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Extracting Indigenous jurisdiction on private land: the duty to consult and Indigenous relations with place in Canadian law

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Handbook on space, place and law
Indigenous jurisdiction on private land

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Introduction

Indigenous relations with land are grounded in place-based legal orders which have been regulating the territories now making up Canada for millennia (Borrows 2010, 2018; McGregor 2010). Judicial consideration of Indigenous relations with place has focused on the duty to consult and accommodate with respect to 'Crown land' – lands for which federal and provincial governments are the deemed owners. This emphasis on Crown lands is logical – 89 per cent of land in Canada is held by either the federal or provincial Crown (Neimanis 2013). Indigenous claims often expressly exclude private land, wary of courts' willingness to unsettle third-party expectations, and conscious of relationships with neighbours (*Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44). However, this emphasis has come at the expense of attention to Indigenous property relations in areas that have been largely privatized. The creation of fee simple lands from Indigenous territories has had a disproportionate impact on particular nations. For example, in heavily populated southern areas the majority of Indigenous lands are now owned by third parties and therefore excluded from modern treaty settlement or other land claims processes (Reynolds 2018). Private lands are also largely controlled by the 'agenda' of the private owner (Katz 2008; Van Wagner 2017).

This chapter explores the relationship between Indigenous environmental jurisdiction – the authority to make decisions about the land – and fee simple property. In Canada's inherited tenurial system the Crown holds the radical title to all land. A fee simple estate is the legal mechanism through which private ownership of land is made possible, subject to the Crown's radical title. This structure of property law has profound implications for Crown–Indigenous relations. Using case studies from British Columbia and Ontario, this chapter examines how the Crown's duty to consult and accommodate Indigenous peoples has been applied to private land. Theoretically the duty ensures the Crown does not 'run roughshod' over Indigenous interests (*Haida Nation* v. *British Columbia [Minister of Forests]*, 2004 SCC 73, para. 27). Yet in practice the duty allows courts to avoid confronting difficult questions about the relationship between Indigenous jurisdiction and private property.

Much emphasis has been placed on the 'innocent' third-party interests of those now in possession of fee simple lands (Hamilton 2018; Lavoie 2017; McNeil 2001, 2010; Slattery 2006; *Chippewas of Sarnia Band* v. *Canada (Attorney General)* [2000], 51 OR [3d] 641). As Gordon Christie (2009, p. 191) argues, the predominant judicial response has been 'allaying the fears of private property owners'. Courts avoid complicated and uncomfortable questions by presuming such interests extinguish Indigenous relations with place (Borrows 2015a; Christie 2009). But where land use decisions implicate Indigenous relations with lands and waters, Indigenous interests cannot be presumed to be subsumed by fee simple title. As John Borrows (2015a, p. 117) notes, such a presumption distorts the Canadian constitution by privileging non-

constitutional private property interests over constitutionally protected Indigenous interests. Financial compensation may be a necessary element of Canadians taking collective responsibility and bearing the cost of righting wrongs against Indigenous peoples (McNeil 2010, p. 25). However, it is an insufficient remedy for dispossession and the consequences flowing therefrom. Rather, we must find ways to restore Indigenous relations with land and territory. Engagement with Indigenous environmental jurisdiction as a source of land use decision-making authority is one place to start.

A meaningful shift towards the recognition of Indigenous jurisdiction requires moving beyond consultation in Canadian law. This will challenge foundational elements of settler-colonial property relations. Yet, it is a critical opportunity 'to consider the kinds of transformation of the self and our relations with one another that are a precondition for wider social and political transformation' (Bhandar 2018, p. 191). Indeed, place-based Indigenous land use law and systems of governance offer tools and methods for engagement with the overlapping, and at times conflicting, relationships with and obligations to particular places in an era of ecological crisis (Borrows 2010, 2018; McGregor 2010; Mills 2016; Mills et al. 2017).

Background: placing law on private land: consultation stories

Like all conflicts about resource extraction, the cases examined below sit in particular places constituted by complex relations between the human and more-than-human. As two of the only cases in which the application of the duty to consult to private land has been considered in any detail by Canadian courts, they demonstrate how conceptions and practices of consultation facilitate the ongoing work of dispossession and colonization in Canada. At the same time, they illustrate the assertion of enduring Indigenous relations with land and legal orders.

