and the relative political positions of relevant actors. The interpretation of the standard of review by different types of judges will impact the incentives to litigate and the probability of success from litigation. In addition, the incentive to litigate shifts as policy positions shift for Cabinet, for boards or for judges, but not in a straightforward fashion. The model informs not only the duty to consult, but judicial review in the standard administrative law context and involving other constitutional issues.

### Cover Page Footnote

I'd like to thank Ben Alarie, David Green, Veronica Guido, Declan Walker, and Albert Yoon for their helpful comments on the article.

# Judicial Influence on the Duty to Consult and Accommodate

ANDREW GREEN\*

The duty to consult and accommodate has increasingly become front and centre in a wide range of resource and development projects and the related litigation. The Supreme Court of Canada has stated that it seeks to foster negotiation and limit litigation through its approach to the duty. This article examines, from a theoretical perspective, whether the Court is furthering this objective. It builds on a simple model of how the legislature and courts interact in the administrative law context and discusses how the relationship changes with the addition of Indigenous peoples seeking enforcement of the government's constitutional duty to consult and accommodate. It examines both decisions made by Cabinet and by an "independent" body such as the Canada Energy Regulator (CER). The model points to the importance of both the approach taken by the reviewing court and the relative political positions of relevant actors. The interpretation of the standard of review by different types of judges will impact the incentives to litigate and the probability of success from litigation. In addition, the incentive to litigate shifts as policy positions shift for Cabinet, for boards or for judges, but not in a straightforward fashion. The model informs not only the duty to consult, but judicial review in the standard administrative law context and involving other constitutional issues.

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\* Professor, University of Toronto Faculty of Law. I'd like to thank Ben Alarie, David Green, Veronica Guido, Declan Walker, and Albert Yoon for their helpful comments on the article.

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**INDIGENOUS RIGHTS HAVE INCREASINGLY** become front and centre in Canada. Proposed resource-related projects, for example, from mines to pipelines to exploration activity, have the potential to impinge on claimed or accepted Indigenous rights. A central feature of Aboriginal law's attempts to deal with disputes about such projects is the constitutional duty on the Crown to consult and accommodate Indigenous peoples prior to undertaking conduct that may adversely affect a potential Aboriginal claim or Aboriginal or treaty right.<sup>1</sup> The duty to consult and accommodate has led not only to considerable negotiation and discussions around proposed projects but also to a large amount of litigation.

The courts in Canada have struggled to find the right balance in their role in overseeing the duty to consult and accommodate. A key barrier is the need to recognize the constitutional nature of the duty (and hence a strong role for the courts) while at the same time fostering negotiations, as opposed to litigation, between the Crown and Indigenous groups. As the Supreme Court of Canada has stated, "No one benefits—not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities—when projects are prematurely approved only to be subjected to litigation."<sup>2</sup> The Court attempts to provide a backstop to consultations over resource development, encouraging the Crown and Indigenous peoples to negotiate through both its vision of the content of the duty and its stance on judicial review of the resulting decisions.

In this, is the Court doing what it thinks it is doing? As Janna Promislow and Naomi Metallic note, "The perennial question surrounding the duty to consult is

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1. See Janna Promislow & Naomi Metallic, "Realizing Aboriginal Administrative Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Emond, 2018) 87 at 89 [Promislow & Metallic, "Realizing Aboriginal Administrative Law"]. Promislow and Metallic state that: "Indigenous law' is increasingly used as an umbrella term encompassing the specific legal orders of Indigenous nations," while "Aboriginal' [law] signifies that the law of the Canadian state is the subject at hand," such as the Constitution (*ibid*).
  2. *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 24 [*Clyde River*].

whether the court prescribed enough content to tilt the risk management equation in favour of the protection of Aboriginal rights, and cast a long enough shadow to improve the political climate for negotiations.”<sup>3</sup> Does the Court’s stance on the duty to consult and accommodate actually tend to foster negotiations? Even if so, does it advantage one side or the other in those negotiations? In one sense, the answer to the second question is clearly “yes,” as the Court has consistently stated that the duty does not provide Indigenous peoples with a veto over the proposed government action. Instead, the Court has stated that accommodation “stress[es] the need to balance competing societal interests with Aboriginal and treaty rights.”<sup>4</sup> However, can we say more about the impact of the Court’s choices on the relative power and decisions made by the various parties involved?

Central to answering this question is the stance the Court takes to reviewing decisions relating to consultation and accommodation. As we will see, the Court takes a hybrid approach: For some questions, it tells judges to adopt their own view of the “correct” answer, while on others, it says the judges are to defer to executive decision makers, such as Cabinet. This issue of the appropriate “standard of review” to be adopted by courts is heavily contested, generally, and similarly controversial in the context of the duty to consult. A number of scholars, such as Promislow, for example, point to the need to reconsider the Court’s deferential approach to reviewing duty to consult cases.<sup>5</sup> Further, Metallic notes that “administrative law rules that have developed around deference tend to place Indigenous peoples at a disadvantage in judicial review proceedings,” as they

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3. “Realizing Aboriginal Administrative Law,” *supra* note 1 at 119.

4. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 50 [*Haida*]. See also *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 59 [*Chippewas*].

5. See Janna Promislow, “Delegation, Deference and Difference: In Search of a Principled Approach to Implementing and Administering Aboriginal Rights” (2019) 88 SCLR (2d) 139 at 150-1. See also Kate Glover Berger, “Diagnosing Administrative Law: A Comment on *Clyde River* and *Chippewas of the Thames First Nation*” (2019) 88 SCLR (2d) 107; David Mullan, “The Supreme Court and the Duty to Consult Aboriginal Peoples: A Lifting of the Fog?” (2011) 24 Can J Admin L & Prac 233 (discussing the nature of the standard of review in duty to consult cases); Audrey Macklin, “Standard of Review: Back to the Future?” in Flood & Sossin, *supra* note 1, 381 (discussing the inconsistencies in the approach to the standard of review between administrative law, generally, and the duty to consult context).

involve deference to regulatory regimes that are skewed towards settler interests.<sup>6</sup> This article aims to provide some insight into the basic pressures and incentives the Court has created in this area.

Part I provides a brief summary of the law concerning the duty to consult and accommodate. It does not explore all the nuances but attempts to lay out the broader pattern of the role taken on by the courts. Part II then sets out a basic model of how the Crown, Indigenous peoples, the legislature, and the courts interact when Cabinet makes a decision. Prior political science literature has created models of such decision making in the US administrative law context. This article builds on these simple models to examine the Canadian administrative law context and extends the analysis to discuss constitutionalizing the decision through the duty to consult. Part III then takes that model to the situation where the Crown relies on an “independent” body, such as a board, to fulfill the duty to consult. Part IV discusses the implication of this model for how we think about the role of the courts, given that negotiations and reconciliation occur in the shadow of judicial review. The model also has implications for both administrative law more generally, as well as for other constitutional litigation, such as challenges to administrative decisions that involve the *Charter*.<sup>7</sup>

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6. “Deference and Legal Frameworks Not Designed By, For or With Us” (2018) 31 Can J Admin L & Prac: Special Issue 159 [Metallic, “Legal Frameworks”] (stating that this argument does not preclude deference but just blanket deference to expertise to all decision makers). See also Matthew J Hodgson, “Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board” (2016) 54 Osgoode Hall LJ 125 (“[t]he 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” (at 152)). Hodgson argues that if there is deference, the discretion exercised must take into account the constitutional nature of the duty.
  7. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

## I. A BRIEF PRIMER ON THE DUTY TO CONSULT AND ACCOMMODATE

For the Supreme Court, the duty to consult originates in section 35(1) of the *Constitution Act, 1982* and is founded on the honour of the Crown.<sup>8</sup> The goal is to promote reconciliation between Indigenous peoples and the Crown as well as to “identify, minimize and address adverse impacts where possible.”<sup>9</sup> The duty requires good faith on all sides to ensure that the consultation and, if possible, accommodation is meaningful.<sup>10</sup>

In *Haida*, the Court set out what has become a three-part test for when the duty is triggered.<sup>11</sup> First, the Crown must have actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights. Second, there must be Crown conduct that has the potential to impact this claim or right. Crown conduct includes not only decisions of Cabinet or line departments but also decisions of executive decision makers, such as the National Energy Board (NEB)—now called the Canada Energy Regulator (CER), that are given power under statutes, whether or not they are the final decision makers.<sup>12</sup> The Court looks beyond the claims of “independence” of these executive bodies for the purposes of this trigger for the duty (stating, for example, that “as the NEB operates independently of the Crown’s ministers—no relationship of control exists between them”), focusing on their purpose of implementing government policy.<sup>13</sup> However, as we will see, the Court brings back in an assumption of independence in its view of the court’s role in the process. Finally, the Crown conduct must have a potential adverse effect on the claim or right. Actual, current effects are covered, but historic impacts are not (although the cumulative

