FROM CONSULTATION TO CONSENT: SQUARING THE CIRCLE?

Michael Coyle[**]

ABSTRACT

This article analyses the apparent tensions between the current Canadian law on the Crown's duty to consult with Indigenous peoples, which generally refuses an Indigenous veto over proposed land uses in traditional lands, and the principle of prior informed indigenous consent, as enshrined in the recent U.N. Declaration of the Rights of Indigenous Peoples. The tension between these competing visions of the rights of Indigenous communities has given rise not just to theoretical legal conflicts, but also to destructive conflicts on the ground. The author argues that attention to the dialogic framework within which Indigenous concerns are addressed during consultations, and particularly to indigenous peoples' participation in developing that framework, is key to managing those conflicts effectively and to reconciling current Canadian law and practice with the principles of the U.N. Declaration. Next it examines a question on which Canadian consultation law is largely silent: the allocation of benefits derived from developments on Indigenous traditional lands. Finally, the analysis turns to the principle of free, prior and informed consent to the substance of proposed developments on traditional lands. The article concludes that the objective of obtaining such consent is a salutary one that has been wrongly marginalized in both the jurisprudence and Canadian government practice.

> The food we get from the land, which includes fish, moose, caribou, geese, ducks and other fowl, provides us with much-needed nutrients and protein. This food from the land also serves a central role in our culture. It is brought to our elders for distribution amongst our people... Anything that may disrupt this fragile system, our sacred relationship with and stewardship of the land, the safety of our drinking water, or our ability to hunt, fish and trap is of great concern to our people, who live in circumstances best described as marginal.[1]
>
> I stand by the fact that the land I'm in, on now is our land. I believe God put us there. God have us a language, the animals to live off and we just

---

[**] Michael Coyle, Associate Professor, University of Western Ontario Faculty of Law. The writer would like to thank Professors Shin Imai and Kent McNeil, of Osgoode Hall Law School, as well as the anonymous reviewers of this article, for their helpful comments on an earlier draft of the article. Any errors in the article are, of course, my own responsibility.

[1] Chief Donny Morris, Kitchenuhmaykoosib Inninuwug First Nation, Affidavit of Chief Donald Morris, Motion Record of the Respondents, *Platinex Inc v Kitchenuhmaykoosib Inninuwug,* Court File No 06-0271 (Ont Sup Ct), May 16, 2006.

> don't want to see development on that area...As a treaty partner I expect to be treated as a partner, not, not where one is superior than us.[2]

The past 25 years have been an exciting and challenging time for all who are concerned about the significance of Indigenous voices in relation to resource developments on the traditional lands of Indigenous peoples in Canada. Over the previous century, those voices had been largely unheeded in decision-making processes about the future uses of those traditional lands. One major exception to this trend was the negotiation of 24 modern treaties over the past 40 years in northern Canada and British Columbia; treaties which provided compensation for the use of Aboriginal title lands and offered the new Indigenous treaty partners detailed processes for participating in environmental and development decisions affecting their traditional lands.[3] In parallel to the development of modern treaties, a series of decisions by the Supreme Court of Canada confirmed that Aboriginal groups are entitled to be consulted wherever provincial or federal governments propose to make decisions about land use that would infringe upon their constitutionally-protected Aboriginal rights, treaty rights, or title rights.[4]

It was not until 2004 that the Supreme Court of Canada set out in detail the nature of the consultation process required of the provincial and federal governments when they propose to make a decision that may interfere with Aboriginal rights. In *Haida Nation*[5], the Court ruled that the duty of federal and provincial governments to consult Indigenous communities extends to situations where the existence of section 35 rights has not yet been adjudicated, so long as the communities can show a *prima facie* claim that their rights would be affected by the proposed decision. This last point is particularly significant given the length of time it will take to resolve individual section 35 claims across the country. The duty to consult derives from the

---

[2] Chief Donny Morris, evidence quoted by Smith J in *Platinex Inc v Kitchenuhmaykoosib Inninuwug Kitchenuhmaykoosib Inninuwug First Nation*, 2008 CanLII 11049 (Ont Sup Ct) at para 15.

[3] The first treaty of the modern era was the James Bay Northern Quebec Agreement, 1977. This Agreement permitted the government of Quebec to flood an extensive area within the territories of the Cree, Inuit and Naskapi peoples in northern Quebec. In exchange, the Agreement provided compensation and explicitly delineated ongoing indigenous self-government and management rights within the treaty territory. See *James Bay and Northern Quebec Agreement (JBNQA)*, 1977, online: <www.gcc.ca/pdf/LEG000000006.pdf >. The Agreement has since been amended several times.

[4] In 1990, the unanimous Supreme Court of Canada judgment in *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*] indicated that in seeking to justify an infringement on Aboriginal rights the "questions to be addressed" by the Crown include the matter of whether the Crown had consulted the Aboriginal group affected (at 1119), a statement affirmed by the Court six years later in the context of treaty rights in *R v Badger*, [1996] 1 SCR 771 at para 97 [*Badger*]. In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168 [*Delgamuukw*], the Court confirmed and clarified the obligation of the Crown to consult in good faith and attend to the concerns of holders of Aboriginal title when it proposes regulations or developments that would affect their title rights (see Lamer CJC at paras 167–169 and LaForest J at paras 203–204). However, as late as 2004, federal and provincial governments continued to maintain that no such duty to consult existed in the case of an unproven Aboriginal right before such a right was confirmed by the courts: see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 8 [*Haida Nation*].

[5] *Haida Nation, supra* note 4. See also the companion case issued simultaneously by the Court: *River Tlingit First Nation v British Columbia (Project Assessment Director*), 2004 SCC 74.

principle of the "honour of the Crown", which requires the Crown, in reconciling its sovereignty claims with those of Aboriginal peoples, to act with integrity in all of its dealings with Aboriginal peoples, from treaty-making to the resolution of Aboriginal claims.[6] In *Haida Nation*, the Court ruled that for federal and provincial governments to completely ignore Aboriginal claims while making decisions to exploit traditional Aboriginal lands would be to act dishonourably, or in violation of their duty.[7]

In every case where its duty is triggered, Canadian law now requires the Crown to consult in good faith with the Aboriginal group affected and with the intention of substantially addressing their concerns. The extent of the required consultation process, and the degree to which decision-makers must accommodate Indigenous concerns, depends on the strength of the Aboriginal group's claim to section 35 rights and the extent of the proposed interference with those rights. Accordingly, while the duty to engage in some consultation with Aboriginal peoples is triggered at a relatively low threshold, the extent of the consultation process and the burden on the Crown to address Aboriginal concerns will vary from case to case. Building on its earlier jurisprudence interpreting section 35, the Court in *Haida Nation* confirmed that provincial and federal agencies must tailor each consultation process in proportion to the seriousness of the potential impact of their decision on existing Aboriginal or treaty[8] rights. While both parties to the consultation must always engage with each other in good faith, the extent of the consultation process required will vary from mere notice of the proposed decision and discussion to, in the most serious cases of potential infringement, a formal process for receiving submissions from the Aboriginal group and the provision of written reasons by the Crown to demonstrate that those submissions were taken into account before a final decision was reached.[9] Although the Court affirmed that in general Aboriginal consent is not a prerequisite for the Crown to proceed with its final decision, the Supreme Court's development and clarification of the duty to consult over the past 25 years has given Indigenous communities a dramatic new lever to influence land use decisions that will affect them.

Nonetheless, gaps remain in the guidance offered by the Court as to the process that the parties should follow when the duty to consult arises. In part, a certain degree of vagueness necessarily follows from the principle that consultation should be more profound when a proposal threatens to have serious impacts and the Indigenous rights claim is strong.[10] Accordingly, no detailed template for consultation will serve in every case. Second, the Supreme Court of Canada has made clear that negotiation processes should be developed by the parties themselves,

---

[6] *Haida Nation*, *supra* note 4, at paras 16 and 17.

[7] *Ibid* at para 27.

[8] A year after its judgment in *Haida Nation*, the court confirmed that the same consultation principles apply to decisions affecting lands covered by historical treaties: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*].

[9] *Haida Nation*, *supra* note 4 at paras 40–45.

[10] *Ibid* at paras 43–46.

and that federal and provincial governments should attend to the mandates of any regulatory schemes that might aid them in fulfilling their procedural duties.[11] However, it has become clear in recent years that more direction is required to avoid continuing conflicts over the adequacy of consultation in individual cases. At present, the Crown and Indigenous communities are required to listen to and consider each other's views in good faith. But if, in good faith, they seriously disagree about the strength of the community's rights claim or about the severity of a project's impacts, in a real sense the consultation process will fail. It will fail as a mechanism for consensus-building, it will fail as a reliable vehicle for facilitating decisions about resources on traditional lands, and it will fail as a process aimed at helping to achieve reconciliation between Indigenous peoples and the state.

Closely related to this concern about the capacity of existing consultation requirements to promote consensus, there appears to be a divergence between domestic Canadian law and emerging international law on whether a state must obtain the consent of Indigenous peoples before making decisions that would affect their traditional lands. Most recently enshrined in the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP),[12] the standard of free, prior and informed consent seems more stringent than the general Canadian requirement of consultation and possible accommodation of Indigenous concerns. Indeed, the apparent difference between the two standards was one of the major reasons cited by the Canadian government when it voted against the Declaration in 2007 and when it later qualified its acceptance of the document in 2010.[13] Although the UNDRIP has been endorsed by 147 nations, it is not a binding statement of international law. Nevertheless, the recently-elected Prime Minister of Canada has declared that his government will implement its provisions.[14] Further, as a statement of internationally-accepted norms, the UNDRIP is a document that may have persuasive value for courts applying the Canadian law on consulting Aboriginal peoples.[15] Indeed, a number of international

---

[11] *Ibid* at para 51.

[12] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR (2007), online: <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> [UNDRIP].

[13] See e.g. Permanent Mission of Canada to the United Nations, "Canada's Statement on the World Conference on Indigenous Peoples Outcome Document: New York, 22 September 2014" (Canada: Permanent Mission of Canada to the United Nations, 22 September 2014), online: <www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/other-autres/2014-09-22_WCIPD-PADD.aspx?lang=eng>.

[14] Prime Minister of Canada, "Statement By Prime Minister On Release Of The Final Report Of The Truth And Reconciliation Commission" (Ottawa: Prime Minister of Canada, 15 December 2015), online: <http://pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission>.

[15] On the persuasive value of international legal principles, and of the provisions of UNDRIP in particular, in the context of the Canadian duty to consult, see Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich, 2014) at 144–153 [Newman, *Revisiting*]. See also *Simon v Canada (AG),* 2013 FC 1117 at para 121. Referring to the UNDRIP, the federal court ruled, "[w]hen it comes to interpreting Canadian law, there is a presumption, albeit refutable, that Canadian legislation is enacted in conformity to Canada's international obligations…Indeed, while this instrument [the UNDRIP] does not create substantive rights, the Court nonetheless favours an interpretation that will embody its values."

business organizations have already decided to adopt the standard of free, prior and informed consent in their dealings with Indigenous peoples.[16]

These developments raise the question of whether the current Canadian law governing the duty to consult Indigenous communities is inconsistent with prevailing international norms. The growing international emphasis on the principle that the consent of Indigenous peoples should be obtained prior to developments on their traditional lands cannot but increase the focus on the ability of current Canadian consultation processes to promote consensus-building between the parties. In this context, our analysis will focus first on two aspects of Canadian consultation law that have received little attention to date in academic writing: the importance of Indigenous participation in developing *the processes* through which they are consulted about decisions that will affect their rights and interests, and the duty of federal and provincial governments during those consultation processes to address the fairness of the benefits Indigenous groups would receive from developments on their traditional lands. Our analysis will suggest that both Canadian law and governmental practice recognize that Aboriginal peoples have a right to participate in shaping the contours of the dialogue through which their interests and concerns will be addressed, that such participation is consistent with current international standards, and that it would strengthen the capacity of consultation processes to result in consensual decisions about the use of traditional lands. Second, an examination of the nature of treaty and Aboriginal title rights will suggest that Canadian consultation law and practice must address the fair allocation of benefits from proposed developments on lands traditionally used by Aboriginal peoples. This is an issue that has received relatively little attention in the leading Canadian consultation cases, although it also is an issue addressed in the UNDRIP. Third, we will return to the principle of free, prior and informed consent enshrined in the Declaration to re-examine the question of whether seeking to obtain the consent of Aboriginal peoples in relation to Aboriginal title and treaty lands is in fact inconsistent with Canada's consultation law and Constitution.