THE ESQUIMAULT AND NANAIMO RAILWAY LANDS: BRITISH COLUMBIA'S 'PRIVATE' FORESTS

Vancouver Island sits on the far west coast of the lands that now make up Canada. Towering Douglas Firs populate temperate rainforests brushing up against the Pacific Ocean. Coast Salish, Nuu-chah-nulth, and Kwakwakaw'akw peoples have lived there for thousands of years. After the onset of British settlement in the late nineteenth century, the government of Canada awarded the Esquimalt & Nanaimo (E & N) Railway Company a series of land grants, converting approximately 20 per cent of Vancouver Island, unceded and collectively held Indigenous territory, into a vast stretch of private land (Egan 2012; Thom 2014). No consent was ever sought or given by any of the impacted Indigenous nations. No compensation was offered. The grant itself is silent on the Indigenous title to the land (Egan 2012; Morales 2014).

Much of the granted land is now owned by public-sector pension plans as 'private managed forest lands' under the British Columbia *Private Managed Forest Lands Act* (Ekers 2019). Yet, the lands remain subject to ongoing treaty negotiations between the Crown and both the Hul'qumi'num Treaty Group and the Hupacasath First Nation. Officially, the British Columbia treaty process excludes private land unless a landowner is willing to sell and a First Nation is willing to purchase it (Reynolds 2018). Nonetheless, Indigenous communities continue to assert claims in relation to the E & N lands, challenging not only title, but also access and use of the lands, and environmental oversight (Thom 2014; Egan 2012; *Hupacasath First Nation* v.

British Columbia, 2005 BCSC 1712). Indeed, intensive private forestry operations are a source of significant conflict between Indigenous nations, the Crown, and the private owners (Ekers et al. 2020).

Robert Morales, chief negotiator for the Hul'qumi'num Treaty Group, describes the grants, which privatized 85 per cent of Hul'qumi'num lands, as the 'great land grab' (Morales n.d.). Today, private forestry companies hold 60 per cent of Hul'qumi'num territory. Another large portion of the E & N grant area is in Nuu-chah-nulth territory, specifically one-third of the lands of the Hupacasath First Nation near Port Alberni. Former Hupacasath chief and now president of the Nuu-chah-nulth Tribal Council, Dr Judith Sayers describes the importance of the fee simple lands to the Hupacasath:

> Our culture as Hupacasath comes from our relationship to the land. Our language comes from the land, our place names describe what is on the land, the sound the animals make or what animals do. The material for our homes, longhouses, our canoes, our regalia, our art and some of our clothing comes from forest ecosystems. The forests cradle the very watersheds that make viable streams for our salmon which are the mainstay of our diet. (Affidavit #2 of Judith Sayers, para. 3)

Both communities have consistently challenged the conversion of their territory into private land. A group of Hul'qumi'num nations have taken their case to the Inter-American Commission on Human Rights (*Hul'qumi'num Treaty Group* v. *Canada*, Inter-Am. C.H.R., Report No. 105/09). Cowichan Tribes, the largest Hul'qumi'num First Nation, also successfully upheld pest management conditions in their territory (*Timberwest* v. *Deputy Administrator*, [2003] 2002-PES-008[a]). In both venues, Hul'qumi'num communities have clearly asserted claims to the fee simple lands based on their property relations. Yet, in the face of asserted title and advanced treaty negotiations, private landowners have continued aggressively harvesting Hul'qumi'num territory with impunity (Ekers et al. 2020).