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8. Being Schedule B to the Canada Act 1982 (UK), 1982, c 11; *Haida*, *supra* note 4 at para 16. See generally Promislow & Metallic, “Realizing Aboriginal Administrative Law,” *supra* note 1; David V Wright, “Federal Linear Energy Infrastructure Projects and the Rights of Indigenous Peoples: Current Legal Landscape and Emerging Developments” (2018) 23 *Rev Const Stud* 175; Glover Berger, *supra* note 5; Hodgson, *supra* note 6.
  9. *Clyde River*, *supra* note 2 at paras 19, 25.
  10. *Haida*, *supra* note 4 at para 42.
  11. *Ibid* at para 35.
  12. *Clyde River*, *supra* note 2 at para 29. See also *Chippewas*, *supra* note 4 at paras 29-31 (the Court found that it does not matter whether the “Crown” as such is a party before the particular decision maker, as the NEB was a statutory body and the final decision maker).
  13. *Clyde River*, *supra* note 2 at para 29. See also Sari Graben & Abbey Sinclair, “Tribunal Administration and the Duty to Consult: A Study of the National Energy Board” (2015) 65 *UTLJ* 382 (discussing expertise and independence in this context).

effects of a project as well as the historic context may affect the analysis of the scope of the duty).<sup>14</sup>

The duty itself is flexible and context dependent. It lies on a spectrum from limited to deep consultation, depending on the strength of the claim and the seriousness of the potential adverse effect.<sup>15</sup> The placement on the spectrum helps identify what actual processes are required. At the limited end may be notice of potential decisions and the opportunity to provide comments. At the deep end of the spectrum, the courts have found that meaningful consultation may require more in the way of disclosure, oral hearings, funding for groups to participate, and even the provision of reasons.<sup>16</sup> The Court recently found that the NEB had fulfilled its duty to consult in one case but not in another, both of which the Court had seen as requiring deep consultation. The Chippewas of the Thames were adequately consulted given the disclosure and participation involved, NEB's oral hearings, and funding of the Indigenous groups involved.<sup>17</sup> For the Inuit of Clyde River, on the other hand, the consultation was inadequate where the Court found none of these procedural elements were present.<sup>18</sup> Further, the Court has stated that reasons will generally be required in the context of deep consultation.<sup>19</sup> Courts seem to base their decision on whether the duty has been met, at least at the "deep" consultation end of the spectrum, on whether there was "meaningful" dialogue or whether there were conditions for such dialogue to occur.<sup>20</sup> In some cases, such dialogue may require that "someone" be present on the Crown side with some authority to speak for the Crown.<sup>21</sup>

The duty, however, is more than just procedural, at least in theory, as it is a duty to consult *and accommodate*—that is, there is a potential need for the

14. *Chippewas*, *supra* note 4 at paras 41-42.

15. See *Haida*, *supra* note 4 at paras 39-44. The Court has stated that, in determining what the duty actually entails in a particular context, "regard may be had to the procedural safeguards of natural justice mandated by administrative law" (*ibid* at para 41). See also *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [*Little Salmon*] ("[a]dministrative law is flexible enough to give full weight to the constitutional interests of the First Nation" at para 47); Mullan, *supra* note 5 (pointing out that the structure of the duty to consult and of procedural fairness for other decisions is very similar).

16. *Haida*, *supra* note 4 at para 44.

17. See *Chippewas*, *supra* note 4 at para 52.

18. See *Clyde River*, *supra* note 2 at para 47.

19. *Chippewas*, *supra* note 4 at para 62.

20. See *e.g.* *Clyde River*, *supra* note 2 ("[n]o mutual understanding on the core issues ... could possibly have emerged from what occurred here" at para 49). See also *Gitxaala Nation v Canada*, 2016 FCA 187 at paras 325-27 [*Gitxaala*]; *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153 at paras 754-63 [*Tsleil-Waututh*].

21. *Tsleil-Waututh*, *supra* note 20 at para 759.

decision maker to change its decisions in some contexts. The Court has stated on a number of occasions that accommodation does not amount to a veto for Indigenous groups.<sup>22</sup> The aim in accommodation is to attempt to undertake “a process of balancing interests, of give and take.”<sup>23</sup> In addressing concerns that this balancing may disadvantage Indigenous groups, particularly in decisions that require the decision maker to focus on the public interest, the Court has stated that the duty to consult implicates a “[s]pecial public interest’ which surpasses economic concerns,” but that a balance still needs to be struck with societal interests.<sup>24</sup> In the context of the NEB, for example, the Court has stated, “We do not, however, see the public interest and the duty to consult as operating in conflict. ... A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest.”<sup>25</sup> Depending on the context, the Crown may need to act so as to avoid irreparable harm or minimize adverse impacts.<sup>26</sup> However, the Court recently noted that “[w]hile the goal of the process is reconciliation of the Aboriginal and state interest, in some cases this may not be possible. The process is one of ‘give and take’, and outcomes are not guaranteed.”<sup>27</sup>

Recently, the Court has attempted to clarify who is responsible for fulfilling the duty to consult. It has clearly stated that the Crown has this responsibility. The Crown may rely on administrative process or executive decision makers, including tribunals, to undertake all or part of the duty, provided the Crown gives notice it is going to rely on that process.<sup>28</sup> It may even rely on project

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22. See *Haida*, *supra* note 4 at para 48; *Clyde River*, *supra* note 2 at para 59.

23. *Haida*, *supra* note 4 at para 48.

24. *Chippewas*, *supra* note 4 at para 59.

25. *Clyde River*, *supra* note 2 at para 40.

26. *Haida*, *supra* note 4 at para 47.

27. *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 114 [*Ktunaxa*]. The Court found that the consultation process by the minister was not unreasonable and that changes had been made to the proposal, but that process came to an end because the Ktunaxa “adopted a new, absolute position that no accommodation was possible ... and that only total rejection of the project would satisfy them” (*ibid* at para 87).

28. See *Clyde River*, *supra* note 2 at paras 22-23. See also *Chippewas*, *supra* note 4; Graben & Sinclair, *supra* note 13 (discussing the issue of the duty to consult and administrative decision makers). In *Chippewas*, the Court found that while notice was not explicitly given that the Crown would rely on the NEB process, the Chippewa of the Thames were given the opportunity to participate and did so, knew the NEB was the final decision maker, and were aware that there was no other Crown actor involved, and so “the circumstances of this case made it sufficiently clear to the Chippewas of the Thames that the NEB process was intended to constitute Crown consultation and accommodation” (*ibid* at para 46).

proponents for certain procedural elements. However, the responsibility remains with the Crown.<sup>29</sup> The decision maker must not take an action (such as issuing an approval) if the duty is not met. If the decision maker does not satisfy the duty to consult, the Crown must take actions to ensure that it is fulfilled prior to any decision. These actions may include additional consultation, legislative changes, or making submissions before the regulatory decision maker.<sup>30</sup>

Whether a particular administrative decision maker has been granted the power to undertake the duty to consult or to assess whether the duty has been fulfilled (or both) depends on the powers granted to the decision maker by statute, including whether the decision maker can decide questions of law and what remedial powers were given to the decision maker.<sup>31</sup> For example, in *Clyde River*, the Court found that, while the NEB was created prior to the origins of the duty to consult, it has a sufficient set of powers to undertake consultation (such as conducting hearings and granting funding), powers (in this case under another statute) to accommodate Indigenous concerns through terms and conditions on or denial of approval, and “developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects.”<sup>32</sup> The Crown could therefore rely on the NEB’s processes to completely or partially fulfill the duty to consult in that case. Statutory bodies like the NEB may take on these roles as they are capable of acting as “neutral arbitrator[s]” according to the Court (a point to which we will return when we discuss the incentives facing such bodies).<sup>33</sup>

What is the role of the courts in this process? The Court has stated that “the question is not whether the [Indigenous groups] obtained the outcome they sought, but whether the process is consistent with the honour of the Crown.”<sup>34</sup> However, in challenges to decisions concerning the duty to consult, while the Court has seen parallels between consultation and the demands of procedural fairness,<sup>35</sup> it has tended to deal with duty to consult cases within its substantive review framework—that is, its approach to review of the substance of particular decisions. Following the Court’s decision in *Haida*, on the questions of whether

29. See *Haida*, *supra* note 4 at para 53; *Clyde River*, *supra* note 2 at para 22.

30. See *Chippewas*, *supra* note 4 at para 32; *Clyde River*, *supra* note 2 at para 22.

31. See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 55-65.

32. *Clyde River*, *supra* note 2 at paras 31-33. See also *Chippewas*, *supra* note 4 at para 48 (the Court found that the NEB’s statutory powers and expertise were sufficient to allow the Crown to rely in whole or in part on its processes).

33. *Chippewas*, *supra* note 4 at para 34.

34. *Kiunaxa*, *supra* note 27 at para 83.

35. See *Haida*, *supra* note 4 at para 41.

the duty to consult is triggered and, if so, what is the depth of consultation required, the Court has tended to use a correctness standard, ostensibly on the basis that there is a significant legal component to these questions.<sup>36</sup> This standard permits a judge to decide for themselves the correct answer to these questions with no deference to the initial decision maker, such as Cabinet or the NEB.

However, on the question of whether the appropriate level of consultation has been achieved with the particular process used (including whether the accommodation was appropriate), the Court has stated that judges are only to examine whether the process was reasonable. In *Haida*, the Court stated that “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’ ... . What is required is not perfection, but reasonableness.”<sup>37</sup> In the context of a ministerial decision, the Court more recently reiterated this standard, stating:<sup>38</sup>

The Minister’s decision that an adequate consultation and accommodation process occurred is entitled to deference ... . The chambers judge was required to determine whether the Minister reasonably concluded that the Crown’s obligation to consult and accommodate had been met. A reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks rather whether the decision of the Minister, on the whole, was reasonable.

