

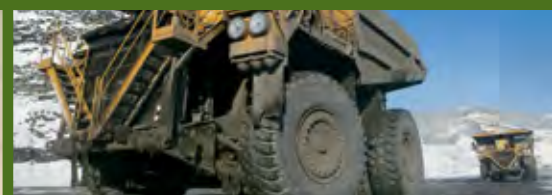


THE RULE AND ROLE OF LAW

The Duty to Consult, Aboriginal
Communities, and the Canadian
Natural Resource Sector

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PREFACE

The year 2013 was the 250th anniversary of the Royal Proclamation of 1763. The Royal Proclamation is widely regarded as having been one of the cardinal steps in the relationship between Aboriginals and non-Aboriginals in British North America – what eventually became Canada.

A quarter of a millennium later it is our judgment that that relationship has often not been carried out in the hopeful and respectful spirit envisaged by the Royal Proclamation. The result has been that the status of many Aboriginal people in Canada remains a stain on the national conscience. But it is also the case that we face a new set of circumstances in Aboriginal/non-Aboriginal relations. Indigenous peoples in Canada have, as a result of decades of political, legal, and constitutional activism, acquired unprecedented power and authority. Nowhere is this truer than in the area of natural resources.

This emerging authority coincides with the rise of the demand for Canadian natural resources, a demand driven by the increasing integration of the developing world with the global economy, including the massive urbanisation of many developing countries. Their demand for natural resources to fuel their rise is creating unprecedented economic opportunities for countries like Canada that enjoy a significant natural resource endowment.

The Aboriginal Canada and the Natural Resource Economy project (of which this paper is the fourth instalment) seeks to attract the attention of policy makers, Aboriginal Canadians, community leaders, opinion leaders, and others to some of the policy challenges that must be overcome if Canadians, Aboriginal and non-Aboriginal alike, are to realise the full value of the potential of the natural resource economy. This project originated in a meeting called by then CEO of the Assembly of First Nations, Richard Jock, with the Macdonald-Laurier Institute. Mr. Jock threw out a challenge to MLI to help the Aboriginal community, as well as other Canadians, to think through how to make the natural resource economy work in the interests of all. We welcome and acknowledge the tremendous support that has been forthcoming from the AFN, other Aboriginal organisations and leaders, charitable foundations, natural resource companies, and others in support of this project.

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EXECUTIVE SUMMARY

In the close to 10 years since the Supreme Court of Canada first gave it modern form, the “duty to consult” has been constantly referenced in the media, constantly considered by natural resource project proponents, and constantly misunderstood. What is undeniable is that the doctrine will play a key role in the nation’s efforts to unlock the vast potential of its natural resources, and bring prosperity to Aboriginal people in Canada.

The duty to consult, in its modern form, requires governments to take the initiative to consult with Aboriginal communities prior to government decisions that might affect Aboriginal or treaty rights, even when the legal status of these rights is in question. A 2004 case, *Haida Nation v. British Columbia*, first enunciated the duty to consult in this manner, and it has since developed in case law.

While much of the doctrine is nuanced, still developing or open to interpretation, several misconceptions about the doctrine can and must be corrected. To be blunt, anyone who perpetuates misunderstandings about the duty to consult is standing in the way of Canada’s future.

For example, many believe the duty to consult provides a veto over development proposals, while the courts have consistently reiterated that it does not.

On the flip side, others argue that the duty is meaningless, because the government ultimately has the authority to go ahead and approve a project, even after consultation has revealed issues to be addressed. But the fact that governments are legally required to act in good faith means that they must take account of the issues identified in consultations.

Many believe the duty applies to existing projects or past breaches of treaty rights, but the courts have been clear that only new potential impacts can trigger the duty to consult.