The legacy of the E & N grants resurfaced in 2003 when the province deregulated forestry on private land through the industry-driven, voluntary *Private Managed Forest Land Act*. While forestry operations on private lands had historically been regulated alongside Crown lands, private lands could now be 'removed' from the public regime (*Forests Act*, RSBC 1996, c 157). The result would be increased harvesting and log exports, reduced environmental oversight, and the loss of access for, and consultation with, Indigenous communities (Ekers et al. 2020; Parfitt 2008). Where the lands had once been protected from sale or residential development, they became primarily an asset in a pension portfolio to be put to the highest and best use (*Ke-Kin-Is-Uqs* v. *British Columbia*, 2008 BCSC 1505, para. 2). When the government approved the removal of Hupacasath land from the former regime without consultation, the First Nation sought judicial review (*Hupacasath*). Then chief, Dr Judith Sayers described the removal decision in stark terms, '[it] allows Weyerhaeuser to do anything they want on one third of our Territory' (Affidavit #2 of Judith Sayers, para. 26).

EXTRACTING THE PENINSULA: TREATY RELATIONS IN ONTARIO'S GREAT LAKES COUNTRY

The Saugeen (Bruce) Peninsula follows the UNESCO-designated Niagara Escarpment as it travels north along the shores of Lake Huron and Georgian Bay in the province of Ontario. These are the territories of the Saugeen First Nation and the Chippewas of Nawash Unceded First Nation, who together make up the Saugeen Ojibway Nation (SON) (*Saugeen First Nation*

v. *Ontario (MNRF)*, 2017 ONSC 3456, paras. 36–8). The SON communities are part of the larger Anishinabek nation whose territory extends throughout the Great Lakes region of North America. The people of SON have governed and cared for these lands and the adjacent areas for thousands of years (The Chippewas of Nawash Unceded First Nation, 2005, pp. 3–4). SON has consistently asserted their jurisdiction over these lands and resources in the face of pressures from settlement. However, after a series of treaties beginning in the mid-1830s, the vast majority of SON territory was transformed into a mix of Crown, municipal, and private land. Questionable treaty negotiations and broken treaty promises are the subject of ongoing litigation (Opening Statement of the Plaintiff, paras. 30–6). As discussed above, lands held by *bona fide* purchasers for value without notice are excluded from the claim (para. 35).

SON territory continues to be under pressure, now also from mining of the peninsula's valuable limestone (*Saugeen*, para. 65; Ritchie 2013). SON's Environment Office, which manages consultation for the communities, has developed a detailed Consultation Process and Protocol for proponents seeking to work within their territories. It states, 'the full expression of SON's rights depends on healthy, biologically diverse ecosystems' and requires proposed projects to be 'consistent with the SON's vision for the land and waters of their traditional territories, respectful of their rights and interests and it must contribute to the cultural, economic, and social vitality of the people'. The Process sets out detailed steps for working with SON. SON's assertion of land use jurisdiction flows from a complex web of relationships with, and responsibilities to care for, the more-than-human world of their territory (Borrows 1997, 2010; Chippewas of Nawash Unceded First Nation 2005).

In spite of this clear assertion and process, the Ministry of Natural Resources and Forestry provided SON with no notice of a 2008 application for a limestone quarry for three and a half years, and ultimately approved the license without consultation (*Saugeen*, para. 6). The quarry proposed by the landowner, T & P Hayes Ltd., would be one of around 500 quarries in SON traditional territory, the cumulative effects of which SON has consistently raised with the Crown (Chiefs and Council Saugeen Ojibway Nation 2012; Ritchie 2013; *Saugeen*, para. 46). The consultation process had been characterized by Crown failures to communicate, unexplained reversals of position, a lack of funding, unsuccessful attempts at delegation to the private proponent, and a general unwillingness to meaningfully engage with SON. In their application to quash the license SON expressly asserted their 'right to protect the health and integrity of the lands, waters and resources throughout SON's traditional territories' (*Saugeen*, para. 40).

Discussion

SEARCHING FOR INDIGENOUS ENVIRONMENTAL JURISDICTION IN CANADIAN LAW

Indigenous relations with land are formally protected by s 35 of the Canadian Constitution, which recognizes and affirms existing Aboriginal rights and title (*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* [UK], c 11). The treatment of Indigenous legal orders and jurisdiction in Canadian law, however, remains very unsettled and continues to be subject to legal and non-legal challenges (King and Pasternak 2019). The Supreme Court has clearly rooted recognition of Aboriginal rights and title in pre-existing Indigenous systems of regulation of use, access to, and ownership of lands, waters, and resources (Borrows 2010; see *R*