Part of the rationale given for such deference is the nature of the decision and capability of the Court. The Federal Court of Appeal thus noted in the context of Cabinet approval of the Northern Gateway Pipeline:<sup>39</sup>

In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ.

The result therefore is a mixed standard, with correctness used for the decision as to whether the duty is triggered and the depth of consultation required, and reasonableness for the content of the process and accommodation.<sup>40</sup> Kate Glover

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36. See *Little Salmon*, *supra* note 15 at para 48; *Haida*, *supra* note 4 at paras 61-63.

37. *Ibid* at para 62.

38. *Ktunaxa*, *supra* note 27 at para 77.

39. *Gitsaala*, *supra* note 20 at para 182.

40. See Glover Berger, *supra* note 5 (arguing that the standard of review is uncertain in the context of the duty to consult, with a greater emphasis on correctness).

Berger argues that this view of the Court of the duty to consult fits with a more general story of administrative law—that courts have moved from skepticism of the administrative state to a stance of trust and confidence.<sup>41</sup> However, it is not clear that there was a move in the context of the duty to consult, in that the courts seemed to have always evinced a basic trust or confidence in the state in fulfilling this duty. For example, in two of its most recent duty to consult cases, the Court found the duty to consult was fulfilled in one but not in another, requiring little of the decision maker (the NEB in each case) in terms of notice and reasons and rejecting only a very weak attempt at consultation.<sup>42</sup> Interestingly, the Court failed in both cases to discuss the standard of review.

In its discussion of the duty to consult, the Court has focused on the need to increase the possibility of negotiation and reconciliation and to reduce the involvement of the courts.<sup>43</sup> If there is inadequate consultation, the courts are to quash the Crown decision, but “judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms.”<sup>44</sup> Expressing a similar need to foster negotiations, the Court noted in the context of treaty interpretation that:<sup>45</sup>

In a judicial review concerning the implementation of modern treaties, a court should simply assess whether the challenged decision is legal, rather than closely supervise the conduct of the parties at each stage of the treaty relationship. Reconciliation often demands judicial forbearance. Courts should generally leave space for the parties to govern together and work out their differences.

The Court recognized that not allowing judicial review to resolve claims will lead to results that Indigenous groups view as “tragic” but stated that “in the difficult period between claim assertion and claim resolution, consultation and accommodation, imperfect as they may be, are the best available legal tools in the reconciliation basket.”<sup>46</sup>

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41. *Ibid.*

42. See *Chippewas*, *supra* note 4 (duty to consult met); *Clyde River*, *supra* note 2 (duty to consult not met). See also *Ktunaxa*, *supra* note 27 (duty to consult also met).

43. See *Haida*, *supra* note 4 at para 51.

44. *Clyde River*, *supra* note 2 at para 24.

45. *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 4.

46. *Ktunaxa*, *supra* note 27 at para 86.

## II. CABINET DECISION MAKING AND THE DUTY TO CONSULT

What can we say about how the principal actors—Indigenous peoples, the legislature, executive actors such as the Cabinet, and the courts—interact in the context of the duty to consult and accommodate? Political scientists have examined how judges, executive decision makers, and legislatures interact strategically. For example, John Ferejohn and Charles Shipan modelled how an administrative agency which has been delegated the power to make policy takes into account the possibility that a judge or Congress may overturn its decision.<sup>47</sup> Similarly, agencies interpret statutes in the shadow of judicial review and legislative override.<sup>48</sup> Ferejohn and Barry R. Weingast, for example, developed a positive model of statutory interpretation to show how agencies, the courts, the president, and Congress are all involved in the process of statutory interpretation.<sup>49</sup> The focus has been on administrative decisions or statutory interpretation but not in a constitutional context.

Building on this literature, we can construct a simple model of how Canadian policy decisions are made that incorporates the basic structure of administrative law. Different types of executive decision makers may be involved in fulfilling the duty to consult, including Cabinet, individual ministers, agencies and boards, provincial governments, and municipalities. To start with the most clearly “Crown” decision maker, we will first examine a decision made by Cabinet. To see the basic outline of the argument, we will begin by considering a decision that does not affect Indigenous interests. Think, for example, of a decision on whether to build a pipeline that may adversely affect the environment but not in a way that gives rise to a duty to consult. We will then use this basic model to see what happens when we constitutionalize aspects of the decision through the duty to consult.

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47. “Congressional Influence on Bureaucracy” (1990) 6 *JL Econ & Org* 1. See also Charles R Shipan, “The Legislative Design of Judicial Review: A Formal Analysis” (2000) 12 *J Theoretical Pol* 269 (examining how a legislature can use the existence of judicial review to influence policy outcomes).

48. For a foundational paper, see William N Eskridge, Jr, “Reneging on History? Playing the Court/Congress/President Civil Rights Game” (1991) 79 *Cal L Rev* 613.

49. “A Positive Theory of Statutory Interpretation” (1992) 12 *Intl Rev L & Econ* 263.

## A. ADMINISTRATIVE LAW DECISIONS

We begin then with a Cabinet decision that does not involve constitutional issues—that is, for which the duty to consult is not triggered. Suppose the basic sequence of the decision-making process is as follows:

1. A company proposes the pipeline and applies to an executive body for approval.
2. The legislature has empowered Cabinet to approve or deny the application following some decision-making process. Cabinet may impose conditions on the project. The next step then is for Cabinet to approve or deny the application, subject to any conditions.
3. If Cabinet approves the pipeline (potentially with limiting conditions), an environmental group or the proponent has to decide whether to apply for judicial review of the approval.
4. If one of them applies for judicial review of the decision, a court then either quashes the decision or allows it to stand.
5. If the court quashes the decision, Cabinet has a choice of implementing a decision that the court will accept or having the legislature amend the legislation to allow the approval either directly or indirectly.<sup>50</sup> A key factor in our analysis is that where the government has a majority, the Cabinet in most cases can determine whether legislation is proposed and which legislation will pass in Parliament.<sup>51</sup> This power provides Cabinet in the administrative law setting with the final move.

How will Cabinet decide given the possibility of judicial review? In part, it will depend on how we think Cabinet and judges decide. To aid in our later discussion of the duty to consult, assume that Cabinet is seeking to implement some “national interest” or, even more narrowly, a largely majoritarian vision. Cabinet has to decide how to maximize its goal. If a court quashes its initial

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50. That is, Cabinet proposes legislation that either explicitly allows this project or indirectly does so by altering the statute to overcome whatever defect the court found in the decision-making process.

51. See Ferejohn & Shipan, *supra* note 47. In their terms, the Canadian federal government essentially operates under a “closed rule” in most cases where the government has a majority—that is, given the centralization of power in the Canadian Parliamentary system, Cabinet can largely determine the scope of any legislative changes (*ibid* at 3-4). Any divergence because of committees or the Senate bring the analysis closer to the “open rule” discussed by Ferejohn and Shipan (*ibid* at 5, 8).

decision, Cabinet faces a range of costs—the direct costs of drafting and negotiating the revised decision or legislation as well as the costs from any delay such as a loss of revenue or in some cases, more importantly, a reduction in the probability that the company will continue with the project.

How judges decide is controversial. There is a vast literature attempting to tease out theoretically and empirically the determinants of judicial decisions.<sup>52</sup> Judges may, for example, be seen to be following the “law” in some sense, naively deciding according to their preferred policy outcome, strategically following their preferences by taking into account how other actors (such as the legislature) will react to a decision, or acting as any other rational actor taking into account not only their preferred policy but also factors such as their prestige or workload.<sup>53</sup> Adapting Ferejohn and Weingast’s approach to statutory interpretation, we use three basic attitudes that judges may take to judicial review of an administrative decision rather than choosing a preferred model of how judges decide; namely: *naive deference*—where a judge defers to whatever the executive body says is the optimal policy; *sophisticated deference*—where a judge exercises deference “as respect,” such that it does not abdicate responsibility for the decision, but they are willing to acknowledge a space or range of decisions that may be taken to be “reasonable”; and, finally, *unconstrained policy maximizer*—where a judge decides

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52. See e.g. Jeffrey A Segal & Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002); Lee Epstein & Jack Knight, *The Choices Justices Make* (CQ Press, 1998); Richard A Posner, *How Judges Think* (Harvard University Press, 2008); Benjamin Alarie & Andrew J Green, *Commitment and Cooperation on High Courts: A Cross-Country Examination of Institutional Constraints on Judges* (Oxford University Press, 2017). For Canadian studies, see Benjamin Alarie & Andrew Green, “Policy Preference Change and Appointments to the Supreme Court of Canada” (2009) 47 *Osgoode Hall LJ* 1; CL Ostberg & Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (UBC Press, 2007); Donald R Songer et al, *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (McGill-Queen’s University Press, 2012).