Let us begin then by reviewing the consultation provisions of the UNDRIP as they compare with current Canadian jurisprudence and practice, both in terms of the legal status accorded to Indigenous concerns about development on traditional lands and the conception of Indigenous-state relations that undergirds that status. Examining the Canadian duty to consult Indigenous peoples and the equivalent standards in the UNDRIP is useful for a number of reasons. A comparison of the Canadian jurisprudence with the international articulation of free, prior and informed consent allows us a fresh perspective from which to consider the precise content of the Canadian law. At the same time, the emerging international consultation norms provide a useful stimulus for representatives of the Crown and Indigenous peoples to develop principled consultation processes that reflect both Canada's unique history and the contemporary challenge of reconciling Indigenous peoples and the Crown. Beyond that, as we shall see, the comparison provides a useful springboard for

[16] As discussed below. See *infra* note 33.

reflection on the historical and legal pillars upon which the Canadian duty to consult is founded.

I. HEEDING INDIGENOUS VOICES: THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND THE CANADIAN DUTY TO CONSULT

The principle of free and informed consent set out in the UNDRIP is closely tied to the concepts of self-determination and the equality of Indigenous peoples. This is underlined by the express confirmation of those principles in Articles 2 and 3 and in the preamble to the UNDRIP.[17] Its source in those principles is also reflected by the Declaration's use of the term "indigenous peoples", not only in the articles of the Declaration that confirm their right of free and informed prior consent, but also throughout the text. The term "peoples", of course, has long been associated in international law with the right to self-determination.[18] From the perspective of the UNDRIP, Indigenous peoples derive their collective right to participate in decisions that affect them precisely because of their status as distinct and equal peoples.

The unique status of Indigenous peoples explains the terms of Article 27 of the UNDRIP. Article 27 calls for states to establish fair processes for adjudicating the rights of Indigenous peoples in relation to their lands and resources. Significantly, the article also provides that such processes be developed "in conjunction with indigenous peoples concerned" and that they give "due recognition to indigenous peoples' laws, traditions, customs and land tenure systems."[19] Further, the equality of Indigenous peoples as holders of property rights is reflected in the right of Indigenous peoples, as set out in Article 28, to obtain "just, fair and equitable compensation" for the taking or use of lands and resources that they traditionally owned without their prior, free and informed consent.[20] Both of these issues – the

[17] UNDRIP, *supra* note 12. Article 2 of the Declaration reads: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." Article 3 of the Declaration reads: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Finally, the reference to self-determination in the preamble to the Declaration reads: "*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development."

[18] For the relevance of the principle of self-determination in shaping the free, prior and informed consent requirements of the UNDRIP, see Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Oxford: Routledge Press, 2015) at 101–24 [Doyle, *Indigenous Peoples*]. See also Office of the United Nations High Commissioner for Human Rights, "The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions" (Switzerland: Office of the United Nations High Commissioner for Human Rights, 2013) at 19–30, online: <www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf>.

[19] UNDRIP, *supra* note 12, Article 27.

[20] *Ibid*, Article 28.

participation of Indigenous peoples in shaping the processes which will determine their rights in relation to the traditional lands, and their right to compensation for the use of the resources on those lands – raise important questions for Canadian law which will be addressed later in this analysis.

On the state's obligation to reach consensus with Indigenous peoples concerning developments that would affect their lands or resources, at first glance the text of the UNDRIP seems clear. Indigenous consent appears to be required. Further, that consent must not be coerced, secured in advance of the state action, and provided on the basis of adequate information regarding the possible implications of the state action. Article 32(2) of the UNDRIP reads as follows:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain their free and informed consent prior to the approval* of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[21]

Does the UNDRIP contemplate a right of veto, then, for Indigenous peoples in relation to developments affecting their traditional lands? The text clearly goes further in according significance to the consent of Indigenous peoples than did earlier international instruments concerning Indigenous rights. The ILO Indigenous and Tribal Peoples Convention, 1989, for example, provided only for states to consult in good faith with Indigenous peoples about administrative measures that might affect them. The text of Article 32 of the UNDRIP appears to require more than consultation, necessitating in the view of some commentators that the prior consent of Indigenous peoples be obtained for developments on traditional lands in all but the most exceptional circumstances.[22]

A closer look at the text of the UNDRIP and, in particular, the evolution of Article 32 suggests, however, that the right of Indigenous consent enshrined in that article may be more nuanced. The original draft of Article 32 had provided that Indigenous peoples had "*the right to require* that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories

---

[21] *Ibid*, Article 32. All told, the application of the principle of free prior and informed consent is identified in six different contexts in the Declaration, ranging from the relocation of Indigenous peoples from their lands (Article 10), to the application of administrative measures to indigenous peoples (Article 19) and the storage of hazardous materials on indigenous lands (Article 29.2) [emphasis added].

[22] Cathal Doyle, for example, in a comprehensive review of the principle of free, prior and informed consent, concludes that nothing less than Indigenous consent to decisions affecting Indigenous lands is necessary to recognize the inherent equality of Indigenous peoples, their right to self-determination, and their capacity to counter power imbalances in their relations with the state. See Doyle, *Indigenous Peoples*, *supra* note 18 at 126–145 and 227–284. See also UNESCOR, Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements*, 8th Sess, UN Doc E/C.19/2009/CRP.7, May 2009 at 19, online: <www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_7.doc>.

and other resources."[23] The final version, as noted, provides that states must consult with Indigenous peoples "in order to obtain" their free and informed consent. This language lies somewhere between the right to require consent and the right to be consulted with a view to obtaining consent. Accordingly, prominent commentators like James Anaya, the former U.N Special Rapporteur on the Rights of Indigenous Peoples, Matthew Coon Come, and other Aboriginal leaders in Canada, have indicated that in their view Article 32 does not endorse an absolute right of veto for Indigenous peoples in all cases affecting Indigenous lands.[24] Anaya, for example, has expressed the view that that the prior consent principle, although a "general requirement," may be subject to "necessary and proportional" limitations under state law consistent with international human rights law and that it does not apply to intrusions on Indigenous lands that do not "substantially affect" the exercise of Indigenous peoples' rights.[25]

At least one international tribunal has reviewed the principle of free and prior informed consent and concluded that its application should be nuanced. The Inter-American Court of Human Rights, after reviewing consent and consultation requirements under international law (including Article 32 of the UNDRIP, which Suriname had endorsed), has suggested that those requirements vary depending on the nature of the Indigenous rights in question. In its groundbreaking 2007 decision in *Pueblo Saramaka vs Suriname*, the court confirmed that the government of Suriname had a duty to consult the Saramaka people in accordance with their customs and traditions before approving development or investment plans on their traditional lands.[26] In that case, the government approved several mining and logging operations on Saramaka lands as well as the building of a hydro-electric dam that flooded tribal lands and forcibly displaced tribal members, apparently even without consulting the tribe. That governmental duty, the court ruled, rises beyond consultation to the level of requiring free, prior and informed consent in cases "regarding large-scale development or investment projects that would have a major impact" within the Indigenous people's traditional territory.[27]

---

[23] Mauro Barelli, "Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead" (2012) 16 Intl JHR 1 at 10 [emphasis added].

[24] For Matthew Coon Come's statement, see Jenny Uechi, "First Nation groups condemn federal government's 'indefensible attack' on Indigenous rights at UN meeting" *Vancouver Observer* (25 September 2014), online: <www.vancouverobserver.com/news/first-nation-groups-condemn-federal-governments-indefensible-attack-indigenous-rights-un>.

[25] See United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UNGAOR, 24th Sess, UN Doc A/HRC/24/41 (2013) at 9–12, online: <www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf>.

[26] *Case of the Saramaka People v Suriname* (2007), Inter-Am Ct HR (Ser C) No 82, at para 134 [*Saramaka*].

[27] *Ibid*. In para 137 of the judgment, the Court appeared to further qualify the right of consent, limiting it to cases of "major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory." In *Saramaka*, the legal instrument directly applied by the court was the American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, Article 21 (property rights), online:

In a recent case involving the exploitation of oil within the traditional territories of the Kichwa Indigenous people in Ecuador, the Inter-American Court avoided the issue of prior Indigenous consent completely. In *Kichiwa Indigenous People of Sarayaku v Ecuador*[28], the Court issued a declaration that Ecuador had violated the rights of the Kichiwa to be consulted under Article 6 of the ILO Convention 169 (which Ecuador has ratified)[29] and other international instruments, including the UNDRIP.[30] The Court had little trouble finding that the activities of the oil company – which involved building heliports, destroying caves and sources of drinking water, as well as sacred sites, all with no prior consultation with the Kichiwa people – violated the relevant consultation requirement of the ILO Convention together with the obligation to consult as a "general principle of international law."[31] However, although its judgment elaborated on the requirements of adequate consultation, reiterating for example that consultations with Indigenous peoples must be carried out using "culturally appropriate procedures,"[32] the Court declined to address submissions that the relevant international law required that the state obtain Indigenous consent to the project.

The precise meaning and application, then, of the principle of free, prior and informed consent, as enshrined in section 32 of UNDRIP, remain to be defined. It is conceivable that future interpretations of Article 32 will limit its application to cases of profound intrusion on Indigenous lands or resources, and rule that the consent principle is subject to proportionate legislative restrictions in the public interest. Nonetheless, the focus of the Declaration – on the goal of securing the agreement of Indigenous peoples to resource developments that would affect them – has considerable symbolic power. It is a focus that emphasizes, after centuries of colonial reliance on "discovery" and "*terra nullius*", the inherent equality of Indigenous peoples and their right to determine their own economic, political, and cultural destinies in partnership with the state. Further, the project of seeking prior and informed consent before resource developments has the pragmatic benefit of promoting social peace between Indigenous peoples, the state, business interests, and local communities. In light of this, it is noteworthy that the past decade has seen a growing number of commercial and non-governmental organizations that have adopted the standard of free prior and informed consent in relation to projects affecting Indigenous peoples.[33]

<www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm>. For other significant decisions of tribunals following the lead of *Saramaka* in applying international instruments toward the recognition of Indigenous land rights, see Barelli, *supra* note 23 at 12.

[28] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (2012), Inter-Am Ct HR (Ser C) No 245 [*Sarayuka*].

[29] Canada is not a party to the ILO Convention.

[30] *Sarayuka*, *supra* note 28 at paras 160–66, 211.

[31] *Ibid* at para 164.

[32] *Ibid* at para 177.