v. *Van der Peet*, [1996] 2 SCR 507; *Delgamuukw* v. *British Columbia*, [1997] 3 SCR 1010; *Mitchell* v. *MNR*, 2001 SCC 33, para. 10; *Tsilhqot'in Nation*, paras. 12, 16). For example, establishing Aboriginal title requires an Indigenous nation to establish historical occupation, evidence of which is found in the pre-existing systems of governance demonstrating control or exclusive stewardship over the land (*Tsilhqot'in Nation*, para. 38). However, the cases fall short of recognizing the link between title and governance, leaving a crucial gap in the colonial conception of Indigenous relations with land (Borrows 2015b; Christie 2015). Further, as Andree Boisselle (2015, p. 34) argues, the Supreme Court has consistently treated the common law 'as law' and the Aboriginal perspective as 'factual context relevant to determining whether or not the legal standard has been met'. For example, while Indigenous systems of land title may be evidence of occupation, the content of Aboriginal title, and its limitations, are defined in relation to common law understandings of property. Thus, the Supreme Court specifically requires occupation to have been 'exclusive', centring the right to exclude at the heart of common law property relations rather than relevant Indigenous concepts about relations with land (Bhandar 2018, p. 65).

The failure to treat Indigenous law as law and to recognize the jurisdictional element of relations with land is intimately connected with the unquestioned acceptance of Crown sovereignty and underlying title by Canadian courts (Bhandar 2018; Borrows 2015b; Macklem 2001; McNeil 2018). Irrespective of the Supreme Court's 2014 declaration that *terra nullius* never applied in Canada, and seemingly in contradiction to the recognition of prior Indigenous occupation and sovereignty, the Crown's radical title in Canada is repeatedly affirmed in s 35 jurisprudence (see for example, *Tsilhqot'in*, 69). As the court pronounced early in its engagement with s 35, 'there was from the outset never any doubt that sovereignty and legislative power, and indeed underlying title, to such lands vested in the Crown' (*R v. Sparrow*, [1990] 1 SCR 1075, p. 1103). This unquestioned colonial legal fiction vests 'extraordinary proprietary power in the Crown' and produces significant distortions in how the Crown and third parties engage with Indigenous relations with land through Canadian law (Macklem 2001, p. 93). As Borrows (2015b, p. 724) succinctly states, '[t]his fraud radically dispossess each original owner'. It lays the foundation for a narrow view of both the relationship between Indigenous parties and fee simple lands and Crown obligations in the context of private property. Indeed, it is what Brenna Bhandar (2018, p. 74) refers to as the 'mythic foundation' on which the colonial production of private land relies. Across Canada, as Patrick Macklem (2001, p. 93) argues, the Crown's radical title provided the freedom required to 'grant third-party interests to whomever it pleased, which it did: to settlers, mining companies, forestry companies, and others'.

Establishing title is a long and expensive process – indeed only one First Nation has successfully done so through the courts, and few have navigated the modern-day treaty process outside of the northern territories. In this context, the duty to consult has become a primary window through which the Canadian legal system interprets Indigenous relationships to their broader territories even where rights and title remain 'unsettled' in Canadian law (Christie 2019, p. 113). Therefore, the duty to consult cases are a logical place to look for recognition of Indigenous environmental jurisdiction in Canadian law. However, the context of private land has had very limited treatment by the courts – the s 35 case law thus far has been guided by 'a visceral driven need to protect private property from any challenge posed by Aboriginal title' (Christie 2009, p. 197). The following section considers how the courts understand the role of First Nations in decisions about private land through analysis of the two case studies outlined above. Rather than working towards the restoration of Indigenous peoples' relations with their

broader territory, the application of the duty to private land compounds the radical dispossession affected by Crown sovereignty. Fee simple lands are understood as effectively severed from the place-based relations and obligations of Indigenous legal orders.