And perhaps the most damaging misunderstanding about the constitutional duty to consult is that it will be wielded by Aboriginal peoples who are by nature opposed to development to consistently thwart progress in accessing Canada’s rich resources. In January 2014, the media paid enormous attention to Neil Young’s concerts to stop oil sands development, while around the same time, the Fort McKay First Nation held a conference on how it can participate in the economic opportunities offered through partnership in oil sands development. The Macdonald-Laurier Institute’s *Aboriginal Canada and the Natural Resource Economy* series, including this paper, has been an effort to make the case for productive Aboriginal engagement on these issues.

What the duty to consult does is provide protection for key Aboriginal interests, and create a lever to cause Aboriginal communities, government, and businesses to come to an agreement over resource projects that benefit all parties.

The interaction between Aboriginal Canadians and resource development has not been all rosy. Bitter confrontations around various developments get headlines and slow projects. From anti-fracking protests in New Brunswick to legal and political confrontations related to the Ring of Fire in Ontario to Aboriginal protests against the Northern Gateway Pipeline in British Columbia, these situations show Aboriginal Canadians making their voices heard in opposition to projects when there are concerns with their impact.

But there are many practical examples of ways the duty to consult has played out that offer lessons for the future – for how some things can go right, how some things can go wrong, and how to work towards more of the former.

Recommendations

Several key recommendations emerge from this study. First, this paper is a call for all to speak about the duty to consult in responsible ways rather than to perpetuate misunderstandings. The duty to consult can protect certain core interests of Aboriginal communities while asking Canadian governments always to be more engaged with Aboriginal issues. Those engaged with the duty to consult, including the scholarly community, must engage with it in rigorous ways that describe it accurately, try to study objectively the policy impacts of different approaches to the duty to consult, and continue to make constructive recommendations on different approaches that respect the broad public interest.

Second, despite the fact that it is a legal doctrine, the duty to consult needs to be approached in less technical ways. The history of how the duty to consult has worked suggests that those who attempt to draw upon the spirit of the duty to consult may well attain better outcomes than those who attempt to follow the letter of the law or what they see as the minimum legal requirements for consultation and accommodation. Governments and industry stakeholders who engage early with Aboriginal communities find trust and relationships that help contribute to better outcomes for all.

For their part, Aboriginal communities need to recognize that the courts' decision to adopt the duty to consult, rather than a system of injunctions, means that governments still have the power to make many decisions. With this understanding they can engage with governments and industry in seeking protection of key interests while otherwise leveraging the duty to consult in the context of working collaboratively on natural resource development that contributes to widespread prosperity.

Third, the courts should be very cautious about continuing to expand the duty to consult doctrine into new contexts. Courts need to leave flexibility for governments to design appropriate procedures for complex scenarios involving multiple Aboriginal communities. Vital transportation infrastructure, such as new pipelines, depends upon all taking reasonable approaches.

The evolution of the duty to consult doctrine continues, but what is increasingly clear is that used properly, it can support a new era of partnerships that offer win-win-win outcomes from business-Aboriginal-government collaboration in the well-managed development of Canada's natural resource potential.

SOMMAIRE

Pendant les dix ans qui se sont écoulés depuis l'arrêt de la Cour suprême qui modernisait l'« obligation de consultation », la doctrine a régulièrement nourri les médias, elle a été soumise à l'examen constant des promoteurs de projets de ressources naturelles et, de surcroît, elle a rarement été bien interprétée. La doctrine jouera, indéniablement, un rôle de premier plan tant pour débloquer le vaste potentiel de ressources naturelles du Canada que pour assurer la prospérité des peuples autochtones.

Sous sa forme actuelle, l'obligation de consultation impose aux gouvernements l'obligation d'entreprendre des consultations auprès des collectivités autochtones avant de prendre des décisions susceptibles d'avoir une incidence sur les droits ancestraux ou issus de traités, même lorsque l'état du droit est incertain. L'étendue de cette obligation a été énoncée dans l'arrêt *Nation Haïda c Colombie-Britannique*, en 2004, et a été développée par la jurisprudence.

Bien que la doctrine soit tout en nuances, en constante évolution et sujette à diverses interprétations, plusieurs erreurs doivent non seulement être dénoncées, mais elles doivent également être corrigées. Clairement, perpétuer les malentendus au sujet de l'obligation de consultation est préjudiciable à l'avenir du Canada.