[33] These include the Prospectors and Developers Association of Canada, the International Finance Corporation, the International Council on Mining and Metals and the Boreal Leadership Council. For an

Unlike the text of Article 32 of the UNDRIP, Canadian jurisprudence on the state's obligations to engage in dialogue with Indigenous peoples is not based on a foundational principle of Indigenous consent to activities on their traditional lands. The Canadian law on the duty to consult Aboriginal peoples, which predates the adoption of UNDRIP, originated in the courts' efforts to balance the rights of Aboriginal peoples with the sovereignty historically asserted by the Crown over Aboriginal lands. Although the Canadian law on consultation also derives from the rights enjoyed by "Aboriginal peoples" under the *Constitution Act, 1982*,[34] its sources derive more directly from judicial descriptions of the implications of duty of the state to act in accordance with the "honour" of the Crown, whose sovereignty over Indigenous peoples and their traditional lands has not thus far been challenged by Canadian courts.[35] In its first decision interpreting section 35 rights, *R v Sparrow*,[36] the Supreme Court of Canada ruled that those rights are not absolute, and may be overridden by federal and provincial governments who can show, first, that the rights violation is justified by a compelling and substantial objective, and second, that the violation is a proportionate one, consistent with the "honour of the Crown."[37] One of the factors cited by the Court as relevant to the second part of this justification test was whether the Aboriginal group in question had been consulted in connection with the measure infringing its rights.[38] Although Aboriginal peoples' consent was not a prerequisite for federal or provincial governments to enact

---

excellent review of this trend, see Shin Imai, "Consult, Consent and Veto: International Norms and Canadian Treaties" in Michael Coyle & John Borrows, eds, *The Right(s) Relationship: Reimagining the Implementation of Historical Treaties* (forthcoming, University of Toronto Press) [Imai, "Consult"]. There is a decades-long history of companies choosing to negotiate impact-benefit agreements with Indigenous peoples, both in Canada and abroad. For an interesting review of four recent examples of companies committing to free prior and informed consent in their dealings with Indigenous peoples, see Cathal Doyle & Jill Carino, *Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector* (2013), online: <www.piplinks.org/makingfpicareality>.

[34] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]. As noted, the duty to consult is closely linked to the protection of Aboriginal and treaty rights under section 35 of the Constitution Act, 1982. Section 35 (1) reads: "The existing Aboriginal and treaty rights *of the Aboriginal peoples* of Canada are hereby recognized and affirmed" [emphasis added].

[35] In *Sparrow*, *supra* note 4, Dickson CJC declared at 1103: "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [their traditional] lands vested in the Crown." The language of the Court in more recent judgments has been more nuanced. In *Haida Nation*, *supra* note 4, McLachlin CJC affirmed, at para 53, that the duty to consult "flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group." Elsewhere, however, the judgment refers to "assumed Crown sovereignty", "sovereignty claims", and "asserted Crown sovereignty" (see paras 20, 26). For thoughtful critiques of the Court's treatment of sovereignty, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia"* (1999) 37 Osgoode Hall LJ 537 [Borrows, "Alchemy"]; Darlene Johnston, "Lo, how *Sparrow* has fallen: A Retrospective of the Supreme Court of Canada's Section 35 Jurisprudence" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a new Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) at 197; and Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" Research Paper for the National Centre for First Nations Governance (October 11, 2007), online: <www.fngovernance.org/publications>.

[36] *Sparrow, supra* note 4.

[37] *Ibid* at 1113.

[38] *Ibid* at 1119.

measures that might limit Aboriginal rights, the Court's unanimous judgment made clear that it viewed the constitutional protection of Aboriginal rights as "a solid constitutional base upon which subsequent negotiations can take place."[39]

In several cases following *Sparrow*, the Supreme Court of Canada confirmed the importance of prior consultation in disputes over an alleged infringement of Aboriginal rights.[40] Fourteen years later, the Supreme Court of Canada definitively ruled that the failure to consult with Aboriginal communities was not merely a factor to be considered *ex post facto* during judicial review of alleged violations of proven Aboriginal or treaty rights. Consultation, the Court declared in *Haida Nation*, is a process that the Crown is duty-bound to engage in whenever it considers measures that it knows or ought to know might interfere with the section 35 rights *asserted* by an Aboriginal community. To hold otherwise, the Court ruled, would be to permit the Crown in the interim to "run roughshod" over credible section 35 claims and thus to undermine the purpose of section 35: the reconciliation of Aboriginal peoples with the sovereignty asserted by the Crown.[41]

The requirement to consult Aboriginal peoples, as elaborated by the Supreme Court does not generally require that federal and provincial governments obtain the free and prior consent of Aboriginal communities either to the substance of development proposals that might affect those communities' constitutional rights or to the Crown's proposed response to Aboriginal concerns. Instead, those governments must engage in a dialogue that permits them to understand and assess the community's perspective as to the scope of its rights and the potential impacts of the proposed decision. If the rights claim is relatively strong and the impacts significant, the government must consider ways of accommodating the community's interests and minimizing the potential impacts. As we have seen, both sides in the dialogue must engage with each other in good faith. In general, however, under current Canadian law, the Aboriginal community has no right to veto the proposed decision.

One circumstance in which Canadian law does require Indigenous peoples' consent to the use of their traditional lands is where a court has confirmed that those lands are still subject to Aboriginal title. Upon proof that the lands in question were exclusively occupied by an Indigenous people at the time the Crown asserted sovereignty, and have never been the subject of either a land treaty or valid legislative extinguishment prior to 1982, an Aboriginal group obtains the sole right to use and control those lands and to enjoy the benefits that flow from them.[42] In such a case, absent consent to a Crown proposal to make use of their resources, the Crown may only proceed if it can prove that it fulfilled its duty of consultation, that the project is justified by a compelling and substantial objective, and that proceeding

---

[39] *Ibid* at 1105.

[40] See *R v Nikal*, [1996] 1 SCR 1013 at para 110, *R v Gladstone*, [1996] 2 SCR 723 at para 64 [*Gladstone*], and *Delgamuukw*, *supra* note 4 at para 168.

[41] *Haida Nation*, *supra* note 4 at 526–29.

[42] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 2 [*Tsilhqot'in*].

with the project is consistent with the Crown's fiduciary duty to the Indigenous titleholders.[43] At a minimum, this means that the Crown's objective "must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective."[44] At the time of writing, the application of this qualified requirement of Indigenous consent to the development of their traditional lands (subject to overriding Crown justification) has been confirmed for just one tract of land in Canada, comprising some 1700 square kilometres in south-central British Columbia, or about .0002 per cent of Canada's land mass.[45] It is the less onerous duty to consult that will generally apply in areas where Aboriginal title has been asserted but not yet confirmed (as in the great majority of British Columbia), and in territories covered by historical land treaties.[46]

Returning to the scope of the free and prior informed consent principle set out in the UNDRIP, two further points of distinction are worth noting. First, the UNDRIP consent requirement applies not just to incursions on Indigenous lands but also to the adoption or implementation of any "legislative or administrative measures that may affect" Indigenous peoples.[47] As we have seen, Canadian law as it currently stands is not so broad, requiring consultation with Aboriginal communities only where a measure may affect Aboriginal or treaty rights that are protected by section 35 of the *Constitution Act, 1982*.[48]

---

[43] *Ibid,* at para 77. On the distinction between proposals to regulate aboriginal title lands and proposals to make use of the resources thereon, see Kent McNeil, "Aboriginal Title and the Provinces after *Tsilhqot'in Nation*" (2015) SCLR (2d) 67 at 78–85 [McNeil, "Aboriginal Title after Tsilhqot'in"].

[44] *Tsilhqot'in*, *supra* note 42 at para 82.

[45] The World Bank, "Data" online: <data.worldbank.org/indicator/AG.LND.TOTL.K2>. The area described (which excludes inland waters) is part of the traditional lands of the Tsilhqot'in people and was declared subject to Aboriginal title by the Supreme Court of Canada in *Tsilhqot'in*, *supra* note 42. The Supreme Court has thus far refrained from seeking to summarize all of the circumstances where an infringement on established rights would give rise to an obligation to obtain Aboriginal consent (subject to justifiable infringement). Such consent would presumably also be required for development on settlement lands under modern treaties and possibly for development on reserve lands set aside under the historical treaties.

[46] The duty to consult arises even where a historical treaty expressly provides for the taking up of treaty lands by the Crown: see *Mikisew, supra* note 8 at para 56 and *Grassy Narrows First Nation v Ontario (Natural Resources*) 2014 SCC 48 at para 51[*Grassy Narrows*].

[47] UNDRIP, *supra* note 12, Article 19.

[48] Further, the Supreme Court of Canada has left open the question of whether governmental conduct in enacting legislation is itself subject to the duty to consult. See *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 44 [*Rio Tinto*]. Canada's lower courts have divided on this issue. See *R v Lefthand*, 2007 ABCA 206, 77 Alta LR (4th) 203 at paras 37–40 (holding that no duty to consult can arise prior to the passage of legislation) and *Courtoreille v Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244 [*Courtoreille*]. In *Courtoreille*, the court ruled that upon the introduction of "omnibus" changes to environmental legislation government, ministers owed an obligation to consult with the Mikisew Cree about the potential impacts of the legislation on their treaty rights. The interaction between the courts' powers to supervise the duty to consult and the legislative process raises issues concerning the separation of powers between the courts and the legislative branch. For more on this subject, see *Ross River Dena Council v Government of Yukon*, 2012 YKA 14, 358 DLR (4th) 100.

Second, in relation to development proposals, Article 32 of the UNDRIP calls for Indigenous peoples' consent when such projects affect "their lands or territories and other resources."[49] Nowhere does the UNDRIP clarify whether this provision is intended to apply to areas that have already been the subject of a land treaty. In those areas, has the necessary consent already been obtained? This is a complex and important question. Under Canadian law, the presence of a land treaty does not obviate the need for consultation with Indigenous communities before decisions by the Crown that may affect the continuing exercise of their treaty rights.[50] On the other hand, a statement in the recent judgment of the Supreme Court of Canada, in *Grassy Narrows First Nation v Ontario (Natural Resources)*,[51] seems to suggest that in the case of interferences with treaty harvesting rights on surrendered lands the consultation obligations of federal and provincial governments may be very limited. The *Grassy Narrows* decision focused on a narrow question: whether the federal government was required by the terms of Treaty 3 to be involved in decisions to take up Crown lands in the treaty area for development. Dismissing that claim, the Court noted that the taking up of lands required provincial consultation with the Indigenous communities affected. However, one passage in the judgment (repeating a comment made in *Mikisew*), might be interpreted as confirming that the Crown's consultation obligations will be somewhat limited where it interferes with treaty harvesting rights, unless the Crown's actions would leave the Indigenous treaty partner with no meaningful harvesting rights at all.[52] The comment was peripheral to the issues before the Court, but the broader issue it raises regarding the accommodation of Indigenous concerns in treaty areas is a very significant one, which will be addressed in the next section of this analysis.

On balance, the Canadian law of consultation provides a powerful tool for Aboriginal peoples: one that limits the freedom of action of Crown representatives in approving projects that may affect their rights. It provides for Aboriginal participation in decisions that will affect them and promotes more informed decision-making by Crown representatives. At the same time, however, the framework of the

---

[49] UNDRIP, *supra* note 12, Article 32.

[50] *Mikisew*, *supra* note 8 at paras 53–57. Treaty 8 held to provide Cree with procedural rights to consultation in addition to the substantive obligations of the parties that flowed from the 1899 treaty.

[51] *Grassy Narrows*, *supra* note 46.

[52] *Ibid* at para 52. In *Grassy Narrows,* the Court was dealing with a common provision in the historical numbered treaties which recognizes the Crown's right to "take up" treaty lands for public purposes. In such circumstances, the Court had earlier ruled in *Mikisew, supra* note 8, the Crown remains duty-bound to consult with Aboriginal groups about impacts on their harvesting rights under the treaty but the taking up may not in fact violate the substantive rights guaranteed by the treaty unless the impact on those rights is severe. Citing a statement from *Mikisew* to similar effect, in *Haida Nation, supra* note 4, McLachlin CJC declared that: "Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway *with no meaningful right to hunt, fish or trap* in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise" [emphasis added]. Given that the extent of the Crown's duty to consult is determined in large part by the severity of the impact of its proposal on the rights of the Aboriginal community, the Court's statement seems to imply that the Crown faces less of a burden of accommodating Aboriginal concerns about land use decisions in the vast areas covered by the numbered treaties.

duty to consult, as articulated thus far, pays little heed to the interest of Aboriginal peoples in helping to shape the process through which the dialogue will occur to ensure that it takes due consideration of their own unique worldviews. Further, although the framework is aimed, at least in part, at promoting reconciliation, it offers minimal assistance to the parties as to how, or even whether they should resolve disagreements that arise during consultations. To date, federal and provincial implementation of the duty to consult in Canada has not eliminated the eruption of protracted disputes with Indigenous communities over developments on traditional lands. Those conflicts have frequently taken the form of expensive and complex litigation, damaging relationships between Indigenous communities, Crown representatives, and resource companies.[53] In two cases over the past ten years, resistance to development projects has led to the imprisonment of eight Aboriginal leaders and community members.[54] Failure to resolve conflicts that arise during consultations creates uncertainty for proposed resource development companies and can threaten the completion of exploration and development projects.[55] There can be little question that concern about current consultation practices is one of the factors that has led a growing number of Canadian companies to declare that they will seek the consent of Indigenous peoples to projects involving development on traditional Indigenous lands.