THE DUTY TO CONSULT AND ACCOMMODATE

The duty to consult and accommodate is rooted in what the Supreme Court has described as the 'honour of the Crown' (*Haida*, para. 16; *Taku River Tlingit First Nation* v. *British Columbia [Project Assessment Director]*, 2004 SCC 74, para. 24). This constitutional principle arises from the Crown's assertion of sovereignty in the face of Indigenous peoples' pre-existing occupation and requires the Crown to act honourably in all of its dealings with Indigenous peoples (*Haida*, para. 27; *Taku*, para. 24). The Crown must engage in consultation and be prepared to accommodate Indigenous interests prior to making decisions or allowing impactful activities on Indigenous territories (*Mikisew Cree First Nation* v. *Canada [Minister of Canadian Heritage]*, 2005 SCC 69, para. 67). This duty arises whenever the Crown has real or constructive knowledge of a proven or credible, potential Aboriginal right or title claim, and contemplates acting in a way that may adversely impact that right or title (*Haida*, paras. 35, 37; *Taku*, para. 25). These elements are, however, complicated in the context of fee simple lands. What is a 'credible' claim to land for which another holds title? When does the Crown take action with respect to private land? What is an 'appreciable' impact on 'the future exercise of the right itself' if the land is understood as having already been transformed into private property and the owner is entitled to exclude all others (*Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43, para. 46)?

In Anglo-Canadian property law, the fee simple is the largest estate in land, limited only by the Crown's underlying title. Relying on this and the centrality of the right to exclude in common law property (Katz 2008; Merrill 1998), both the Crown and the fee simple title holders argue the duty simply does not apply on fee simple lands (*Hupacasath*, para. 165; *Saugeen*, paras. 30, 63). This position was accepted without authority or detailed reasons by the Alberta Court of Appeal in *Paul First Nation* v. *Parkland (County)* (2006 ABCA 128). Lower courts and tribunals in other jurisdictions, including those in the case studies outlined here, have not fully adopted this position (*Timberwest*, p. 40; *Hupacasath*, para. 199; *Saugeen*, para. 8). However, even where the duty is found to have been triggered, its application both affirms Crown sovereignty and upholds the power of the property relations flowing from Crown title. Indigenous environmental jurisdiction and the relationships it upholds are placed outside the frame of legal relevance (Blomley 2014). At best, Indigenous relations with place provide context for the scope of a procedural duty to consult rather than grounding enforceable decision-making authority or interests in land (Collins and Sossin 2019, p. 335).

TRIGGERING THE DUTY ON PRIVATE LAND

In *Hupacasath*, the Crown and the landowner argued the duty could not arise because the Hupacasath claim to title was 'fundamentally incompatible' with fee simple and therefore not 'credible' (*Hupacasath*, paras. 155–6, 167). The Hupacasath claim was 'not realizable' because fee simple interests would necessarily be prioritized even if challenged directly (*Hupacasath*, paras. 157, 160). The Crown went so far as arguing application of the duty would 'constitute a step towards a challenge to the entire Torrens property system' (*Hupacasath*, para. 166). The

Court rejected this argument, finding '[t]he Crown's honour does not exist only when the Crown is a land-owner'; however, the judge noted the case presented 'unique circumstances' (*Hupacasath*, paras. 199–200). The unique circumstances, according to the court, arose from the Crown's past 'specific and significant control over activities on the land' under the *Forests Act* rather than from the Crown's power to make land use policy and decisions more generally. The public character of the E & N lands was not inherent. Rather, as a Ministerial Briefing Note described, the removal lands had simply been managed 'as if' they were public. The impact of the removal was to return them to 'the private lands they have always been' (Ministry of Forests 2004). In other words, the Crown would step back and the owner would be restored as the primary decision maker. The pre-existing title to the lands, the ongoing treaty negotiations with the Crown, were effectively erased.

At the time of the SON hearing, the Crown conceded that the duty was triggered (*Saugeen*, para. 137). Therefore, the court did not have to grapple with the question as it did in *Hupacasath*. However, the facts make it clear that at key moments the Crown's position had been that there was no duty on private lands. The court concludes from the Crown's initial response to SON's request for consultation: 'The premise of this letter is that MNRF did not consider that consultation with SON was required because the Project is not on Crown lands' (*Saugeen*, para. 63). The Crown viewed SON's relationship to the land as tenuous at best, with any obligation fulfilled by a cursory review and deference to the proponent's assessment of the impacts and accommodation (*Saugeen*, paras. 111, 120). Further, while the Crown attempted to delegate the consultation process to T & P Hayes, 'it is absolutely clear that Hayes wanted nothing to do with direct dealings with SON' (*Saugeen*, para. 120). Nonetheless, the Crown proceeded to approve the licence without consultation, and in explicit reliance on Hayes' engagement with SON, which never actually happened.