53. See e.g. Lee Epstein, William M Landes & Richard A Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press, 2013). In the constitutional context, see Benjamin Alarie & Andrew Green, “Quantitative Analysis of Judicial Voting” in Malcolm Langford & David S Law, eds, *Research Methods in Constitutional Law: A Handbook* (Edward Elgar) [forthcoming] (for a discussion of different models of decision making).

solely in accordance with their own policy preferences taking into account whether there will be a political reaction to the decision.<sup>54</sup>

In order to keep the model simple and bring out the central notion, we need to make three more sets of assumptions.<sup>55</sup> First, we will think of the policy options as lying along a line. In terms of our example of the pipeline, you could think of the line setting out policies from less to more development or from less to more risky. For want of a better short-form term and to tie into the literature on judicial decision making, we will call decisions more to the left on the line to be “liberal” decisions and to the right “conservative,” recognizing the imperfect mapping of this policy domain into such political terms. This reduction of the policy dimensions obviously abstracts from the polycentric nature of the decisions, but it allows us to see the strategic interactions. Second, we will initially assume that the parties are rational and fully informed about the choices of other parties. Finally, we assume that the political actors prefer that their decisions are not overturned and cannot commit upfront to a particular course of decisions. This assumption allows us to see the strategic moves more clearly.

Each decision maker has a preference over the policy positions on the line, with the strength of preference declining as the policy is further from their ideal point. In Figure 1, assume that the line arrays potential outcomes from less development to more development with the optimal policy for the pipeline company at “P,” the Cabinet at “C,” and the environmental group at “E.” If there was no judicial review, the proponent would propose P and Cabinet would respond with approval, but only at C (that is, would approve subject to conditions such as a reduction in the size of the pipeline or pipeline corridor).

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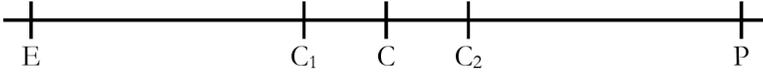
54. *Supra* note 49 at 268. Ferejohn and Weingast examine three stances of judges to statutory interpretation: “[n]aïve textualist” (interprets legislation as close as possible to the wishes of the enacting legislature), “[p]olitically sophisticated honest agent” (aims for an outcome as close as possible to the wishes of the enacting legislature), and an “[u]nconstrained policy advocate” (seeks to maximize the judge’s own policy preferences, taking into account whether its position is politically viable) (*ibid* [emphasis in original]).

55. See generally Ferejohn & Shipan, *supra* note 47.

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**FIGURE 1: PREFERENCES OF CABINET, THE PROPONENT, AND THE ENVIRONMENTAL GROUP**


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NOTES: The line provides the array of possible policy outcomes from least development on the left to most development on the right. The points represent the preferred outcomes for an environmental group (“E”), Cabinet (“C”), and the proponent (“P”). “C1” is the outcome preferred by Cabinet minus the cost of delay (including loss of government revenue and the decreased probability that the pipeline will be built) and “C2” is the point to the right of C where Cabinet is indifferent to C1.

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Now consider what happens when we introduce the possibility of judicial review of the approval. Once Cabinet chooses its preferred policy, both the environmental group and the proponent have the possibility of applying to the court to overturn the decision. In order to understand the impact of judicial review, we need to think about three factors. First, what is the type of judge—are they naively deferential, sophisticated in their deference, or a policy maximizer? Second, what are the preferences or views of the judge relative to the other actors—and, in particular, Cabinet? You can think of the position of the judge on the line as indicating their policy preferences (particularly if the judge is a policy maximizer) or as their view of the optimal legal position. Finally, these two factors interact with the third—the standard of review selected by the judge.<sup>56</sup> We will assume, for now, that the selection of the standard of review is exogenous (that is, the judge does not choose the standard of review to get to a particular result). In Canada, there are currently two standards of review—correctness, where the judge specifies what they believe is the right result, and reasonableness, under which the judge defers to the initial decision maker either fully (the naive deference view) or partially (the sophisticated deference position).

Assume that if Cabinet has to react following judicial review, the costs (including the potential for no development) move the policy to C1. What happens if the judge is much more “liberal” than Cabinet—in fact, so liberal that their preferred point is to the left of C1? Cabinet must make its decision in the face of possibly being overturned by the court on judicial review. If it knows the judge is naively deferential and the standard of review is reasonableness, Cabinet can safely set its policy at its preferred point, knowing that the judge will defer to its (Cabinet’s) view of the right decision. Take the opposite type of judge—the

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56. See *Canada (Minster of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov].

policy maximizer. Both Cabinet and the judge know that if the judge quashes a Cabinet decision at C and imposes their own preferred view, Cabinet will respond by altering the legislation to its best alternative in the circumstances—C1. This, in fact, is true of any Cabinet decision to the right of C1. With a weak preference not to be overruled and a rational expectations assumption, Cabinet has no incentive to choose any policy greater than C1 and the judge no incentive to overturn this decision. For the same reason, in all other instances where the judge's preference (including their space of reasonable outcomes) lies to the left of C1, the outcome will be C1.

Consider next a judge who is much more “conservative” than Cabinet—that is, their preferred policy lies relatively far to the right of Cabinet's preferred policy. As before, if the judge is naively deferential and the standard of review is reasonableness, Cabinet can enact its preferred policy (C) as the judge will not overturn it. Again, take the opposite type of judge—the policy maximizer. If the judge chooses their preferred policy, Cabinet will react with legislation and the result will be C1. However, imagine a policy, C2, for which Cabinet is essentially indifferent between C2 and C1. At C2, for example, there is more development than Cabinet prefers but without the costs of new legislation or the reduction in the probability of the project proceeding. On review, the judge would impose C2 as Cabinet would be indifferent between that policy and C1 and so would not enact legislation, and the judge would be closer to their preferred policy. Cabinet can only safely choose C2 if it prefers not being overturned and is indifferent between C2 and C1.

Finally, judges may have views only slightly more liberal or conservative than Cabinet, such that  $C1 < “J” < C2$ . In such cases, Cabinet will still choose its preferred policy (C) when faced with a naively deferential judge, as the judge would not overturn their decision. If the judge is willing to impose their own policy (that is, not just quash the decision but order the particular outcome), a judge using a standard of review of correctness would impose their own preferred policy (J) knowing that Cabinet would have no incentive to overturn it (since it would prefer J to C1—that is, it is not willing to bear the additional cost). Cabinet would therefore choose J to avoid being overturned. The only exception to this would be where the judge engages in sophisticated deference—that is, provides some space (we can refer to as between the lower bound, “JL,” and the upper bound, “JU”) for there to be some other “reasonable” policy than the judge's

preferred policy.<sup>57</sup> Cabinet would then choose the lower bound (JL) of the more conservative sophisticated judge's range and the upper bound (JU) of the more liberal sophisticated judge's range. Cabinet is then able to get slightly closer to its preferred outcome (C).

Table 1 sets out the outcomes for the different types of judges. Cabinet faced with a naively deferential judge, whether liberal or conservative, will choose its own preferred policy. Where the judges are much more liberal or conservative than Cabinet, the threat of judicial review pulls the Cabinet in the direction of the judge, with the distance depending on the costs imposed by the delay and uncertainty of losing on judicial review. Where the judge is similar to the Cabinet in preference, Cabinet will move towards the judge's preferred outcome (either fully or partially, depending on whether the standard of review is correctness or reasonableness) as that is preferred to the costs of delay and uncertainty.

TABLE 1: OUTCOME BY TYPE AND PREFERENCES OF JUDGE AND BY STANDARD OF REVIEW—ADMINISTRATIVE LAW DECISION (NO DUTY TO CONSULT)

JUDGE	NAIVE DEFERENCE		SOPHISTICATED DEFERENCE		POLICY MAXIMIZER	
	Reasonable	Correct	Reasonable	Correct	Reasonable	Correct
J<C1	C	C1	C1	C1	C1	C1
C1<J<C	C	J	JU	J	J	J
C<J<C2	C	J	JL	J	J	J
J>C2	C	C2	C2	C2	C2	C2

NOTE: The columns represent the two different standards of review (reasonableness and correctness) for the three different types of judges (a judge who naively defers, another who defers in a more sophisticated fashion, and another who maximizes their policy preferences). The rows indicate the ideal position for the judge ("J") on the line in Figure 1. "JU" refers to the upper (right-most) extreme of the policies that the judge would find reasonable, and "JL" is the lower (left-most) extreme of the policies that the judge would find reasonable.

57. This notion of a policy space extracts from the nuances of the standard but serves to differentiate the types of judges. See also *Vavilov*, *supra* note 56. The Court states "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision" (*ibid* at para 85). It requires consideration of both the outcome and the reasoning process (*ibid* at para 87).

For administrative law decisions then, the type and ideology of the judge matters in this model but only in limited respects. Naive deference means no actual check on Cabinet decision making, regardless of the preferred policy of the judge. A more extreme judge in terms of policy preferences shifts Cabinet in their direction, regardless of the type of judge (other than naive deference), as both sides have the possibility of applying for judicial review. For judges closer to Cabinet preferences, the judges' preferences may lead to their choices directly playing out. The court influences the policy chosen even if no judicial review is actually undertaken where Cabinet prefers not to be overturned. One implication of this overall dynamic may be that in Canada, where parties have held power for a considerable period of time in the past, if there is a change of government after a long stint of a different stripe of government appointing judges, the preferences of judges may shift to the opposite side of Cabinet or to a more extreme position.