Can the duty of the Crown to consult with Aboriginal peoples under Canadian law be interpreted in a manner that reflects more closely the principles underlying the standard of free, prior and informed consent, particularly their rights as peoples to shape their destinies in accordance with their own distinctive cultural values? Is it possible to implement the duty to consult in a manner that better promotes reconciliation, through more effective dialogue and consensus-building between Aboriginal peoples and the state? The next two sections of our analysis will suggest modest answers to these questions that flow from existing principles of Canadian law.

---

[53] The trial alone of the *Tsilhqot'in* case took 339 sitting days over five years, the pretrial examination of Chief Roger Williams saw him respond to 11,042 questions, and the cost of the trial, excluding appeals, has been estimated at $30 million. See Lawson Lundell Aboriginal Law Group, "The Tsilhqot'in Nation v. British Columbia Case: What It Means and What It Doesn't Mean", online: <www.worldservicesgroup.com/publications.asp?action=article&artid=2189>.

[54] See *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 [*Frontenac*] and *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 533 [*Platinex* CA]. Both cases reduced custodial sentences imposed on Indigenous leaders for contempt of court in refusing to abide by injunctions. In the latter case, the Ontario Court of Appeal allowed the appeal of five elected leaders and a community member from their six-month prison sentence after the mineral exploration company involved advised the court that it did not oppose the appeal. As noted by MacPherson JA at para 3: "Platinex Inc., informed the court that it would not be opposing the appeal because 'the appellants have spent enough time in jail, the matter will ultimately be settled only through negotiation, and no good purpose would be served by keeping the appellants in jail any longer.'"

[55] For a brief review of the recent impact of consultation issues and the current climate for resource development in Canada, see Dwight Newman, "The Rule And Role Of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector" (May 2014) Macdonald-Laurier Institute, Aboriginal Canada and the Natural Resource Economy Series at 9–17, online: <www.usask.ca/icngd/publications/reports/Reports-Files/MLI%20Duty%20to%20Consult_May%202014.pdf>.

II. STRENGTHENING THE FRAMEWORK OF CONSULTATIONS WITH ABORIGINAL PEOPLES IN CANADA

> Q. What's your view of those penalties that Platinex is seeking against you?
>
> A. [L]ike I said, we're in a difficult financial problem, we're in a deficit. And personally myself too, I don't have that kind of cash to pay fines. So the only thing I have left is my good health, not my youth, but I'm willing to go jail and spend time and hopefully Platinex will go away. That's a good trade off. You'd assume he'd take it and that's why I promised to appear here. I'm willing to give myself up for the belief that I belong up there, it's my land and I have an obligation to protect it too…[56]

The outcome of the failed consultation in the Platinex case was a particularly unfortunate one. The refusal of the Kitchenuhmaykoosib Inninuwug First Nation to consent to uranium exploration on their traditional lands, even after a court ordered them to permit exploration, came after the First Nation had already incurred some $650,000 in legal costs.[57] Although the dispute arose after the judgment in *Haida Nation*, the Ontario government had, in the words of the trial judge, "been almost completely absent in the consultation process…and abdicated its responsibility and delegated its duty to consult" to the junior mining company involved.[58] Unable to obtain the community's consent to exploration, the company sued the First Nation, apparently in the amount of $10 billion.[59] After prison sentences were imposed on the Chief and five other members of the First Nation, the Ontario Court of Appeal intervened, as we have seen, to reduce those sentences to time served.[60] Finally, faced with no realistic way for the company to proceed with the exploration, the government of Ontario reportedly spent some $5,000,000 to purchase the company's exploration interest.[61]

The circumstances of the Platinex dispute were in some respects exceptional, but they illustrate the potential costs of failing to achieve consensus over

---

[56] See the examination of Chief Donny Morris at the sentencing hearing for contempt of court. Court Transcript, *Platinex Inc v Kitchenuhmaykoosib Inninuwug et al,* Ontario Superior Court, January 25, 2008 ["Platinex Sentencing Transcript"] at 25–26.

[57] According to counsel for the First Nation: see *ibid* at 137. Further, at 102, counsel for Platinex Inc estimated that the overall legal costs of the dispute, excluding disbursements for travel and translation, exceeded $2,000,000.

[58] *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation* (2006), 272 DLR (4th) 727 (Ont Sup Ct) at para 92.

[59] See Rachel Ariss & John Cutfeet, "Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law" (2011) 10 Indigenous LJ 1 at 20.

[60] The six-month sentences were thus reduced to nine weeks. See *Platinex* CA, *supra* note 54 at para 2.

[61] See Karen Mazurkewich, "Losing Ground" *FinancialPost Magazine* (April 2010) 20, online: <www.republicofmining.com/2010/12/12/ontario-mining-losing-ground-–-karen-mazurkewich-originally-published-in-financial-post-magazine-april-2010-issue>. For a review of the background to and legal issues raised by the Platinex dispute, see Ariss & Cutfeet, *supra* note 59 at 34.

developments on the traditional lands of an Indigenous people. Beyond the human and financial costs of failure for those directly involved looms the indirect cost of economic uncertainty as to the conditions upon which development may proceed. Further, dialogic processes that do not attend sufficiently to Indigenous worldviews risk leaving Indigenous peoples feeling further marginalized by Canadian law. Finally, failed processes of engagement may damage existing relationships between Indigenous peoples and federal and provincial governments. In short, the consequences of failed and ineffective consultation processes may be just as severe as not consulting at all.

Recognizing that the issues that arise in conflicts between Aboriginal peoples and the Crown over proposed developments are likely to be complex and polycentric, the Supreme Court of Canada has repeatedly urged that they should be addressed through negotiation – a flexible process capable of handling those complexities.[62] As we have seen, Aboriginal groups do not have the right to unilaterally veto the substance of proposed developments on their traditional lands, except in the case of proved Aboriginal title claims and, perhaps, in the case of proposals to significantly intrude on proved Aboriginal rights.[63] The alternative is arguably unsustainable: allowing one group to override existing regulatory processes on the basis of merely *asserting* that it holds rights that would be affected. It might also create apparently intractable problems where more than one Aboriginal community will be affected by a Crown proposal and those Aboriginal communities disagree among themselves about the merits of that proposal. The counterweight offered by the Court is an obligation of both parties to engage in dialogue, nuanced and general directions about the process they must undertake, and the factors that should guide the outcome of that process. Implicit in those directions, however, are more specific principles that pay heed to the voice of the Indigenous people involved and strengthen the capacity of the process to command the respect of both parties and assist them to manage disagreement.

The first of these principles is that the Indigenous group affected must have a reasonable opportunity to contribute meaningfully to the shape of the process through which their concerns will be heard. The duty to consult requires that consultation must be in good faith, "with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue."[64] Good faith consultation has an informational component: the Crown must provide all necessary information in a timely way.[65] Listening and seeking to understand concerns expressed in dialogue with an Indigenous group also has a cultural component. Concerns expressed about developments on traditional lands and their impacts on the environment, traditional activities, and the web of relations between plants, animals

---

[62] See e.g. *Sparrow*, *supra* note 4 at 1105, *Delgamuukw*, *supra* note 4 at para 186 (Lamer CJC), and *Haida Nation*, *supra* note 4 at paras 14, 20, 25, 26, 38.

[63] See *Delgamuukw*, *supra* note 4 at para 168 and *Haida Nation*, *supra* note 4 at para 48.

[64] *Delgamuukw*, *supra* note 4 at para 168, *Mikisew*, *supra* note 8 at para 51, and (paraphrased in) *Haida Nation*, *supra* note 4.

[65] *Mikisew*, *supra* note 8 at para 64.

and the spirit world are not mere empirical assertions. They flow from and are intimately shaped by the distinctive cultures, traditional legal orders, and worldviews of those expressing the concerns. A process that does not create a space for those distinctive worldviews will fail to produce a proper understanding of the relevance and significance of those concerns and limit its capacity to accommodate those concerns. Thus, a process that seeks to permit Crown representatives to understand and assess Indigenous concerns must be structured in a manner that is conducive to appreciation of the cultural context and significance of those concerns. This conclusion, as we have seen, is consistent with international interpretations of the states' obligations in consulting with Indigenous peoples.

A dialogic process that seeks to take Indigenous concerns seriously must come to grips with a cultural reality in which one of the parties to the dialogue does not typically conceive of development decisions concerning traditional lands as merely affecting their rights and "interests". For most, if not all, Aboriginal peoples in Canada, traditional norms dictate that living properly requires a focus on maintaining proper relationships – with other persons and with the natural and spiritual world. Inupiat/Inuvialuit legal scholar Gordon Christie puts it this way:

> At the heart of Aboriginal belief systems are senses of responsibility demanding that Aboriginal peoples resist being reconceived, either as liberal moral agents or as free-floating, self-creating boundary-less beings. While Aboriginal people may feel comfortable with the communitarian leanings of the critical theorist's vision (for individuals in Aboriginal societies are seen as interwoven into intricate webs of relationships, the self being defined in its relation to others), nevertheless individuals are conceptualized in Aboriginal societies as nodes in these webs, as relatively fixed and determined beings connected by strands of the web. The identity of these individuals (and the various communities they collectively comprise) is provided by the responsibilities they have, which work to weave the web of which they are parts.[66]

Good-faith efforts to understand and accommodate Indigenous concerns about proposed changes to the use of traditional lands must take into account the potential differences in the parties' cultural perspectives and allow space for the

---

[66] Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67 at 110–11. For more on the importance of indigenous concepts of "right relations", see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 77–79 and Leanne Simpson, "Looking after *Gdoo-naaganinaa*: Precolonial Nishnaabeg Diplomatic and Treaty Relationships" (2008) 23:2 Wicazo Sa Rev 29. For more on the impact of worldviews on cross-cultural understanding and communications, see Leroy Littlebear, "Jagged Worldviews Colliding" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: University of British Columbia Press, 2000). The influence of the Indigenous emphasis on relations rather than stipulated rights is reflected in the Kaswentha, or Two-Row Wampum, exchanged by the British Crown with Indigenous leaders at the 1764 Treaty of Niagara and in the "Covenant Chain" agreements entered by the British and the Indigenous peoples of eastern North America and the Great Lakes region. See John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Essays on Law, Equity, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) at 155–69 and Mark D Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After *Marshall*" (2001) 24 Dalhousie LJ 75.

parties to explore solutions that respect both perspectives. This conclusion also flows from the fact that the duty to consult arises from the assertion of inter-societal rights. Determining the existence and scope those rights, the Supreme Court has made clear, requires due attention to the distinct perspectives of the Aboriginal peoples involved.[67]

In administrative and negotiation processes aimed at understanding Indigenous concerns, Indigenous representatives must have an opportunity to contribute to the shaping of the process in which their concerns will be expressed. For Crown representatives to unilaterally dictate the terms of the process in which Indigenous concerns may be expressed risks privileging non-Indigenous perspectives about the nature and significance of those concerns. The tendency for minority cultural perspectives to be marginalized in cross-cultural dialogue may be unconscious, but it is a well-understood phenomenon.[68] This tendency exists because of cultural differences in communication patterns, including differences in the significance attributed to the context of the dialogue, as well as culturally-inflected differences in what is perceived as socially acceptable or persuasive forms of argument. Unless both parties in the dialogue take steps to counteract the effect of the obstacles to effective cross-cultural communication, interlocutors from the dominant culture are at risk of unconsciously attributing those effects to the "ineffective" arguments of their negotiation counterparts. In the context of the duty to consult Indigenous peoples, this is a tendency that may be exacerbated by the law's emphasis on the balancing of Aboriginal and societal "interests."[69] The Supreme Court of Canada's use of the term is clearly intended to broadly encompass Indigenous concerns related to a proposed intrusion on their rights. Still, care must be taken to ensure that in cross-cultural consultations the word "interests" is not interpreted by Crown representatives solely in accordance with its frequent Euro-Canadian connotation of material, legal, or economic priorities.[70] The logical way to

---

[67] In the context of Aboriginal rights, see *Sparrow*, *supra* note 4 at 1112: "While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake." The principle applies equally to treaty rights claims and to Aboriginal title claims: see *R v Marshall*, [1999] 3 SCR 456 at para 19 (on the "need to give balanced weight to the Aboriginal perspective" about the meaning of a treaty); and *Delgamuukw*, *supra* note 4 at para 81 (on the significance of the Aboriginal perspective and the perspective of the common law in Aboriginal title cases, as with Aboriginal rights cases, "[t]rue reconciliation will, equally, place weight on each").