THE CONTENT OF THE DUTY: CHARACTERIZING RELATIONS WITH LAND

The Supreme Court has characterized the scope of the duty along a spectrum. The stronger the claim and the more serious the possible impacts, the more significant the consultation and accommodation must be (*Haida*, para. 39). Regardless of where the duty lies on the spectrum, the duty requires that the Crown act honourably and with integrity, and engage in meaningful, good faith consultation 'with the intention of substantially addressing the concerns' of the Indigenous group (*Delgamuukw*; *Haida*, paras. 19, 42). Therefore, a crucial element is the characterization of the parties' relations with the land at stake.

In challenging the E & N removal decisions, Dr Sayers' emphasized the connection between the land and the Hupacasath language, culture, and way of life: 'As the Hupacasath, we continue to assert and exercise our aboriginal rights throughout our Territory and have done so since before contact with Europeans … The present exercise of our rights and title includes active participation and management of activities occurring on our Territory' (*Hupacasath*, Affidavit #2 of Judith Sayers, para. 3). This contrasts starkly with the position of the Crown and landowner who characterized Hupacasath access and use of the land as 'at the sufferance of the private land owner, which can at any time prohibit access to its private property' including by putting the land to visibly incompatible use, such as commercial logging (para. 165, see *R* v. *Badger*, [1996] SCR 771, para. 66 and *R* v. *Alphonse*, [1993] 80 BCLR [2d] 17 [CA]). Further, the Crown and landowner argued, the government's treaty negotiations policy expressly excludes private land – therefore, the Hupacasath title could and would never be realized.

The court's characterization of the Hupacasath relationship with the E & N lands effectively accepted this characterization. In doing so, it produced much the same substantive result as if the duty had not been applied at all (*Hupacasath*, para. 200). The judge characterized Hupacasath rights as 'at best highly attenuated'. Their title 'if it has not been extinguished seems very unlikely to result in obtaining exclusive possession of the Removed Lands in the future' (*Hupacasath*, para. 249). Even though the Court concluded the Crown had 'relinquished its ability to protect unproven aboriginal claims and the integrity of the Treaty process' and recognized potentially significant adverse effects on Indigenous interests, including reduced access, less oversight, increased extraction, and even sale, it also deemed the duty to consult to be minimal (*Hupacasath*, para. 223). The Hupacasath were left with few, if any safeguards for their asserted constitutional rights. Indeed, just three years later they were back in court, locked out of the territory, unable to access sacred sites and care for the land (*Ke-Kin-Is-Uqs*, para. 120). Analysis of public harvesting data reveals the private forestland owners continue to harvest timber at unsustainable rates, extracting tremendous value from the E & N lands (Ekers et al. 2020).

At the time of the judicial review, the ownership of the land had shifted from a large integrated forestry company to an asset management company, Brascan (later renamed Brookfield and sold to two large Canadian public pension funds). Brascan told the court the reduced oversight and management under the deregulated regime was crucial to their decision to acquire the lands (*Ke-Kin-Is-Uqs*, para. 59). If the removal decision was quashed, they argued, 'the value of the Brascan purchase … would be seriously impacted by such an outcome' (*Ke-Kin-Is-Uqs*, para. 309). Brascan's evidence that it would lead them to 'reassess and reconfigure its business plans … possibly leading to reduced production and job losses' led the court to conclude 'there would be significant prejudice' to the landowners if the removal decision were set aside or delayed. The Hupacasath would suffer 'lesser prejudice' (*Ke-Kin-Is-Uqs*, paras. 311, 314). The court provided no explanation for why the loss of access to territory and the inability to safeguard sacred sites and ecological integrity was the lesser prejudice. The economic relationship to the land was upheld, as was the Crown's ability to relinquish its power to govern fee simple lands subject to unsettled Indigenous claims. Hupacasath relations were presumed to be severed – first by the unilateral Crown grant of their lands to the E & N, and then by the Crown's unilateral policy to exclude fee simple lands from treaty negotiations. When the matter returned to court in 2008, the owner argued the court could and should not order further consultation because 'as a private landowner [it] has a legitimate expectation that it will have quiet enjoyment of its land' and not be subject to the exercise of 'any aboriginal rights or interests' (*Ke-Kin-Is-Uqs*, paras. 198–200). The court agreed, interpreting its own power narrowly to avoid disrupting private property relations and rejecting the possibility that title holders could be held to have relationships and obligations to the original holders of fee simple lands.