Par exemple, nombreux sont ceux qui croient que l'obligation de consultation confère un droit de veto aux propositions de mise en valeur des ressources, alors que les tribunaux ne cessent d'affirmer le contraire.

Par contre, certains soutiennent que l'obligation est sans effet puisque le gouvernement peut aller de l'avant et approuver un projet même après qu'une consultation a identifié des problèmes à résoudre. Pourtant, puisque le gouvernement a l'obligation de mener les consultations de bonne foi, il doit donc prendre en considération les questions soulevées lors de ces consultations.

En outre, nombreux sont ceux qui croient que l'obligation ne se limite qu'aux projets existants ou aux violations antérieures aux droits issus des traités. Cependant, les tribunaux ont affirmé clairement que seuls les nouveaux impacts potentiels doivent être soumis à l'obligation de consultation.

Le malentendu sans doute le plus dommageable au regard de l'obligation constitutionnelle de consulter est de croire que les peuples autochtones, de par leur nature même, s'opposent à tout développement et font systématiquement obstacle à l'accès aux abondantes ressources du Canada. Or, en janvier 2014, alors que les médias braquaient leurs projecteurs sur la tournée de concerts de Neil Young contre l'exploitation des sables bitumineux, la Première Nation de Fort McKay organisait une conférence au cours de laquelle elle envisageait les avantages économiques d'un partenariat pour leur mise en valeur. Par le biais de la série *Aboriginal Canada and the Natural Resource Economy* (cet article y compris) parrainée par l'Institut Macdonald-Laurier, d'importants efforts sont déployés afin de promouvoir la participation productive des peuples autochtones à ces enjeux.

L'obligation de consultation prévoit la protection des principaux intérêts des Autochtones et crée un effet de levier en amenant ces communautés, le gouvernement et les entreprises à s'entendre sur des projets de mise en valeur des ressources qui soient avantageux pour toutes les parties.

Les relations entre les Autochtones du Canada et les promoteurs du secteur des ressources n'ont jamais été idylliques. Divers projets sont l'objet de rudes affrontements à la une des médias et accusent donc des retards. Les peuples autochtones ont fait entendre leur voix contre les projets qui les préoccupent, notamment lors des manifestations contre la fracturation hydraulique au Nouveau-Brunswick, dans la confrontation politique et judiciaire au sujet du Cercle du feu en Ontario et encore, en Colombie-Britannique, contre le projet pipelinier Northern Gateway.

Néanmoins, il convient de souligner, maintenant et pour l'avenir, les leçons tirées des différentes approches utilisées pour respecter l'obligation de consultation : les unes ont ouvert la voie au succès, certaines se sont terminées par un échec, tandis que d'autres nous ont donné des pistes à suivre.

Recommandations

Plusieurs recommandations importantes ressortent de cette étude. En tout premier lieu, celle-ci est un appel lancé à tous sur l'obligation de consulter de façon responsable dans le but de mettre un terme aux malentendus perpétuels. Cette obligation peut protéger certains intérêts fondamentaux des communautés autochtones tout en exigeant des gouvernements du Canada qu'ils s'intéressent davantage aux questions préoccupant ces populations. Tous ceux qui sont interpellés par l'obligation de consulter, notamment la communauté universitaire, doivent s'impliquer avec rigueur pour la définir avec exactitude, de façon à pouvoir étudier objectivement les effets sur les politiques des différentes manières de consulter et de continuer à faire des recommandations constructives au regard de différentes approches respectueuses de l'intérêt public dans son ensemble.

Deuxièmement, bien que l'obligation de consultation repose sur la jurisprudence, on devrait adopter une approche moins technique lorsqu'on y a recours. L'obligation de consulter a évolué, ce qui montre qu'on obtiendrait de meilleurs résultats en s'inspirant de l'esprit de la doctrine plutôt que de la lettre ou ce qui est considéré comme le minimum imposé pour consulter et accommoder. Lorsque

les gouvernements et les parties intéressées de l'industrie établissent rapidement un processus de dialogue avec les communautés autochtones, ils y découvrent d'authentiques relations de confiance qui évoluent vers de meilleurs résultats pour tous.