[68] In the context of negotiations involving Indigenous peoples, see Toby Rollo, "Mandates of the State:

Canadian Sovereignty, Democracy, and Indigenous Claims" (2014) 27 Can JL & Jur 225 and Michael Coyle, "Establishing Indigenous Governance: The Challenge of Confronting Mainstream Cultural Norms" in G Otis & M Papillon, eds, *Federalism and Aboriginal Governance* (Québec City: Presses de l'Université Laval, 2013). For the influence of culture on communications in negotiations generally, see Iris Marion Young, Inclusion *and Democracy* (Oxford: Oxford University Press, 2000) especially chapters 2 and 3, Jeswald W Salacuse, "Ten Ways that Culture Affects Negotiating Style: Some Survey Results" (1998) 14 Negotiation Journal 221, John Barkai, "What's A Cross-Cultural Mediator To Do? A Low-Context Solution For A High-Context Problem" (2008) 10 Cardozo J of Conflict Resolution 43.

[69] The judgment of the Supreme Court of Canada in *Haida Nation*, *supra* note 4, uses the word "interests" in this sense 27 times.

[70] For an argument that the word "interests" in the context of interest-based negotiation theory is quite capable of encompassing culturally significant values, see Michael Coyle, "Negotiating Indigenous

ensure that both parties' concerns are considered in their full context is to design consultation processes through an iterative process that solicits and incorporates both of their perspectives.

Negotiating the form of consultation processes that reflect the values of both consultation partners also increases the legitimacy of those processes, and their outcomes, in the view of Indigenous peoples. From the perspective of dispute resolution theory, participation by both parties in the design of a conflict resolution process is likely to enhance respect for the outcome of the process. But legal systems also have a critical need to attend to the question of whether the laws they produce command the respect of those who will be subject to the law.[71] The issue of legitimacy is a particularly vital one for Canadian law as it relates to Indigenous peoples. In a thoughtful examination of this issue, Professor Mark Walters has posed the question of "whether Canadian Aboriginal law is sufficiently grounded in a reciprocal relationship of respect between the Canadian state and Aboriginal peoples for it to constitute "law" in a meaningful sense, rather than mere power or force."[72] Respect and reciprocal dialogue lie, of course, at the heart of the duty to consult in Canadian law. The duty to consult is part of an ongoing process of fair dealing and reconciliation through dialogue between Indigenous peoples and representatives of the Crown. The duty embodies a "generative constitutional order" that in turn relies on continued dialogue with Aboriginal peoples.[73] In the words of McLachlin CJC writing for the entire court in *Rio Tinto*, the duty to consult is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing

---

Peoples' Exit From Colonialism: Are Interest-Based Strategies The Right Approach?" (2014) 27 Can JL & Jur 283 [Coyle, "Interest-Based Strategies"]. British Columbia, however, is one example of a Canadian provincial government that appears to adopt a particularly narrow interpretation of the meaning of "interests" within the duty to consult. Their current consultation policy indicates that for the purposes of the document "'Aboriginal Interests' will be used generally to refer to *claimed or proven Aboriginal rights (including title) and treaty rights* that require consultation." See British Columbia, "Updated Procedures For Meeting Legal Obligations When Consulting First Nations" (May 7, 2010) at 5, online: <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations> ["BC Consultation Procedures"] [emphasis added].

[71] For a famous treatment of this point, see Lon L Fuller, *The Morality of Law*, rev ed (New Haven and London: Yale University Press, 1969). For Fuller, "[t]he functioning of a legal system depends upon a cooperative effort - an effective and responsible interaction - between lawgiver and subject" (at 219). For a discussion of Fuller's theory in the context of indigenous-state relations in Canada, see Mark Walters, "The Morality of Aboriginal Law" (2005) 31 *Queen's LJ* 470 [Walters, "Morality of Aboriginal Law"] and Jean Leclair, "Nanabush, Lon Fuller and Historical Treaties: The Potentialities and Limits of Adjudication" in Coyle & Borrows, *supra* note 33.

[72] Walters, "Morality of Aboriginal Law", *ibid* at 473. On the legitimacy of Euro-Canadian law in relationship to Aboriginal peoples. See also John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill LJ 153 at 168: "We have a real crisis in the rule of law in Aboriginal communities. And it is not a crisis because Aboriginal peoples don't have the rule of law; it is a crisis of legitimacy about the rule of law and Aboriginal communities. If Aboriginal peoples were able to start to see themselves and their normative values reflected in how they conduct their day-to-day affairs, I believe that would go at least some distance to diminishing some of the problems that we have. It is not the whole solution, but it is a part of the solution."

[73] See *Rio Tinto, supra* note 48 at para 38. The Court drew the language of generative constitutional order from Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433.

negotiations."[74] Consultation processes imposed by the Crown that focus only on non-Indigenous values and cultural perspectives are not only unlikely to obtain the respect of Indigenous peoples; they cannot hope to advance the process of reconciliation with Indigenous peoples and as such are inconsistent with Canadian law.

While the central purpose of the duty to consult requires that Aboriginal peoples be invited to negotiate the process under which consultations will occur, current federal and provincial consultation policies rarely require the participation of Aboriginal groups in the design of the processes through which their concerns will be discussed. All of these policies summarize the Canadian jurisprudence on the duty to consult and direct relevant government ministries and agencies to implement procedures consistent with that jurisprudence. Perhaps unsurprisingly, the current policies focus on the mechanics of implementation: when consultation should occur, which Aboriginal groups should be consulted, the role of industry proponents in consultations, the formal elements of consultation, considerations to be taken into account by decision-makers, and coordination between the consulting ministry or agency and other government departments. The current federal guidelines, for example, are presented in a relatively detailed document comprising 69 pages.[75] The document seeks to summarize the substance of the duty to consult, promote integrated and consistent decision-making within the federal government, and harmonize that decision-making with the policies of provincial and territorial governments. The guidelines indicate that federal officials should develop processes that will "facilitate" the inclusion of Aboriginal perspectives.[76] They do not, however, require that Aboriginal peoples affected by a particular process be invited to participate in the design of the process.[77] Nor do the policy guidelines issued to date by the governments of Ontario or Quebec.[78] Neither does the current

---

[74] *Ibid*.

[75] Canada, Indigenous and Northern Affairs Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines to Fulfill the Duty to Consult* (Ottawa: Minister of Aboriginal Affairs and Northern Development, 2011), online: <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf> ["Federal Consultation Guidelines"].

[76] *Ibid* at 15.

[77] The Federal Consultation Guidelines do at least suggest (at 48) that federal officials "[c]onsider involving Aboriginal groups in the design of effective consultation processes." The next sentence, however, suggests, that the goal here is not a broad dialogue on the general process. The paragraph continues: "For example, agreeing on meeting objectives, in advance, can help all parties to focus their efforts and develop effective working relations." (See also page 23 of the guidelines on this point). Similarly, the guidelines suggest (at 48) that federal representatives *may* wish to familiarize themselves with any existing consultation protocol developed by the Aboriginal group as such a protocol "may become the starting point for a discussion on the process. Even so, however, federal officials "must follow the Updated Guidelines." The guidelines describe appropriate coordination with provincial and territorial governments about consultation processes on more than 20 occasions.

[78] The draft consultation guidelines published by the government of Ontario indicate that in addition to listening to Aboriginal perspectives generally, "*[i]n some instances*, ministries may need to have discussions with the affected Aboriginal community or communities, to determine what processes or approaches should be used to consult with the communities" [emphasis added]. See Ontario, "Draft Guidelines for Ministries on Consultation with Aboriginal Peoples related to Aboriginal Rights and Treaty Rights", online: <www.ontario.ca/page/draft-guidelines-ministries-consultation-aboriginal-

consultation policy of the government of Alberta. The latter notes that industry proponents should be aware that some First Nations have developed their own preferred consultation procedures, but the policy expressly provides that such procedures need not be followed when consulting First Nations.[79] Nowhere does the Alberta policy suggest that there may in fact be benefit to listening to First Nation perspectives on the design of an appropriate consultation process, or to taking into account the impact of distinctive First Nation worldviews about development decisions.

There are notable exceptions. The consultation policy of the government of Manitoba expressly provides that Aboriginal communities should participate in the design of the consultation processes that they will take part in.[80] The purpose of this, according to the Manitoba policy, is "to ensure the process is mutually acceptable."[81] The government of British Columbia, for its part, has negotiated several regional "Reconciliation Protocols" that provide for the establishing of joint processes with First Nation groups for more effectively managing decisions about specific resources like timber, conservation plans and First Nation sharing in the benefits derived from those resources.[82] Overall, however, the consultation policies developed by federal and provincial governments since *Haida Nation* pay little heed to the principle that Aboriginal consultation partners should have meaningful input into the *processes* through which decisions affecting their traditional lands will be made.[83]

---

peoples-related-aboriginal-rights-and-treaty> ["Ontario Draft Guidelines"]. The consultation policy currently published by the Ontario Ministry of Northern Development and Mines makes no reference to developing consultation processes in concert with the Aboriginal groups affected. See Ontario, "MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration" (Ontario: Ministry of Northern Development and Mines, 2012), online: <www.mndm.gov.on.ca/sites/default/files/aboriginal_exploration_consultation_policy.pdf>. For Quebec's policy, see Quebec, "Interim Guide for Consulting the Aboriginal Communities" (Quebec Interministerial Support Group on Aboriginal Consultation, 2008), online: <www.autochtones.gouv.qc.ca/publications_documentation/publications/guide_inter_2008_en.pdf>.

[79] Alberta, "The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013", (Alberta: Government of Alberta, 3 June 2013) at 7, online: <indigenous.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf>.

[80] Manitoba, "Interim Provincial Policy For Crown Consultations with First Nations, Métis Communities and Other Aboriginal Communities", (Manitoba: Government of Manitoba, 4 May 2009) at 3, online: <www.gov.mb.ca/ana/pdf/pubs/interim_aboriginal_consultation_policy_and_guidelines.pdf>.

[81] *Ibid* at 4.

[82] See British Columbia, "Reconciliation and Other Agreements", (British Columbia: Ministry of Aboriginal Relations and Reconciliation), online: <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/reconciliation-other-agreements>.