On the surface, the SON decision provides somewhat of a contrast to that of the Hupacasath. While neither the project lands nor the surrounding lands are subject to a title claim, and the territory is covered by a historic treaty, there was no serious dispute before the court that SON was owed a duty to consult and accommodate. Indeed, the court explicitly recognizes the ongoing nature of treaty relations and enduring requirement that the Crown act honourably in its dealings with SON territories (*Saugeen*, para. 21). Indeed, while the court sympathetically speaks about the impact on the proponent, they do not hesitate to quash the licence approval. Yet, ultimately the primacy of the private landowner is left undisturbed by the decision's failure to

take up SON's broader jurisdictional claim. T & P Hayes wanted to go about its business, according to the court, and as long as the Crown follows through with its own consultation process, it is free to do so without any engagement with SON.

SON asserted both specific rights to hunt, fish, and gather medicines, as well as a broader right to fulfil their obligations 'to protect the health and integrity of lands, waters and resources throughout SON's traditional territories' (*Saugeen*, paras. 38, 40). This jurisdictional assertion was an opportunity for the court to meaningfully engage with SON's relations with, and obligations to, the territories – to take up Christie's invitation to enter into 'dialogue with particular people in particular places' affected by Crown grants to third parties (Christie 2009, p. 202). This is consistent with an Anishinaabe understanding of the treaties entered by SON's ancestors with the Crown as 'sacred agreements that brought newcomers into the existing relationship the Anishinaabe had with all of the creation' (*Restoule* v. *Canada*, 2018 ONSC 7701, para. 414). As legal scholar and SON community member Borrows (2018, p. 63) argues, 'Treaties must be seen as rooted in particular environments with the goal of sustainably using ecosystems in ways that preserve, Indigenous land-based life'. Treaties reserved 'every power of governance, and every resource not explicitly given to the government', he argues, including, 'the right and freedom to act in accordance with their environmental stewardships'.

Yet we see none of this in the SON decision. Rather, we see the court reinforce the duty to consult as a unilateral Crown-designed, Crown-implemented, and Crown-determined process (*Saugeen*, para. 125). The 'ongoing building of relationships' and 'meaningful conversations' envisioned by the court exclude the very relations with place central to SON's legal order and way of life. The only attention to SON's jurisdictional claim is a two-sentence paragraph entitled, 'SON's Alleged Interest in General Environmental Stewardship' in which they set it aside: 'This decision does not decide whether this alleged interest is a basis on which the Crown is required to consult SON in respect to the Project' (*Saugeen*, para. 153).

The court refuses to engage with SON's jurisdictional claim. Where it could have opened the door to legal creativity and dialogue about how these broader relations with place intersect with the honour of the Crown and the treaty relationship, the court chooses to leave it aside. In doing so they implicitly uphold the Crown's understanding of the treaties as land cessions rather than an agreement to share and care for the land. This choice sends a clear message to both the Crown and private landowners about whose relations with place matter in Canadian law. As Linda Collins and Lorne Sossin argue, it seems Indigenous perspectives on 'environmental protection and ecological sustainability will play no role in elaborating the obligations under section 35' (Collins and Sossin 2019, p. 335). Outside of the kind of egregious Crown failures where consultation 'went sideways', the relations to SON's territory continue to be presumptively determined by the intersection of third-party interests and Crown-controlled and -designed consultation (*Saugeen*, para. 160).

Conclusion: a Crown process and nothing more?