## B. CABINET, THE COURTS, AND THE DUTY TO CONSULT

Adding in the constitutional duty to consult brings a few changes. First, Cabinet is no longer the final decision maker—that is, given that the duty to consult is a constitutional issue, in theory legislative supremacy no longer holds and Cabinet's ability to resort to legislation is removed. There may be ways for Cabinet to bake certain types of biases into legislation, thereby affecting deference.<sup>58</sup> However, on an individual decision, we will assume that the legislation is fixed and Cabinet cannot resort to changes for that decision. Second, access to the courts is no longer bilateral—only Indigenous groups can seek judicial review of a decision on the basis that the Crown has not fulfilled its duty to consult.

Again, begin by considering a judge who is much more “liberal” than Cabinet ( $J < C1$ ). If the standard of review is reasonableness and the judge is naively deferential, Cabinet can choose its preferred outcome (C), as in the standard administrative law case. On the other hand, if the judge is deferential in a more sophisticated manner, the best Cabinet can do is JU—the upper bound of the range of reasonableness for that judge. If the judge is a policy maximizer, or if the standard of review for any type of judge is correctness, the best Cabinet can do is the judge's preferred point (J). As it turns out, the same is true if the judge is only slightly more liberal than Cabinet ( $C1 < J < C$ ).

At the opposite extreme, consider a judge who is much more “conservative” than Cabinet ( $J > C2$ ). Cabinet facing a naively deferential judge and a standard of review of reasonableness can still choose its preferred option (C). Also similar

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58. See Promislow & Metallic, “Realizing Aboriginal Administrative Law,” *supra* note 1.

to the previous case of a liberal judge, under a standard of review of correctness or with a policy-maximizing judge, the best Cabinet can do is the judge's (now much more conservative) preferred outcome (J). The only difference is the case of a standard of review of reasonableness and a sophisticatedly deferential judge. The best Cabinet can now do is the lower bound of the judge's reasonableness space (JL). Sophisticated deference therefore narrows the range of outcomes from correctness review. The same results occur in the constitutional context for judges who are only slightly more conservative than Cabinet ( $C < J < C2$ ).

**TABLE 2: OUTCOME BY TYPE AND PREFERENCES OF JUDGE AND BY STANDARD OF REVIEW—DUTY TO CONSULT**

JUDGE	NAIVE DEFERENCE		SOPHISTICATED DEFERENCE		POLICY MAXIMIZER	
	Reasonable	Correct	Reasonable	Correct	Reasonable	Correct
$J < C1$	C	J	JU	J	J	J
$C1 < J < C$	C	J	JU	J	J	J
$C < J < C2$	C	J	JL	J	J	J
$J > C2$	C	J	JL	J	J	J

NOTE: The columns represent the two different standards of review (reasonableness and correctness) for the three different types of judges (a judge who naively defers, another who defers in a more sophisticated fashion, and another who maximizes their policy preferences). The rows indicate the ideal position for the judge ("J") on the line in Figure 1. "JU" refers to the upper (right-most) extreme of the policies that the judge would find reasonable, and "JL" is the lower (left-most) extreme of the policies that the judge would find reasonable. The table assumes the judge is willing to impose their own view (not merely quash and return to the original decision maker).

What then is the difference if Cabinet faces a constitutional constraint? Table 2 sets out the outcomes in the constitutional context. When the judge's preferences are similar to those of Cabinet (either slightly more liberal or slightly more conservative), the outcome is the same for a standard administrative law decision (as seen in Table 1). In addition, judges with any type of preference, if they are naively deferential, then Cabinet can again choose its preferred outcome (C) without fear of being overturned. However, when the judge's preferences are more extreme, the outcomes from there being a constitutional duty become more extreme. The outcomes are no longer tempered by Cabinet override but shift to the judge's preference.

Given these outcomes, Indigenous groups' preference as to the role of the court should depend on the position of the judge relative to Cabinet. Where

the judge is much more conservative than Cabinet ( $J > C_2$ ) in the sense of favouring development, Indigenous groups should prefer a standard of review of reasonableness. The outcome is much better than correctness if the judge is naively deferential and at least somewhat better if the judge defers in a sophisticated manner (with the size of the benefit depending on the size of the reasonableness space). On the other hand, for a judge who is much more liberal than Cabinet ( $J < C_1$ ), Indigenous groups will be better off with a correctness standard. This standard would foreclose the possibility of the Cabinet getting its preferred outcome (C) and would limit the downside from a sophisticatedly deferential judge.

What does this tell us about the Court's current approach to standard of review and its hope that the parties will engage in negotiation rather than litigation? Recall that the current standard of review approach (to the extent that the Court articulates one) is a limited form of correctness review for determining the level of consultation required but reasonableness for the content of the duty, including the nature of accommodation required.

To understand the impact of this standard of review, we need to at least in part relax the assumption of all parties being perfectly rational and having full information since otherwise there would be no litigation. Consider first a judge who is more liberal than Cabinet (either because they were appointed by a prior administration or the Cabinet position shifted to the right). A strict reasonableness standard of review would strengthen the threat point of Cabinet since Cabinet can credibly threaten a position that is further to the right (possibly even its own preferred outcome (C)). Indigenous groups in this case would, on the margin, rather negotiate than risk litigation. The mixed standard complicates the picture somewhat as correctness strengthens the threat point for the Indigenous group. Correctness would increase the risk of litigation by increasing the probability of Indigenous groups gaining from litigation. In fact, a judge may be able to effectively make the standard of review into correctness if they want to overturn a more "conservative" outcome, since they can choose their own level of consultation.

If the judge is more conservative than Cabinet, either because they were appointed by a prior administration or because the Cabinet position has shifted to the left (Cabinet has become more liberal), the story is even more complicated. The standard of review will essentially be reasonableness. A judge seems unlikely to use the correctness standard to find that more is owed to an Indigenous group where they are more conservative or, if they did use the correctness standard, find that that position has not been met. If the judge is willing to impose their

views of the proper level of consultation and accommodation, reasonableness somewhat weakens the threat point for Cabinet relative to correctness, as Cabinet cannot credibly threaten any worse an outcome from litigation than JL, and there is a potential for a naively deferential judge to find that the appropriate policy is C. This standard then increases the strength for Indigenous groups and, on the margins, increases the risk of litigation as opposed to negotiation (that is, the Indigenous groups are more likely to view the outcome of litigation as worth the risk).

However, there is one further wrinkle. What happens if the judge is likely only to quash the decision (that is, not impose its view)? This remedy seems more likely in the duty to consult case with relatively conservative judges. If an Indigenous group, for example, challenges a Cabinet decision at C, a judge may seem unlikely (or unable) to impose less procedure (that is, to take away procedure already given, unless the decision is not already made), and judges may be reluctant to second guess Cabinet to say that the honour of the Crown demands less accommodation than is already given. In this case, the result would then be asymmetrical. Where the judge is more liberal than Cabinet, they may be willing to impose their view of greater procedure or accommodation, and, in any event, the threat of quashing moves Cabinet towards the judge's position. Where the judge is more conservative, they may be only willing to quash decisions, in which case the judge would uphold any decision to its left, regardless of the standard of review (recall that only Indigenous groups can bring duty to consult claims, meaning they are going to be asking for more process or accommodation). In that case, the best that Indigenous groups can hope for would be that they can threaten to impose a cost on Cabinet (both the cost of litigation itself and delay in the project) if Cabinet attempts to apply its optimal position (C). Its best hope is then to negotiate with Cabinet to move it towards C1 through the threat of litigation—that is, to the position Cabinet would be in following litigation. The threat will be credible; the Indigenous group knows it will lose but at least it may move the position a little to the left. Cabinet then has some incentive to attempt to negotiate to reduce the probability of litigation.

The result is that the Supreme Court's current mixed strategy has two effects. First, the approach somewhat strengthens the position of Indigenous groups relative to Cabinet by weakening the threat point of Cabinet, regardless of whether the judge is more or less conservative than Cabinet. The exception is where a judge is unwilling to impose their views (*i.e.*, will only uphold or quash a decision) and is more conservative than Cabinet. In that case, both reasonableness and correctness weaken the threat point of Indigenous groups, as there is no

realistic potential for the decision to be quashed. Their threat becomes dependent on the cost of delay in both monetary terms and risk that the project will not be undertaken (and contingent on Indigenous groups having resources to credibly make such a threat).

Second, and relatedly, the approach increases the risk of litigation rather than negotiation. If the judge is more conservative than Cabinet, to the extent there is any uncertainty about the type of judge (that is, that the judge may be naively deferential) and judges impose their own policy preferences, reasonableness means that Indigenous groups have some greater probability of gain from litigation than under correctness. If the judge will only quash, Indigenous groups facing a conservative judge may still be willing to bear the costs of litigation, as it moves Cabinet towards C1. If the judge is more liberal, Indigenous groups have greater incentive to litigate given the correctness aspect of the test, as that may increase their probability of moving the policy to the left. The result is then that the current Court model enhances the bargaining position of Indigenous groups generally but with a higher probability of litigation on the margin.