[83] See "Federal Consultation Guidelines", *supra* note 75. It should be noted on this point that the Federal Consultation Guidelines, at least, are not inconsistent with initiatives to negotiate consultation protocols with Aboriginal peoples. Indeed, at 23, the guidelines indicate that the Department of Indigenous and Northern Affairs will explore and negotiate "consultation arrangements and protocols" with Aboriginal groups and provinces (although the purpose of such arrangements is stated to be to achieve "efficient and coordinated" processes, rather than to incorporate Aboriginal values). It is unclear whether any such negotiations have begun. The "Ontario Draft Guidelines", *supra* note 78, expressly contemplate Aboriginal peoples will at some point participate in developing the government's final consultation

If providing Aboriginal peoples with a prior opportunity to negotiate the shape of consultation processes is a minimal requirement of good faith engagement aimed at reconciliation, one way to achieve this is for federal and provincial governments to seek consultation process agreements at the broader level of Indigenous nations and treaty partners. Engaging in dialogue with broader Indigenous groups offers the promise of mitigating, to some extent, the negotiation capacity problems faced by individual Indigenous communities. At the very least, such negotiations will offer valuable information to federal and provincial officials about the cultural and procedural norms that their consultation partners believe should be incorporated in the consultation process. Further, where historical treaties are in effect, Crown negotiations with Indigenous treaty partners over the process through which treaty concerns over development will be discussed during consultations would be consistent with the relationships established by the historical treaties, and a significant gesture toward reconciliation. In all such broader negotiations there is a risk that consensus will not be obtained. Indeed, consensus may not be achievable even among the communities on the Aboriginal side of the table. But the successful negotiation of agreements regarding the procedures that will be followed in implementing the duty to consult would increase the legitimacy of subsequent consultations about specific developments on traditional Indigenous lands.

There is one other manifestation of good faith in consultations that is worthy of mention here: the willingness of both parties to negotiate and abide by timely dispute resolution procedures. Where consultation does not lead to consensus over whether or how to accommodate the concerns of the Aboriginal consultation partner, Crown representatives are currently required to decide how to proceed through a balancing of interests in good faith. The judgment in *Haida Nation*, however, indicates that in cases where there is a strong *prima facie* claim to a section 35 right and a risk of significant potential intrusion on that right, the Crown may have additional obligations. In appropriate cases, these may include a requirement to provide written reasons that clarify how Aboriginal interests were taken into account in reaching the final decision.[84] Although the Supreme Court expressly declined in *Haida Nation* to enumerate all of the Crown's obligations in such cases, it is noteworthy that the Court suggested that in complex or difficult cases federal and provincial governments may consider adopting mediation or impartial administrative processes to help resolve disputes between the parties.[85]

There can be no doubt that negotiation is generally the most flexible process for addressing the complex issues that may arise when the duty to consult is triggered. Negotiation, rather than a process which imposes an outcome on one party,

---

policy. At least six provinces (Saskatchewan, New Brunswick, Manitoba, Alberta, Nova Scotia and Newfoundland and Labrador) have already engaged with Aboriginal peoples, at least to some extent, in the development of their province-wide consultation policies. See Newman, *Revisiting*, *supra* note 15 at 118–27.

[84] *Haida Nation*, *supra* note 4 at para 44.

[85] *Ibid.*

is also the mechanism most likely to strengthen the parties' relationship. Nevertheless, particularly in serious cases of significant potential intrusion on Aboriginal rights, it is inevitable that the parties will sometimes find themselves unable to move beyond an impasse over appropriate accommodation of the Aboriginal interest.[86] In that event, it is of course open to the Indigenous group, if it has sufficient resources, to challenge the Crown's decision in the courts. However, in cases where it is evident at the outset of the consultations that significant rights claims are involved, each party's demonstrated willingness to negotiate timely and culturally-balanced dispute resolution procedures should be considered in determining whether the consultation was conducted in good faith.[87]

As a matter of policy, a demonstrated willingness by the Crown to negotiate dispute resolution procedures at the outset of a consultation process, at least in cases where the group clearly has credible rights claims and significant *prima facie* concerns about the use of their traditional lands, would communicate clearly that federal and provincial governments intend to treat Indigenous peoples as equals under the law. Adopting such an approach to the resolution of consultation disputes would also bring Canadian practice closer to the principles set out in the UNDRIP. Article 27 of the UNDRIP provides as follows:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[88]

Particularly noteworthy here are the principles that Indigenous peoples should have the opportunity to participate in the development of procedures that address disputes between Indigenous peoples and the state, and that those procedures should incorporate Indigenous laws and customs.

From the perspectives of both negotiation theory and legal legitimacy, the outcome of a dispute resolution procedure is more likely to be respected by both parties if it is a procedure that has been agreed by both sides and is consistent with

---

[86] Such impasses may arise because the parties honestly hold different views abut the strength of the Indigenous rights claim or about the desirability of the proposed accommodation. The power imbalance that typically characterizes dialogue between the state and Indigenous communities may further inhibit their ability to reach consensus. For an explanation of how power dynamics may affect negotiations between Indigenous communities and the Crown, see Christopher Alcantara, "To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada" (2008) 38 Publius: The Journal of Federalism 343. See also Michael Coyle, "Transcending Colonialism? Power and the Resolution of Indigenous Treaty Claims in Canada and New Zealand" (2011) 24:4 NZULR 596.

[87] The focus of such dispute resolution mechanisms would be on the adequacy of the particular consultation process, not on the merits of the underlying rights claims.

[88] UNDRIP, *supra* note 12, Article 27.

both sides' norms and values. In the context of consultations between Aboriginal groups and the Crown, an effective procedure will apply the principles set out in *Haida Nation* through a process that is designed to take into account Aboriginal worldviews and calls upon third parties acceptable to both sides.[89] Options available here range from, at the most intrusive end of the scale, appropriately constituted administrative bodies, to mediation, and procedures whereby one party can request the non-binding direction of an expert acceptable to both sides if the consultations reach an impasse. Faced with such impasses, Canadian courts have already issued orders requiring that consultations be assisted either by a neutral third party or by the court itself.[90] The courts have not, thus far, required that the parties attempt at the outset to negotiate in good faith mutually-acceptable dispute resolution procedures, but such an interpretation of the law promotes consultation outcomes to which both parties have at least indirectly consented, and supports the reconciliatory purposes of section 35 and the duty to consult. Like the negotiation of consultation processes that take into account Indigenous values, it is not possible to guarantee that the parties will ultimately reach agreement on appropriate dispute resolution procedures, or to mandate such agreement by law. In both cases, however, for the reasons described above, it is appropriate for the law to encourage such agreements and to take into account the openness of Crown and Aboriginal representatives to attempt to negotiate agreement on these issues as evidence of their good faith in consultation. The consequence of recognizing that these principles flow from existing Canadian law is not to mandate that the substantive consent of Aboriginal peoples be obtained for all developments on their traditional lands, but rather to provide Aboriginal groups with a reasonable opportunity to offer their free, prior and informed consent to *the process* by which such development decisions will be assessed.

III. BENEFIT-SHARING: A SUBSTANTIVE CHALLENGE

Thus far we have focused on procedural aspects of the duty to consult. If a proper understanding of the duty to consult reveals the need to attend to the procedural aspects of consultations aimed at respecting the Indigenous perspective, it is also necessary to consider an issue of substance: the allocation of benefits flowing from the use of traditional lands. Thus far, the Canadian jurisprudence on the duty to consult has paid little attention to the question of who benefits from developments on traditional lands.[91] Perhaps because of the way those cases were pleaded, in

[89] For a review of the relevant dispute resolution theory here, see Michael Coyle, "Interest-Based Strategies", *supra* note 70 and Shin Imai, "Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes" (2003) 41 Osgoode Hall LJ 587.

[90] See e.g. *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests)* 2008 BCSC 1505 where the court granted an application by the Hupacasath First Nation for the appointment of an independent mediator to assist in ongoing consultation and accommodation discussions with the provincial Ministry of Forests. The court's order retained supervisory jurisdiction over the issues in the event the parties required further direction or assistance.

[91] A notable exception is the decision of the Ontario Divisional Court in *Waubauskang First Nation v. Minister of Northern Development and Mines et al*, 2014 ONSC 4424 (Div Court). In that case the court rejected the First Nation's application to set aside the Ministry's approval of a company's proposal for

identifying the substantive issues to be addressed in consultations, the Supreme Court of Canada has focused almost entirely on three issues: the nature and strength of the Aboriginal rights claim and the expected negative impacts of Crown action on traditional lands and the exercise of Aboriginal rights. The proposed sharing of benefits (if any) derived from the use of traditional lands has received much less attention in the consultation case law. Earlier decisions of the Supreme Court have identified the question of compensation to Aboriginal peoples as a factor to be considered when the Crown seeks to justify infringements on Aboriginal rights[92], but the consultation process prescribed by the Court has not to date expressly identified the allocation of benefits as an issue to be discussed pursuant to the duty to consult. [93] This lack of emphasis on benefit-sharing as a central issue during consultations is particularly striking in light of the long history in Canada of corporations negotiating "impact–benefit" agreements with Indigenous communities relating to proposed developments on traditional lands.[94] Article 28 of the UNDRIP calls for Indigenous

---

closure of a gold mine. The First Nation argued, on a number of grounds, that Ontario had failed to properly fulfil its duty to consult. One of those grounds was that the Province had a duty to consult regarding the sharing of benefits from the mine. In fact, the company and provincial officials had consulted with the First Nation over a period of three years and the company had attempted for almost a year to negotiate a benefit-sharing agreement in separate meetings with the First Nation. Writing for the Court, Kiteley J ruled that Ontario was not required to consult separately with respect to revenue sharing. Dealing with the issue in one paragraph, she noted that the First Nation had previously agreed that this issue was one that was to be negotiated between the First Nation and the company, changing its position only after the approval of the closure plan. Further, she found, on the record before the Court, that no such right arose from Treaty 3. For the reasons given in the text that follows, I submit that the Court's ruling on this point should not be followed.

[92] See e.g. *Sparrow*, *supra* note 4 at 1119. As per Dickson CJC & Lamer J: "Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available…" [emphasis added]. See also *Gladstone, supra* note 40 at para 64 (where Crown regulates Aboriginal right to sell fish commercially, it must show "both that the process by which it allocated the resource and the actual allocation of the resource which results from that process reflect the prior interest") and *Delgamuukw*, *supra* note 4 at para 69 ("[t]he economic aspect of aboriginal title suggests that compensation is relevant to the question of justification").

[93] By way of example, in describing the issues to be addressed during consultations, the judgments in *Haida Nation*, *supra* note 4, and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2014 SCC 74 [*Taku River*], each use the word "impacts" eight times in the context of the effects on the environment or intrusions on Aboriginal rights. By contrast, the word "benefit" is entirely absent in the *Taku River* judgment and appears twice in *Haida Nation*, both times in the context of the attributes of the claimed rights which gave rise to the duty to consult. The *Grassy Narrows* case, *supra* note 46, concerned a provincial decision to grant a license authorizing clear-cutting of forests within Treaty 3 territory in northwestern Ontario. The Court's brief analysis of the appropriate subject of consultations about the approval (at para 52) referred to the impact of the project on section 35 harvesting rights, but did not mention the distribution of the benefits of the development as a relevant issue.