Les communautés autochtones, quant à elles, doivent reconnaître que si un tribunal décide d'adopter l'obligation de consultation plutôt que d'invoquer les procédures d'injonction, les gouvernements détiennent toujours les pouvoirs décisionnels. En comprenant bien cet enjeu, les Autochtones pourront participer aux discussions avec les gouvernements et l'industrie pour protéger leurs intérêts clés tout en faisant de l'obligation de consultation un moyen de contribuer à la prospérité générale grâce à la collaboration en matière de mise en valeur des ressources naturelles.

Troisièmement, les tribunaux ne devraient élargir l'application de l'obligation de consultation à de nouveaux contextes qu'en faisant preuve d'une grande circonspection. En effet, les tribunaux doivent laisser aux gouvernements la souplesse leur permettant de mettre en place les procédures appropriées à des scénarios complexes impliquant de multiples communautés autochtones. Les infrastructures de transport essentielles, notamment les nouveaux pipelines, ne seront aménagées que si tous les intervenants adoptent des approches raisonnables.

L'obligation de consultation continue d'évoluer, mais il est de plus en plus clair qu'appliquée judicieusement, elle peut conduire à une nouvelle ère de partenariats établis au moyen d'une collaboration tripartite entre les entreprises, les communautés autochtones et les gouvernements, où chacun y trouve son compte, et qui peut réussir à mettre en valeur le vaste potentiel en ressources naturelles du Canada.

INTRODUCTION

In the ongoing discussion of Canada's massive natural resource potential, the current possibilities for development of this potential, and the possible benefits for Aboriginal Canadians arising from this development, a significant legal development looms large. The "duty to consult" is constantly referenced in the media, constantly considered by natural resource project proponents, and is constantly being misunderstood. The doctrine has major implications for natural resource development and for Aboriginal Canadians.

In the close to 10 years since the Supreme Court of Canada first gave it modern form, the duty to consult and accommodate doctrine has rapidly become a major example of the power of Aboriginal rights. Governments and proponents of natural resource projects struggle to work within the strictures set up by the duty to consult. The doctrine and associated policies have also created significant opportunities in the natural resource sector for some Aboriginal communities, with uneven outcomes. Critically, the doctrine's legal technicalities also hold the potential to undermine the best policies for Aboriginal participation in natural resource development.

The duty to consult is situated against a broader background in so far as it bridges questions related to Aboriginal Canadians and natural resource development. The Macdonald-Laurier Institute's (MLI) ongoing *Aboriginal Canada and the Natural Resource Economy* research project contributes to an essential Canadian conversation. It brings together two major sets of policy issues. First, Canada faces significant policy questions arising from the historical circumstances surrounding its relationships with Aboriginal peoples and, most importantly at a practical level, faces questions of how Aboriginal people in Canada can move forward successfully into a healed and prosperous future.

Second, current world circumstances offer significant opportunities for Canada to prosper from responsible resource development. But it also cannot wait forever. The history of projects like the Mackenzie Valley Pipeline illustrates that a delay may stretch past the economic circumstances during which a resource project can viably go ahead. It is important to have the policy environment working right now.

The early 2014 suspension by Cliffs Resources of its work in the Ring of Fire in Ontario is an example of a resource development company responding to a variety of issues related to the policy environment that included government relations with Aboriginal communities – reaching the conclusion that it could not continue to pursue resource development in the area at that time. A framework deal between the Ontario government and First Nations in the Ring of Fire region in late March 2014 may yet enable resource development to proceed. But visible decisions by resource companies to suspend developments – not to mention the less visible decisions never to enter into certain developments – have the result of lost opportunities for all concerned.