In an imagined dialogue with Indigenous nations about the private interests in their territories, Gordon Christie suggests we listen to how the original owners of the land understood the encroachment by the new arrivals onto their land (2009, p. 203):

> It might be, for example, that they were open to the notion of sharing, of living on these lands in a respectful and peaceful relationship with the newcomers. Perhaps they imagined that while each society or nation would manage its own internal affairs together they would work out a way of sharing the physical space they would come to co-inhabit, an arrangement that would preserve key elements of group autonomy while allowing for a process whereby important decisions about shared land use were arrived at between two societies.

In Canada, s 35-driven consultation has failed to be a space for such a dialogue. In both cases examined here the duty to consult is found to apply in the context of private land. This is undeniably important for the First Nations involved. These decisions provide an opening to push back against the presumptive reasoning applied by the Alberta Court of Appeal in *Paul First Nation*. Yet they nonetheless lay bare the limitations of the duty as a tool to facilitate a shift towards shared, or even Indigenous-led decision making.

The Hupacasath claimants were granted declaratory relief affirming that consultation was required; however, the removal decision was nonetheless upheld. The owners could now 'do anything they want' on Hupacasath land. When the parties were back before the judge just three years later without satisfactory accommodation for the Hupacasath, the court sent the parties for mediation (*Ke-Kin-Is-Uqs*, para. 255). Citing a narrow view of its own jurisdiction, the court declined to impose even temporary obligations on the private landowner. The court accepted the owner's assertion that doing so would set an 'extraordinary precedent for private landowners' (*Ke-Kin-Is-Uqs*, para. 199). The Hupacasath's relations to their territory were excluded from the property relations recognized in Canadian law – without any cession or surrender and in the midst of treaty negotiations.

SON did succeed in having T & P Hayes' licence quashed. The process was sent back to the minister, with the Crown required to provide some funding towards SON's participation. Indeed, the court makes a crucial observation about the requirement for funding – SON should not have to use its limited resources for consultation costs for a project that is for third-party benefit (*Saugeen*, para. 159). Yet in the same paragraph, the decision underscores the limitations of the duty to consult: '[SON] does not participate in the process as a party to the Project. The expense of consultation arises as a result of a proponent's desire to pursue a project, usually for gain, and the Crown's desire to see the project move ahead' (*Saugeen*, para. 159). Even with the application remitted, there is no change to the property relations involved. The proponent seeks authorization to extract benefit from *their* property without regard to SON's relations with the land. The Crown seeks to authorize extraction and can do so as the sovereign decision maker. SON is neither a beneficiary of the project, nor is it a decision maker. While the Crown is held to account for repudiating its own process and failing to replace it with another, the court concludes: 'The failure of the Crown, in this case, is primarily a failure to follow its own processes' (*Saugeen*, para. 124). In requiring funding for SON's participation, the court emphasizes that it is doing no more than 'find[ing] that the Crown is obliged to keep its word' (*Saugeen*, para. 127). The Crown is obliged to go back and implement a process and follow it through, 'and nothing more' (*Saugeen*, para. 144). SON's duties and obligations to their territories, their Process and Protocols upholding their relations with the land, are neither mentioned nor incorporated into future processes.

There are glimpses of other ways of engaging with Indigenous relations with land through Canadian law. In a recent trial decision interpreting another treaty in Anishinaabe Great Lakes country, *Restoule*, the judge described her task as finding an interpretation that 'holds the parties in relationship, looking toward the future together' (para. 465). Could the duty to consult

also be interpreted generously and creatively to hold the parties, including fee simple title holders, in relationship with each other and the land? Can consultation ever create spaces for the reimagining of property relations in particular places through ‘truly inter-societal understandings’ and ‘reasoned, open, unconstrained and principled dialogue’ (Christie 2009, pp. 203–4)? Such radical reimagining will undoubtedly impact our understanding of private property in order to see how it can co-exist with, and within, the enduring environmental jurisdiction of Indigenous nations. Perhaps this is just the shift in perspective we require to take up Borrows’ call to work towards our ‘collective reconciliation with the earth’ (Borrows 2018, p. 69).

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