### III. DOES ADDING AN “INDEPENDENT” AGENCY MAKE A DIFFERENCE?

Next, consider the case of the legislature delegating the approval decision to some other “independent” decision maker—that is, a public body that is not the Cabinet or a line ministry, such as the Ministry of Natural Resources. In the pipeline example, we can think of the NEB (we will use the NEB as opposed to the CER to tie in with the language of recent court decisions). Depending on the structure set in the legislation delegating the power, this body may be more or less independent of Cabinet. Cabinet may control the body through a range of means such as the granting of appointments, the threat of removal or of not reappointing a member, the establishment of guidelines for decision making, and the implementation of a budget for the decision maker.<sup>59</sup>

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59. Andrew Green, “Delegation and Consultation: How the Administrative State Functions and the Importance of Rules” in Flood & Sossin, eds, *supra* note 1, 307 at 320-21 [Green, “Delegation and Consultation”]. See also *Clyde River*, *supra* note 2. This notion of the connection between the body and the Cabinet has not been fully recognized by the Supreme Court of Canada, which has stated that there is “no relationship of control” between the Crown (Cabinet, in effect) and such bodies (*ibid* at para 29).

## A. ADMINISTRATIVE LAW DECISIONS

As with the case of Cabinet being the sole decision maker, first consider a purely administrative law decision that does not involve the duty to consult. In this case, the sequence of the decision-making process is as follows:

1. A company proposes the pipeline and applies to the executive body (the “Board”) for approval.
2. The legislature has empowered the Board to approve or deny the application following some decision-making process. The Board may impose conditions on the project. The second step is then for the Board to approve or deny the application, subject to any conditions.
3. If the Board approves the pipeline, an environmental group or the proponent has to decide whether to apply for judicial review of the (possibly conditional) approval.
4. If one of them applies for judicial review of the decision, a court then either quashes the decision or allows it to stand.
5. If the court quashes the decision, Cabinet then has a choice of implementing a decision that the court will accept or having the legislature amend the legislation to either directly or indirectly allow the approval.<sup>60</sup> Thus, Cabinet still has the last word, but the Board is the first mover.<sup>61</sup>

As seen in Figure 2, we will assume that there is some difference between the preferences of the decision maker (“B”) and that of Cabinet (“C”), with the size of the difference depending on the degree of independence of the body. Note that the difference may come from different preferences of the members of the decision maker and Cabinet or, even if Cabinet appointed individuals with similar preferences to their own, from some use of the body’s expertise in a non-political fashion. The decision maker may lie to the left of Cabinet at BL (as in Figure 2(a)) or the right of Cabinet at BC (as in Figure 2(b)).

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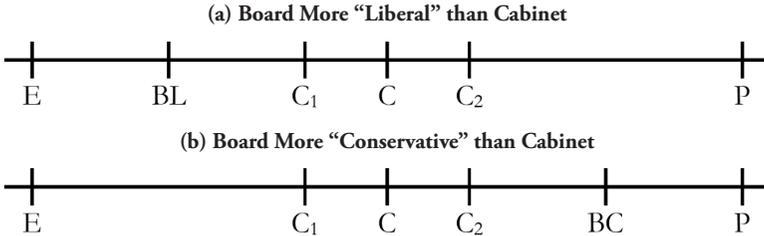
60. That is, Cabinet proposes legislation that either explicitly allows this project or indirectly does so by altering the statute to overcome whatever defect the court found in the decision-making process.

61. For an administrative law problem with a similar sequence see Ferejohn & Weingast, *supra* note 49.

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**FIGURE 2: PREFERENCES OF CABINET, THE BOARD, THE PROPONENT, AND THE ENVIRONMENTAL GROUP**


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NOTES: The line provides the array of possible policy outcomes from least development, on the left, to most development, on the right. The points represent the preferred outcomes for an environmental group (“E”), Cabinet (“C”), an executive decision maker which is “liberal” (“BL”) or “conservative” (“BC”), and the proponent (“P”). C1 is the outcome preferred by Cabinet minus the cost of delay (including loss of government revenue and the decreased probability that the pipeline will be built) and C2 is the point to the right of C where Cabinet is indifferent to C1.

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Given that the Board gets to make the first move, it may be able to forestall reaction by either the courts or by Cabinet, if it chooses properly. The analysis is similar to where Cabinet is the primary decision maker, but there are a few differences. First, where the judge is naively deferential and the standard of review is reasonableness, the judge will be deferring to the Board. The Board can forestall being overturned by either the Court or Cabinet if it sets its policy as closer to that of Cabinet but where Cabinet will not want to act. Where the Board is more liberal than Cabinet, it would set its policy at C1 and, if more conservative, at C2. Adding in the independent decision maker then moves the policy decision away from Cabinet’s preferred position (C)—where it was when Cabinet was the decision maker—towards the Board but not completely to the position of the Board. A second difference exists when the judge is sophisticated but has non-extreme preferences ( $C1 < J < C2$ ). In each case, a more liberal board will be able to set its policy at the lower end of the judge’s policy space at best (and conservative at the upper end). The Board can then exert at least a small pull in its direction using the span of reasonableness offered by the judge.

As seen in Table 3, for all other cases, the outcomes are the same where there is no constitutional component, regardless of whether the decision maker is Cabinet or a board. The more liberal judges pull the decision in a liberal direction and the more conservative in a more conservative direction. The result is that if the “independent” decision maker has preferences that align with your own relative to Cabinet (for example, an environmental group and a liberal board

or a proponent and a conservative board), you would prefer reasonableness regardless of the type or ideological preference of the judge, with the best being a naively deferential judge. If the “independent” agency’s preference is opposed to yours relative to Cabinet, then you would prefer correctness regardless of the preferences of the judge, with the worst being a naively deferential judge acting under a reasonableness standard.

**TABLE 3: OUTCOME BY TYPE AND PREFERENCES OF JUDGE, BY POSITION OF BOARD, AND BY STANDARD OF REVIEW—ADMINISTRATIVE LAW DECISION (NO DUTY TO CONSULT)**

<b>(a) Board More “Liberal” than Cabinet</b>						
<b>JUDGE</b>	<b>NAIVE DEFERENCE</b>		<b>SOPHISTICATED DEFERENCE</b>		<b>POLICY MAXIMIZER</b>	
	<b>Reasonable</b>	<b>Correct</b>	<b>Reasonable</b>	<b>Correct</b>	<b>Reasonable</b>	<b>Correct</b>
J<C1	C1	C1	C1	C1	C1	C1
C1<J<C	C1	J	JL	J	J	J
C<J<C2	C1	J	JL	J	J	J
J>C2	C1	C2	C2	C2	C2	C2

<b>(b) Board More “Conservative” than Cabinet</b>						
<b>JUDGE</b>	<b>NAIVE DEFERENCE</b>		<b>SOPHISTICATED DEFERENCE</b>		<b>POLICY MAXIMIZER</b>	
	<b>Reasonable</b>	<b>Correct</b>	<b>Reasonable</b>	<b>Correct</b>	<b>Reasonable</b>	<b>Correct</b>
J<C1	C2	C1	C1	C1	C1	C1
C1<J<C	C2	J	JU	J	J	J
C<J<C2	C2	J	JU	J	J	J
J>C2	C2	C2	C2	C2	C2	C2

NOTES: The columns represent the two different standards of review (reasonableness and correctness) for the three different types of judges (a judge who naively defers, who defers in a more sophisticated fashion, and who maximizes their policy preferences). The rows indicate the ideal position for the judge (“J”) on the line in Figure 1. “JU” refers to the upper (right-most) extreme of the policies that the judge would find reasonable, and “JL” is the lower (left-most) extreme of the policies that the judge would find reasonable.

## B. “INDEPENDENT” BODIES, THE COURTS, AND THE DUTY TO CONSULT

How does this change if we now add in the duty to consult where a board is making the decision? Table 4 sets out the outcomes where there is a board deciding in the context of the duty to consult. First, consider a naively deferential judge.

When Cabinet was the final decision maker, it could choose its preferred policy (C). Adding an “independent” agency in the non-constitutional context shifted the policy in the direction of the Board. In the context of a constitutional duty to consult, a board faced with a naively deferential judge and a reasonableness standard can shift the policy even further, all the way to its preferred policy (either BL or BC, whether more or less liberal than Cabinet, respectively), as Cabinet cannot enact legislation to counteract the judge’s determination.

**TABLE 4: OUTCOME BY TYPE AND PREFERENCES OF JUDGE, BY POSITION OF BOARD, AND BY STANDARD OF REVIEW—DUTY TO CONSULT**

<b>(a) Board More “Liberal” than Cabinet</b>						
<b>JUDGE</b>	<b>NAIVE DEFERENCE</b>		<b>SOPHISTICATED DEFERENCE</b>		<b>POLICY MAXIMIZER</b>	
	<b>Reasonable</b>	<b>Correct</b>	<b>Reasonable</b>	<b>Correct</b>	<b>Reasonable</b>	<b>Correct</b>
J<C1	BL	J	J	J	J	J
C1<J<C	BL	J	JL	J	J	J
C<J<C2	BL	J	JL	J	J	J
J>C2	BL	J	JL	J	J	J

<b>(b) Board More “Conservative” than Cabinet</b>						
<b>JUDGE</b>	<b>NAIVE DEFERENCE</b>		<b>SOPHISTICATED DEFERENCE</b>		<b>POLICY MAXIMIZER</b>	
	<b>Reasonable</b>	<b>Correct</b>	<b>Reasonable</b>	<b>Correct</b>	<b>Reasonable</b>	<b>Correct</b>
J<C1	BC	J	JU	J	J	J
C1<J<C	BC	J	JU	J	J	J
C<J<C2	BC	J	JU	J	J	J
J>C2	BC	J	J	J	J	J

NOTES: The columns represent the two different standards of review (reasonableness and correctness) for the three different types of judges (a judge who naively defers, who defers in a more sophisticated fashion, and who maximizes their policy preferences). The rows indicate the ideal position for the judge (“J”) on the line in Figure 1. “JU” refers to the upper (right-most) extreme of the policies that the judge would find reasonable and “JL” is the lower (left-most) extreme of the policies that the judge would find reasonable. “BL” refers to the optimal position for a board that is more “liberal” (to the left) of Cabinet and “BC” for a board that is more “conservative” (to the right) of Cabinet.