[94] As their name suggests, impact-benefit agreements, typically negotiated between resource developers and Indigenous communities, inevitably provide for sharing of the financial, employment, and training opportunities created by the development, as well as measures to reduce its negative impacts on the community and its members. For a pragmatic summary of the procedural and substantive issues raised in the negotiation of an impact-benefit agreement, see Ginger Gibson & Ciaran O'Faircheallaigh, "IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements" (Toronto: Walter & Duncan Gordon Foundation, 2010), online: <www.afoa.ca/afoadocs/L3/L3a%20-%20IBA_toolkit_March_2010_low_resolution.pdf>. See also Brad Gilmour & Bruce Mellett, "The

peoples to receive "fair, just and equitable compensation" where states use their traditional lands without their prior consent.[95] Finally, resource revenue benefit-sharing in relation to the use of traditional lands has been the subject of several provincial initiatives in recent years.[96]

To the extent that Canadian jurisprudence addresses the potential benefits deriving from developments on traditional lands, its emphasis so far has been on the benefits that stand to accrue to society at large. Thus, the benefits that may be obtained by the public at large – from logging, hydroelectric generation, economic development, and the "settlement of foreign populations" – may be taken into account as factors tending to justify for constitutional purposes developments on traditional lands that that infringe Aboriginal rights.[97] These types of benefits accruing to the public at large are also clearly relevant in the consultation process

---

Role of Impact and Benefit Agreements in the Resolution of Project Issues with First Nations" (2013) 51 Alta LR 385 and "Benefit Sharing Agreements in British Columbia: A Guide For First Nations, Businesses, And Governments" (Victoria: Woodward & Company, 2010), online: <www.for.gov.bc.ca/tasb/slrp/lrmp/nanaimo/cencoast/ebmwg_docs/hw03b_benefit_sharing_final_report.pdf>.

[95] *UNDRIP*, *supra* note 12, Article 28.

[96] In 2002, the government of Quebec entered the *La Paix des Braves Agreement* following years of litigation between the government and the Grand Council of the Crees in Quebec. Among other things, the Agreement provides for revenue sharing with the Cree and greater Cree employment in the resource industries operating on their traditional lands. In 2009, Ontario announced a $30 million initiative as an interim step toward more comprehensive resource revenue sharing with Aboriginal communities. See Ontario, Ministry of Aboriginal Affairs, "Partnering For Future Economic Growth: McGuinty Government Reaffirms Commitment To Resource Benefits Sharing With Aboriginal Communities" (Ontario: Ministry of Aboriginal Affairs, 27 April 2009), online: <news.ontario.ca/maa/en/2009/04/partnering-for-future-economic-growth.html>. Since 2011, the government of British Columbia has negotiated more than one hundred agreements with First Nations that provide for sharing of the revenues from forestry. See "Forest Consultation and Revenue Sharing Agreements", (British Columbia: Ministry of Aboriginal Relations and Reconciliation), online: <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/forest-consultation-and-revenue-sharing-agreements>. The consultation policies of Nunavut and Newfoundland and Labrador expressly provide for the question of benefits to be addressed through negotiation with Aboriginal groups: see Newman *Revisiting*, *supra* note 15 at 124–25.

[97] All of thee factors were listed by Lamer CJC as relevant to the justification of Aboriginal title in *Delgamuukw*, *supra* note 4 at para 165. As we have seen, these kinds of benefits accruing to the public may be relied upon by Crown to justify intrusion upon Aboriginal title even where the Crown has failed in its duty to consult the Aboriginal peoples involved: *Haida Nation*, *supra* note 4 at para 45. In the case of Aboriginal rights or treaty rights that have a commercial aspect, the pursuit of economic or regional fairness may amount to a valid legislative objective justifying infringement of the right: *Gladstone*, *supra* note 40 at para 75. The Supreme Court has not thus far gone so far in relation to treaty or Aboriginal rights that do not have a commercial aspect. There, the Court has not to date elaborated on the "valid legislative objective" test set out in *Sparrow*, *supra* note 4 (at 1113–1114) in which the goal of conserving a natural resource was the sole example given of a valid objective for infringing an Aboriginal right. The Court has been equally circumspect with respect to the infringement of non-commercial treaty rights (see *Badger*, *supra* note 4 at paras 75-79 and *Grassy Narrows*, *supra* note 46 at para 53). See, however, *Halfway River First Nation v British Columbia (Ministry of Forests)* (1999), 178 DLR (4th) 666 at 716 (BCCA), in which Finch JA reasoned that "the economic and cultural needs of all peoples and communities in the Province" could be relied on in justifying the infringement of treaty rights to hunt, trap and fish.

when the Crown seeks, as required by *Haida Nation*, "to balance societal and Aboriginal interests."[98] Logically, the allocation of these benefits as between peoples is relevant to both questions. Allocation is relevant to the question of whether "public" benefits justify Crown infringements on Aboriginal rights, because Aboriginal peoples form part of the "public" and because the justification test requires that the Crown act honourably in formulating and implementing measures that will affect Aboriginal rights. The same two considerations apply to the Crown's duty to balance Aboriginal and societal interests during consultations over proposed infringements to claimed Aboriginal rights. Accordingly, although the consultation jurisprudence has not yet stated this explicitly, the consideration during consultation of the expected impacts of a development on an Aboriginal group must take into account whether and to what extent that group would benefit from the proposed development.[99]

Whether the issue is examined, then, in the context of the honour of the Crown or the public interest, the share of benefits expected to flow to the Aboriginal group affected must be taken into account by the Crown in fulfilling its obligation to consult. However, the justification for Aboriginal peoples receiving a proportionate share of the benefits from developments on traditional lands does not lie merely in a parsing of the principles that comprise the duty to consult. Where Aboriginal peoples are being consulted because of significant proposed infringements on the exercise of their section 35 rights, a fair allocation of benefits is a minimum, although not sufficient,[100] *quid pro quo* for the proposed infringement. Further, where traditional lands are subject to a historical treaty or to a credible claim of Aboriginal title, the Aboriginal people involved have a more direct claim, flowing from the nature of their section 35 rights, to share in the benefits flowing from development on those lands. The content of Aboriginal title directly confers on titleholders the *de jure* right to use and enjoy the fruits of the title lands.[101] Canadian law has recognized since the *Delgamuukw* decision that infringement of Aboriginal title will ordinarily require fair compensation to the Aboriginal people affected.[102] The Aboriginal partners of

---

[98] *Haida Nation, supra* note 4 at para 45.

[99] This must be assessed, of course, from the perspective of the Aboriginal group affected.

[100] The Crown remains obliged to consider, in response to Aboriginal concerns, whether the negative impacts of a proposed development can be reduced or eliminated. In cases where the anticipated damage to Aboriginal peoples' rights and interests, and their relationship to the land, will be significant and long-lasting or permanent, a potential allocation of economic benefits may be insufficient to justify the proposed intrusion on their rights. The relevance of economic benefits, like the severity of the interference with Aboriginal rights, must be considered from the perspective of the Aboriginal people affected. Nonetheless, a failure to offer an honourable share of the benefits expected to flow from resource development to the Aboriginal groups whose rights are affected by the development may properly be considered as a factor to be considered in the determining whether the consultation was consistent with the honour of the Crown.

[101] In the words of McLachlin CJC, writing for the Court in *Tsilhqot'in*, *supra* note 42 at para 70: "[i]n simple terms, the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development."

[102] *Delgamuukw*, *supra* note 4 at para 169.

the Crown under historical treaties also have a legal right to share in the benefits derived from the use of their traditional lands, a point to which we will now turn.

For more than 150 years following the Treaty of Niagara in 1764, Crown representatives entered into land treaties with Aboriginal peoples across the country. From the Crown's perspective, the aim of those treaties was to free up land for settlement and the exploitation of its resources. The legal effect of those treaties was to transform Aboriginal title rights to treaty rights flowing from the understandings reached between the treaty partners. The written texts of those land treaties, drafted by Crown representatives, largely follow a very similar pattern. The Aboriginal treaty partner is recorded as having given up all interests in their traditional lands, apart from those relating to reserves to be set apart on their behalf and a continued right to hunt, fish and trap within their traditional territories. The latter right was generally described in the written texts as subject to the Crown's right to take up treaty lands for development. Typically, the texts also provide for the payment of modest annuities and the provision of some goods to support agriculture and harvesting activities. The written version of Treaty 3, for example, the treaty considered in *Grassy Narrows*, states that the Crown will supply "to any band of the said Indians" who cultivates the soil:

> [T]wo hoes for every family actually cultivating, also one spade per family as aforesaid, one plough for every ten families as aforesaid, five harrows for every twenty families as aforesaid, one scythe for every family as aforesaid, and also one axe and one cross-cut saw, one hand-saw, one pit-saw, the necessary files, one grind-stone, one auger for each band, and also for each Chief for the use of his band one chest of ordinary carpenter's tools…all the aforesaid articles to be given once for all for the encouragement of the practice of agriculture among the Indians.[103]

The territory covered by Treaty 3, like most of the historical land treaties, was vast: it comprised some 55,000 square miles in what is now northwestern Ontario and eastern Manitoba. The area was known to be rich in valuable timber, gold, and other resources. It is possible to make the argument that its written text, like the texts of other land treaties, should be parsed like a contract of sale, and that the benefits to be derived by the Crown's Aboriginal treaty partners from their traditional lands should be limited to the goods enumerated in the treaty, combined with an ever-diminishing right to engage in traditional harvesting activities. The assurances consistently offered by Crown representatives in the treaty negotiations, however, and the premises of the historical treaty-making process, belie this conclusion. The records kept by the Crown negotiators reveal that they repeatedly assured their Aboriginal counterparts that entering into a permanent treaty relationship with the Crown would provide for their peoples' well-being "as long as the sun shines and the rivers flow."[104] Such assurances, together with other historical

---

[103] Indigenous and Northern Affairs Canada, "Treaty Texts – Treaty No 3" (Ottawa: Indigenous and Northern Affairs Canada), online: <www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679>.

[104] With reference to the negotiation of Treaty 3, see Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-west Territories* (Toronto: Prospero Books, 2000) at 53–56 [Morris, *Treaties*]. For other typical examples of the assurance, from the negotiation of Treaty 4 (1874) and

evidence of the common intention of the treaty parties, must be taken into account in the interpretation of the treaties. The argument that the benefits Aboriginal treaty peoples are entitled to derive from the treaty relationship are not limited to the discrete items enumerated in their written texts could undoubtedly be made on a case-by-case basis, based on each individual treaty negotiation.[105] In each such case, interpretation of the parties' common intention will be governed by the principle of the honour of the Crown, which prevents federal and provincial representatives today from arguing that historical land treaties were the product of sharp dealing by the Crown.[106]

The argument need not be made in this manner, however. The conclusion that the form of benefit sharing from treaty lands must be understood as evolving over time follows from the inherent nature of the historical treaties. Treaties, the courts have recognized, give rise to *sui generis*, reciprocal obligations. The historical land treaties in particular are comprehensible only on the basis of certain necessary premises about how the new treaty relationship was intended to function. These essential premises give rise inexorably to a core set of principles that are required to make sense of, and therefore form the normative framework of, the new inter-societal institution that was to govern the coexistence of settlers and Aboriginal peoples on the traditional lands of the latter. One of these necessary premises, for example, was that the representatives of those peoples had the authority to bind their peoples to that new relationship. This necessarily implies that in the treaty relationship, each treaty partner would have sufficient rights of self-determination to regulate the affairs of their people and to empower them to fulfil their treaty commitments. In terms of the benefits to be received by each people under the treaty, the historical land treaties were premised on their enduring indefinitely, long beyond the lifetimes of the generations that entered them. The treaty relationship, then, was designed to continue to govern the parties' relationship over a period of such length that significant changes to the use of the treaty lands would inevitably occur. This leads to two further implications in terms of the normative structure of the institution of law created by those treaties. The first is that the historical treaty framework obligates Indigenous peoples and the Crown to remain in dialogue about their relationship under the treaty and to discuss appropriate changes to its implementation as changing circumstances on the treaty lands require. The second implication is that the historical land treaties, as an intersocietal institution created to ensure the harmonious coexistence of peoples in perpetuity, will not be interpreted or implemented in a manner that would force the impoverishment of either treaty

---

Treaty 6 (1876), see Morris, *Treaties*, at 96, 202. Morris was the chief Crown negotiator for several of the numbered treaties.

[105] For a recent example of careful analysis of the common intention of the historical land treaties, see Michael Asch, *On Being Here to Stay: Treaties and Historical Rights in Canada* (Toronto: University of Toronto Press, 2014).