Second, for extreme judges (those much more liberal or conservative than Cabinet), where the judge is willing to impose their own decision (as opposed to quash), the outcome will be more extreme. In the non-constitutional context,

the outcome moves to C1 or C2 where the decision maker is either Cabinet or a board. In the constitutional context, the outcome moves out to the judge's preferred outcome (J) or, depending on the relative position of the Board and the judge, perhaps even the extreme end of the judge's policy range (if the standard is reasonableness). Finally, for judges with similar preferences to those of Cabinet, the outcomes are the same in the constitutional and non-constitutional cases (except, as noted, where the judge is naively deferential and the standard of review is reasonableness).

Given these outcomes, the relative ordering of reasonableness and correctness in general appears to remain the same in the constitutional as in the non-constitutional case—reasonableness if the Board is aligned with your preferences (regardless of the position of the judge), and correctness if the Board is opposed to your preferences (again, regardless of the position of the judge). However, remember that only Indigenous peoples can bring duty to consult applications. This asymmetry means Cabinet is no longer central to the analysis but, instead, the focus is on the location of the Board relative to the judge. Indigenous peoples are not likely to challenge a decision where the judge is to the right of the Board (as they will lose), although, again, there may be some delay value.<sup>62</sup> When the judge is to the left of the Board, the Indigenous group may challenge its decisions, with correctness giving them a stronger position than reasonableness.

Does this analysis tell us anything different about the Court's chosen standard of review in the context of a board as the final decision maker? Consider a board that is more liberal than Cabinet. Where the judge is to the left of the Board, Indigenous groups may be able to get the decision quashed through either the correctness or the reasonableness standard, with the exception of a naively deferential judge using a standard of reasonableness. If the judge is to the right of the Board, the Indigenous groups cannot credibly threaten litigation (except for the delay value) regardless of the standard and may then focus on negotiation. Similarly, when the Board is more conservative than Cabinet, a judge to the left of the Board increases the value and probability of litigation for Indigenous groups, and a judge to the right of the Board forecloses the threat of litigation.

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62. Recall that we are working with an assumption of perfect information for now. However, the parties are not likely to know the identity of the judge (or panel of judges) until after an application for judicial review is launched. You could think in terms of the parties having knowledge of the median judge on the relevant court which would then bring in the parties' expected outcomes.

As a result, if Cabinet relies on a board to fulfill the duty to consult, the basic structure of the problem remains the same. The Court's approach increases the threat point (and possibility of litigation) for Indigenous groups when the judge is to the left of the decision maker. When the judge is to the right, Indigenous groups have no real prospect of succeeding and there should therefore be less litigation, unless Indigenous groups are using the litigation for the delay value (that is, to extract more from negotiations or reduce the probability of the project due to the uncertainty). The effect of having a board rather than Cabinet as the decision maker, though, can be quite stark depending on the relative positions of the actors.

#### IV. NEGOTIATION AND LITIGATION

The duty to consult raises difficult questions about the scope of the duty, who gets to decide how and whether the duty is fulfilled, and the substantive value of the duty. In this article, we use a simple positive political theory model to try to map some of the strategic concerns underlying the relationship between the principal parties. The contours of the problem are smoothed out by various limiting assumptions, such as the rationality of the parties and knowledge about the relative position of each of the actors. However, the model allows us to see some of the basic paths that influence decisions.

The underlying layout of the choices can be seen most easily where the administrative law decision does not raise constitutional issues. Judicial review shifts decisions in the direction of the preferences of the reviewing court, except where the judge is willing to completely defer to the views of the executive decision maker. This shift occurs because challenges are two-sided, in the sense that parties on both sides of a particular issue can apply for judicial review. Where either Cabinet or an "independent" body makes the initial determination, Cabinet still retains the final say after judicial review. However, the sequence of decision making matters. If Cabinet is the initial decision maker and dislikes being overruled by the courts, it will not choose its preferred policy but a policy that will not be overturned, taking into account whether the reviewing judge is more liberal or more conservative than itself. If an "independent" body is the initial decision maker, the body can use its first-mover advantage to forestall both judicial review and Cabinet or legislative override. In that case, the Board does not choose its optimal policy but a policy more in line with that of Cabinet, regardless of the preferences of the reviewing court. The exception is where the judge is naively deferential to the initial decision maker. In that case, Cabinet can

choose its preferred policy, but a board must still act in the shadow of Cabinet override and therefore must moderate its choice to reduce the probability of Cabinet override.

This simple model highlights a few features of the relationship between the executive, the courts, and the affected parties. First, the interaction between the views and the type of reviewing judge is important to the final outcome. The views of the judge are irrelevant where the judge is naively deferential and the standard of review is reasonableness. Correctness makes the type of judge irrelevant (on the assumption that correctness allows the judge to adopt what they feel is the best outcome). It is the combination of reasonableness and different views that plays some role in the outcome.

Second, the first-mover advantage of the “independent” agency provides it with a limited ability to shape decisions towards its own preferences. However, it is Cabinet’s last move that shapes the agency’s choices. Judicial review in this model of administrative decisions is then somewhat democratic if that means shaping decisions in the light of Cabinet’s preference over this particular decision. At least where there is complete information and the parties behave rationally, the Board’s initial decision will stand but will reflect Cabinet’s views as well.<sup>63</sup> The interaction of the different players provides some context for criticisms of the Court’s approach to administrative law over time. Support for more or less deference may depend on your assumptions about the positions of the different actors relative to each other but also relative to your own general policy preferences. This connection between support for deference and policy preferences has and is playing out in the United States. Support for and criticism of their administrative framework, including the *Chevron* doctrine, is aligned with political leanings—with conservatives initially supporting its underlying deference when it was in line with a more conservative set of policies but more recently criticizing it, seeing it as fostering an expansive regulatory state.<sup>64</sup> Similarly, in Canada, one question that arises is whether there is a connection between support for a more or less deferential approach and the assumptions about the nature and relative orientation of the judiciary relative to government.

Third, the Court has stated that, “[r]easonableness is a single standard that takes its colour from the context.”<sup>65</sup> The nature of the deference analysis changes

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63. See Ferejohn & Shipan, *supra* note 47.

64. See Cass R Sunstein, “*Chevron* as Law” (2019) 107 *Geo LJ* 1613 (discussing the different views of *Chevron* over time and its correlation with political ideology).

65. *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. See also *Vavilov*, *supra* note 56 at para 85.

with, for example, the nature of the decision maker and the decision. The result seems to be that where, for example, Cabinet is deciding a broad question (such as whether a pipeline is in the “national interest”), judges are likely to be very close to naive deference. For example, the Federal Court of Appeal in *Gitxaala*, dealing with approval of the Northern Gateway Pipeline, stated that Cabinet:<sup>66</sup>

was entitled to assess the sufficiency of the information and recommendations it had received, balance all the considerations—economic, cultural, environmental and otherwise—and come to the conclusion it did. To rule otherwise would be to second-guess [Cabinet’s] appreciation of the facts, its choice of policy, its access to scientific expertise and its evaluation and weighing of competing public interest considerations, matters very much outside the ken of the courts.

Boards, on the other hand, may not get such a high level of deference and therefore may be more likely to face a version of sophisticated deference. These differences will potentially impact the pull of the courts and the nature of the dynamic at play.

Finally, the model shows the importance of the reason for and structure of the “independent” agency. Cabinet may establish these agencies for a number of reasons. As we discussed, Cabinet may be attempting to have the decision taken on the basis of expertise or may wish for decisions to be made that are independent of political influence for other reasons (such as credibility or policy stability). The difference between Cabinet’s optimal policy and that of the Board is meant to reflect these values. The pull of the decision towards the views of Cabinet in the model serves, in part, to undermine these reasons. At the same time, the Board’s ability to pull away policy from Cabinet’s preferred outcome at least shows some effect of creating these bodies. We have, of course, assumed that there is some independence of the Board. To the extent that the Cabinet creates a body that mimics its own preferences, then the two cases (either Cabinet or the Board being the initial decision maker) collapse into one. Cabinet could create such a board for efficiency reasons (to allow its preferences to prevail over a wider range of decisions without having to be involved in the decision)<sup>67</sup> or possibly to provide the illusion of independent (perhaps expert) decision making without the risk of unwanted policy decisions.

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66. *Gitxaala*, *supra* note 20 at para 157.

67. See Ferejohn & Shipan, *supra* note 47 at 8. In a slightly different context, Ferejohn and Shipan point out that the question then becomes: Why does Parliament or Cabinet delegate to the Board if they are not providing answers that are consistent with Cabinet’s preferences? Their answer is that there are likely efficiency gains and Cabinet retains the power to review and alter ultimate policy decisions.