[106] *Badger*, *supra* note 4 at para 41: "Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. It is always assumed that the Crown intends to fulfil its promises. No appearance of "sharp dealing" will be sanctioned."

partner.[107] As I have argued in more detail elsewhere,[108] these implications of the historical treaty-making process are not mere background facts. As necessary shared premises of the treaty as a permanent, inter-societal institution, the obligation of ongoing dialogue to address changes in circumstance and the principle that the treaties will not be implemented in a manner that leads to the impoverishment of either treaty partner are fundamental legal principles that apply to all of the historical land-sharing treaties.

The conclusion that the Crown shall not be permitted to interpret or implement historical treaties in a manner that leads to the impoverishment of its Aboriginal treaty partner might equally be reached by application of the obligations that flow from the honour of the Crown. However, recognizing that these fundamental treaty implementation principles necessarily flow from the historical treaty-making process places the law more firmly on a ground of equality – an equality based on the nature of the treaty partnership. Acknowledging the fundamental premises of the historical treaty-making process means that the implementation of those treaties can no longer viewed as a zero-sum game in which the value of the Aboriginal people's treaty rights is doomed forever to diminish as the benefits flowing to the Crown from treaties continue to increase. Properly conceiving the historical treaties as giving rise to a unique institution of law governed by the shared premises that led to their creation leads to the acknowledgment of a generic right[109] held by both treaty partners to continue to share meaningfully in the benefits that flow from their treaty lands. Finally, for the law to recognize the necessary premises of the historical treaty-making process is to recognize that Aboriginal peoples' interest in sharing the benefits obtained from the treaties flows not merely from even-handed, after-the-fact stewardship by federal and provincial governments, but from the institutional nature of the treaties themselves.

The obligation of the Crown representatives to address the issue of the allocation of benefits from traditional lands does not, therefore, arise only in the context of the existing law on the duty to consult in relation to specific development proposals. It is a broader obligation that flows from the nature of the historical treaties and the economic content of Aboriginal title. It is an obligation that the Crown must address honourably in negotiations with Aboriginal peoples who have *prima facie* claims to Aboriginal title and with those who have entered historical land-sharing treaties.[110]

---

[107] The analysis of treaties as institutions of law and the implications of such an analysis are developed more fully in Michael Coyle, "As Long as The Sun Shines…Recognizing that Treaties Were Intended to Last" in Coyle & Borrows, *supra* note 33.

[108] Ibid.

[109] For the general concept of Aboriginal generic rights, see Brian Slattery, "Making Sense Of Aboriginal And Treaty Rights" (2000) 79 Can Bar Rev 196 and Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433.

[110] The words of McLachlin CJC at para 17 in *Haida Nation*, *supra* note 4, are opposite here: "Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims. Treaties serve to reconcile pre-existing Aboriginal sovereignty with

IV. REVISITING SUBSTANTIVE CONSENT: A MARGINAL CONCEPT IN CANADIAN CONSULTATION LAW?

Recognizing the ongoing interests of Aboriginal peoples in the use of lands covered by Aboriginal title or historical treaties prompts a closer look at the role of consent within the duty to consult. The Supreme Court of Canada has held, most recently in *Tsilhqot'in*, that holders of Aboriginal title have "the right to choose the uses to which the land is put and to enjoy its economic fruits."[111] Aboriginal title arises from occupation at the time of the assertion of Crown sovereignty and it crystallizes at that time, not upon subsequent confirmation by the courts.[112] Aboriginal groups with a strong *prima facie* claim to Aboriginal title therefore have a strong claim to participate in decision-making about the uses of their traditional lands.[113] For their part, the Aboriginal partners to historical land-sharing treaties, as I have suggested above, have the right to participate in an ongoing dialogue with the Crown. This dialogue is not just about the allocation of benefits from treaty lands, but also about the need to implement the treaty in accordance with the changing circumstances that both parties knew would inevitably develop over the decades and centuries following the initial treaty negotiation. Those treaty relationships were entered into with the intention of binding the parties indefinitely, and therefore none of the parties to those treaties expected that the written terms of those treaties, in the words of Binnie J (writing about Treaty 8) "constituted a finished land use blueprint."[114]

How do these reflections on the ongoing interests of Aboriginal treaty partners and groups with strong claims to Aboriginal title affect the question of consent in consultations about developments on their traditional lands? The consultation jurisprudence makes a distinction between the Crown's obligation to negotiate underlying rights claims and its obligation to consult in connection with specific land-use proposals. In the former case, the Supreme Court has made clear that the Crown must honourably negotiate a resolution of those claims (that is, seek

---

assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the Constitution Act, 1982. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises." This promise is realized and sovereignty claims reconciled through the process of honourable negotiation" [citations deleted].

[111] *Tsilhqot'in*, *supra* note 42 at para 67. Those uses are subject to an "inherent" limit in that land may not be used in ways that substantially limit its value for future generations given the nature of the group's attachment to the land.

[112] *Ibid* at para 69. See also McNeil, "Aboriginal Title after Tsilhqot'in", *supra* note 43 at 71–75.

[113] *Ibid* at paras 91, 93. In *Tsilhqot'in*, the Court found that the Tsilhqot'in people had a strong prima facie claim and that the provincial government's intrusion on their rights was significant, necessitating "significant consultation and accommodation in order to preserve the Tsilhqot'in interest."

[114] *Mikisew*, *supra* note 8 at para 27. The paragraph in full reads: "Thus none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint. Treaty 8 signalled the advancing dawn of a period of transition. The key, as the Commissioners pointed out, was to "explain the relations" that would govern future interaction 'and thus prevent any trouble'." The historical land-sharing treaties themselves arose within the context of an ongoing history of established and evolving relations between the Crown and Aboriginal peoples, a context within which the signing of a treaty document at one point in time should not be viewed in isolation: see e.g. Janna Promislow, "Treaties in History and Law" (2014) 47 UBC L Rev 1085.

an outcome to which both parties consent).[115] In the context of consultations about specific developments, as we have seen, the Crown must also engage in dialogue, and the conduct required of the Crown during that dialogue varies in proportion to the strength of the Aboriginal claim and the impact of the proposed decision. However, in all but the most trivial cases, the Crown is obliged to enter the consultation with the objective of substantially responding to the Aboriginal group's rights and interests. In the words of Lamer CJC in *Delgamuukw*:

> [E]ven in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and *with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue*. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.[116]

Subsequent Supreme Court decisions, as we have seen, have indicated that obtaining Aboriginal consent is not generally a necessary element of consultations, except in certain cases of established Aboriginal rights, like Aboriginal title.[117] Still, the obligation during consultations to engage in good faith dialogue, with the intention of addressing the other's concerns – in the words of McLachlin CJC, "a process of balancing interests, of give and take"[118] – appears very similar to the process of negotiating with a view to seeking agreement.

While the Canadian consultation jurisprudence rules out a general veto for Aboriginal peoples over developments on traditional lands, nothing in the Supreme Court's judgments from *Haida Nation* onward is inconsistent with the proposition that both parties must participate in consultations *with a view to* seeking consensus about the ultimate decision. Indeed, for the Crown and Aboriginal peoples to seek consensus about individual developments on traditional lands, while negotiating a longer term resolution of underlying claims, appears perfectly consistent with reconciliatory purpose of section 35. Agreement may not always be achievable, as the courts who must address litigation about claimed rights are perfectly aware. But to recognize that both sides are obligated to engage in consultations with a view to reaching mutual consent, particularly in cases of strong Aboriginal title claims and significant intrusions on historical treaty lands, is to give due recognition to the importance of the underlying interests at stake and of the ongoing constitutional relationship of the Crown and Aboriginal peoples. Enforcing an obligation to engage in consultations with a view to reaching mutual consent is no more difficult than the enforcement of the other nuanced obligations set out in the consultation jurisprudence. It is an engagement, as we have seen, that has already been embraced

---

[115] See e.g. *Haida Nation*, *supra* note 4 at paras 17, 25.

[116] *Delgamuukw*, *supra* note 4 at para 168 [emphasis added].

[117] *Haida Nation*, *supra* note 4 at para 48. Even in such cases, as we have seen, the Crown may still proceed with its decision if it can justify its infringement of the section 35 right.

[118] *Ibid*.

by significant industry associations. And the framing of consultations as directed toward seeking agreement is a direction, like the other directions in the consultation jurisprudence, that provincial and federal governments are quite capable of incorporating within their operational policies.

The obligation to engage in consultations with the objective of seeking agreement would not prevent either party in the process from defending their interests firmly, but it would require both parties to demonstrate an openness to discussing creative options for resolving their differences. Agreement will not always be achieved, but the paradigm within which the parties interact will necessarily shift when mutual consent is expressly identified as one of the objectives of the consultation process. Recognizing an obligation to engage with a view to obtaining mutual consent does not go as far as some learned commentators, critical of the manner in which the section 35 jurisprudence has addressed the issue of Aboriginal sovereignty and legal orders, would undoubtedly wish.[119] Those critiques raise pressing questions about the *de jure* relationship between Aboriginal peoples and the Crown – questions which it is beyond the scope of this analysis to explore. Nonetheless, explicitly underlining the importance of seeking consent in consultations would demonstrate respect for Aboriginal peoples' agency and autonomy in their relationship with the state. And, in doing so, Canadian law on the duty to consult would incidentally move toward harmony with the principle of consent set out in Article 32 of the UNDRIP.

V. CONCLUSION

The jurisprudence of the Supreme Court of Canada has done much in recent decades to spur continuing dialogue between Indigenous peoples and the Crown regarding the contemporary meaning and application of Aboriginal and treaty rights. As Brian Slattery has observed, the direction provided by the Court through its interpretation of section 35 and the duty to consult means that "the Crown, with judicial assistance, has the duty to foster a new legal order for Aboriginal rights, through negotiation and agreement with the Aboriginal peoples affected."[120] As we have seen, that dialogue must permit Aboriginal peoples to engage Crown representatives in accordance with their own perspectives on the issues at stake. Seeking the consent of Aboriginal peoples to the *process* within which their voices will be heard in consultations with the Crown, jointly developing appropriate mechanisms for managing disputes that arise during consultations, addressing the just allocation of benefits from proposed developments, and engaging in consultations about specific land use proposals with a view to seeking mutual consent to the final decision are all appropriate steps toward

[119] See e.g. Gordon Christie, "A Colonial Reading Of Recent Jurisprudence: Sparrow, Delgamuuk and Haida Nation" (2005) 23 Windsor YB Access Just 17, Borrows, "Alchemy", *supra* note 35 and Val Napoleon, "Tsilhqot'in Law of Consent", (2015) 48 UBC L Rev 873. For the argument that reliance on the historical treaties "taking up" provisions in a manner that significantly affects Aboriginal harvesting rights should be accompanied by the substantive consent of Aboriginal peoples, see Imai, "Consult", *supra* note 33.

[120] Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 SCLR (2d) 595 at 627.

ensuring that the Aboriginal voices are duly heeded during the consultations mandated by Canadian law. Just as importantly, all are *indicia* that a court may properly consider in determining whether the consultation parties have engaged in have been conducted in good faith.

Expressly recognizing the parties' obligations to take these steps during consultations about significant changes to the use of traditional lands will bring a salutary clarification to the law governing the duty to consult Aboriginal peoples – a clarification that will support Aboriginal and non-Aboriginal governments as they seek to move forward consensually while they come to grips with long-standing underlying rights claims. To acknowledge that Canadian law requires seeking consensus at each of these levels during consultations will not satisfy all concerns about the adequacy of the current direction provided by the courts. But clarification of the law proceeds incrementally, and the explicit acknowledgement of the principles described above will permit a fuller recognition of the agency of Aboriginal peoples and their unique constitutional relationship with the other orders of government in Canada and, finally, of the UNDRIP principle that indigenous peoples have the right to participate on their own terms in decision-making concerning the use of their traditional lands.