The constitutional context, particularly that of the duty to consult, brings greater complexity, in part because challenges are now one-sided—only by Indigenous groups. There are a number of departures from the straight administrative law case. First, naively deferential judges lead to even starker outcomes, if operating under a reasonableness standard. Where Cabinet is the initial decision maker, the decision rests at their preferred outcome (that is, the preferred outcome of an elected, majoritarian body), even though it is a constitutional issue. However, where a board is involved, the outcomes shift out to its preferred outcome and, depending on the makeup of the body, the swing could be quite significant.

Second, the one-sided nature of the challenges under this model means that any challenge facing a judge whose preferences lie to the right of the initial decision maker will fail. The result will be either fewer challenges in such cases or only challenges where the challenge has a delay value (such as reducing the probability of the development). Where the judge lies to the left of the decision maker (that is, substantively more aligned with the Indigenous group), the Court's standard should foster litigation—the combined correctness/reasonableness standard providing a greater incentive for litigation relative to reasonableness alone, as it increases the probability of success. Part of your view of the effect of the duty to consult framework will depend on your view of the likely relative position of Cabinet as opposed to judges. If you believe judges will tend to have preferences very close to or to the left of Cabinet, the result would likely be greater litigation.

Third, this effect on probability of success makes the position of the initial decision maker important to the probability of litigation versus negotiation. Consider the two positions of the board relative to Cabinet. A “liberal” board should face less litigation than Cabinet, not only because its preferences lie to the left of Cabinet, but also because it is less likely that there will be judges whose views lie to the left of the Board than of Cabinet. The Board may not provide a significantly better policy than Cabinet from the perspective of the Indigenous group (such as where their preferred level of development is none), but the probability of success in litigation may be significantly reduced. For the same reason, a “conservative” board will face much higher levels of litigation than Cabinet and certainly more than a “liberal” board.

The outcome will then depend on the relationship between the parties. Again, it points to the need to carefully consider the structure of any decision-making body. Cabinet may be able to use its powers of appointment, for example, to shift the location of the Board to obtain particular results, which may have impacts even within a constitutional setting. The Court's claim that these boards and

agencies are “independent of control” of Cabinet is not true in almost all cases, given the control Cabinet has on appointment and other aspects of these bodies’ existence and mandate.<sup>68</sup> Further, its claim that these bodies can act as neutral arbiters of constitutional issues, such as the duty to consult (not to mention other constitutional questions), requires an ability and willingness to ignore the pull of Cabinet which is, at its core, an empirical question. This pull exists even without getting into the more basic levels of control by the legislature raised by Metallic who argues that where the substance of the enabling legislation is biased to begin with, deference leads to biased decisions.<sup>69</sup> In the constitutional context, Cabinet may not be able to change an existing decision of the Court, but it may be able to shape that decision *ex ante* or future decisions *ex post* by changing the nature of the delegation (and perhaps, for example, the level of deference offered by the courts).

As Audrey Macklin notes, in the *Charter* context, we need judges to police *Charter* rights because they are independent from the legislature and the executive. She argues that in the *Charter* context, “decisions by elected officials (legislators) are distrusted precisely because they might be inclined to trade off individual rights in the name of political gain.”<sup>70</sup> We worry about deferring to those who are close to the political branch in this context. The same holds true for the duty to consult. This model of constitutional decision making is applicable to many more general *Charter* challenges implicating administrative decision makers.

Further, independence has an important connection to expertise. Expertise may provide a measure of independence to a decision maker where the expertise ties the decision maker into professional or reputational norms (for example, doctors may have certain norms of decision making in the context of medical decisions).<sup>71</sup> The fact that the individual or body is an expert may make it more likely that they are able, or feel obligated, to make decisions in line with that expertise, as opposed to submitting to political considerations. However, there is an equally as strong (or even stronger) tie in the other direction. Some measure of independence may be necessary to be sure that expertise is actually being exercised. If we feel that expertise allows better decisions about Indigenous

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68. For a discussion of the issue of the expertise and independence of the NEB, see Graben & Sinclair, *supra* note 13. Graben and Sinclair studied NEB decisions implicating the duty to consult. See generally Green, “Delegation and Consultation,” *supra* note 59.

69. See “Legal Frameworks,” *supra* note 6.

70. Audrey Macklin, “Charter Right or Charter-Lite? Administrative Discretion and the Charter” (2014) 67 SCLR (2d) 561 at 574 [Macklin, “Charter Right”].

71. See Adrian Vermeule, “Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State” (2017) 130 Harv L Rev 2463.

claims, we need to be sure it is actually being exercised and decisions are not being altered to meet political demands. As a possible example, in their study of NEB decisions, Graben and Sinclair found that the NEB does not use appropriate legal standards to assess whether the duty to consult has been met.<sup>72</sup> Judges deferring to politically accountable actors on constitutional rights on the basis that they have expertise raises concerns about whether that expertise is actually being exercised. The duty to consult context may be different than the *Charter* context in this sense. In the *Charter* context, Macklin notes that judges should decide, as they may have both expertise and independence.<sup>73</sup> However, in the duty to consult context, there may be more of a trade-off between expertise and independence. There are considerable context-specific decisions that judges may not have relative expertise to make but do have the independence. We need to think about how the trade-off affects the final decision.<sup>74</sup>

This simple model shows some potential influences on decision making, particularly from the strategic interaction of different parties to decisions. It applies to administrative law decisions generally, as well as to constitutional questions beyond the duty to consult. However, like any model, it is a simplification and rests on some fairly strong assumptions. The assumptions about perfect rationality and full information are obviously false and would result in no litigation at all, but they provide some insight into the general pull from the context. One basic piece of information that is missing upfront is the identity of the judge or judges that will hear the application. This information is not revealed until after the application is launched. However, you may have some information about the average preferences of judges on the relevant bench relative to Cabinet or a board. The variance of the judges' preferences would be much higher than that of Cabinet (which would depend on the median minister or perhaps just the Prime Minister) or a board, as judges will be appointed over time and, moreover, sit in panels (and, on lower courts, sit alone). The partial exception is the Supreme Court of Canada which has only nine members, but, even there, the Chief Justice

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72. Graben & Sinclair, *supra* note 13 at 415.

73. "Charter Right," *supra* note 70 at 578-79.

74. See David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action —The Top Fifteen!" (2013) 42 *Adv Q* 1. Mullan has pointed to this connection in the general administrative law setting. In the statutory interpretation context, judges may be more hesitant to defer to ministers than adjudicative tribunals out of fear that ministers will not base their decisions on their expertise. Mullan also notes that tribunals which are not actually independent should perhaps not benefit from a presumption of expertise. See also Hodgson, *supra* note 6 (for an argument in support of consideration of a specialized tribunal to assess the adequacy of consultation).

has the ability to choose the size and identity of the panel hearing the appeal, thereby reducing the certainty in the preferences of the judges deciding the issue.<sup>75</sup>

The assumption that the problem is unidimensional and can be thought of as being on a simple left/right, liberal/conservative line is also very strict and stylized. The problems underlying the duty to consult and, in fact, other constitutional and many administrative law contexts, are multi-dimensional. However, the model is meant to illuminate the basic influences from these situations, even though it abstracts from a realistic portrayal of these disputes.

We have also considered a few different types of judges—those that are naively deferential to the executive decision maker, those that defer but in a more circumspect manner based on their own baseline views, and those that aim for their own preferred outcome. While we have said that the latter are aiming to maximize their preferred policy, they could also be thought of as simply working from their best view of the law (that is, in the terms of judicial decision making, working from a legal model as opposed to an attitudinal model). The story can be made more complex through different assumptions about these judges but these three help with understanding some of the core questions about the differences between reasonableness (and shades of reasonableness) and correctness.

Finally, we assume static preferences for the principal actors such as the Cabinet, the Board, and even the Indigenous groups. This assumption is potentially problematic in the context of the duty to consult, as one of the reasons for consultation is to attempt to have the parties understand and internalize the other parties' views and concerns, with the possible alteration of what they see as the optimal policy. This connection between procedure and substance and the nature of these dynamics in the context of procedural questions is interesting. On a basic level, you can use the same basic structure to think about procedural choices—that is, with the line being an array of procedures from more to less, with Indigenous groups seeking more to hopefully alter the substance of the outcome and the executive seeking less to minimize cost and delay. However, a more fulsome model would build the connection between substance and process to a greater extent.

Given these assumptions, however, what can we say about the Court's approach to the duty to consult? The combination of the Court's choice of standard of review and the one-sided nature of the challenges means that the impact of its approach depends on the relative positions of the relevant actors. The incentive to litigate shifts as policy positions shift for Cabinet (such as

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75. Benjamin Alarie, Andrew Green & Edward M Iacobucci, "Panel Selection on High Courts" (2015) 65 UTLJ 335.

following elections), for boards (again, following elections where new members are appointed or structures are changed), or for judges (with new appointments to the bench), but not in a straightforward fashion. Further, the interpretation of the standard of review by different types of judges will impact these incentives to litigate and the probability of success from litigation. The Court recognizes that the duty to consult is not a static, objective exercise of applying the constitution, but it underestimates the importance of the underlying dynamic relationship between the main players. A simple call for greater negotiation will not be effective without considering how to use these relationships to build the incentives for all parties to negotiate rather than become bound in seemingly endless cycles of litigation.