Canada needs to pursue resource development effectively, efficiently, and equitably. In doing so, all Canadians can attain greater prosperity. Resource development today does not mean being "hewers of wood and drawers of water", as might have been the case in some bygone era. Modern resource development involves specialized technologies and offers high-skill jobs. The prosperity it brings can reach all Canadians, including Aboriginal Canadians, if we get the policy environment right.

Some of the policy environment for Aboriginal economic development will come about through ongoing changes to legislation. In recent years, the federal government has pursued a number of incremental steps designed to help facilitate Aboriginal economic development. Many of these steps have been organized in ways that allow Aboriginal communities to opt in to new legal frameworks that allow them to then make decisions and implement legal structures to pursue their own economic

development. For example, the legal framework of the *First Nations Land Management Act*, enacted in 1999 and now used by dozens of First Nations, is an alternative to the *Indian Act*'s provisions on land management and a means of sectoral self-government, though it is only one of a number of similar opt-in statutes. Many Aboriginal communities have taken up those opportunities.

Some of the policy environment for Aboriginal economic development has come through the negotiation of significant new treaty relationships. Modern treaty frameworks throughout northern Canada have offered many Aboriginal communities important dimensions of control over and opportunities to

participate in resource development in their traditional territories. From the Inuvialuit Final Agreement (1984) to the Tlicho Agreement (2003), a number of these agreements recognize Aboriginal-held lands and subsurface rights. Based on the possibilities available, Aboriginal communities in the north can be expected to generate literally billions of dollars for their communities and to be well positioned to pursue very significant northern development in all meanings of the term.

However, the interaction between Aboriginal Canadians and resource development has not been all rosy. Bitter confrontations around various developments get headlines and slow projects. From anti-fracking protests in New Brunswick to legal and political confrontations related to the Ring of Fire in Ontario to Aboriginal protests against the Northern Gateway Pipeline in British Columbia, these situations show Aboriginal Canadians making

their voices heard in opposition to projects when there are concerns with their impact. In some situations, protest alone has led to withdrawal of companies from particular developments, such as with Shell's withdrawal from a shale gas development in northern British Columbia in a region regarded by Aboriginal communities as the Sacred Headwaters, with a government moratorium on oil and gas development following. However, Aboriginal Canadians have also not trusted corporations or governments to protect their interests. They have taken many resource-based issues to the courts and have received many successful court decisions.¹

A key result is that some of the policy environment for Aboriginal economic development and natural resource development actually comes not from legislators or government departments but from the courts. Section 35 of the *Constitution Act, 1982* "recognizes" and "affirms" Aboriginal and treaty rights. This section, with little definition in the constitutional text, left space for the courts to develop the law. Courts have done so in ways that impact the policy environment. Of course, there have been various debates over the years about "judicial activism", especially in the context of various provisions of the *Canadian Charter of Rights and Freedoms*, and those are important debates. But, at a practical level, the reality is that the courts have developed law in the Aboriginal rights context. We need to consider seriously the impacts of the policy framework that they have created by doing so.

What the courts have said on the duty to consult creates rules that governments and others are legally required to follow. At the same time, what they have not said leaves spaces to develop and implement the duty to consult in ways that achieve better results. Fortunately, we need not make these statements in some abstract void. There are many practical examples of ways the duty to consult has played out that offer lessons for the future – for how some things can go right, how some things can go wrong, and how to work towards more of the former.

Since the duty to consult, we've seen how things can go right or wrong, and how to work towards more of the former.

SECTION ONE

OVERVIEW OF THE DUTY TO CONSULT

Essence of the Duty to Consult

As stated above, the duty to consult is a “legal doctrine”, which means it is a duty, or legal requirement, described by a body of case law from the courts. But the body of case law that has developed and applied the duty has raised nuanced questions concerning its application, and refined in detailed ways many aspects of the duty.²

The duty to consult, in its modern form, requires governments to take the initiative to consult with Aboriginal communities prior to government decisions that might affect Aboriginal or treaty rights. It actually applies even in the context of ongoing uncertainty about the legal status of the rights in question. That is, prior to final decisions on Aboriginal or treaty rights claims in the courts or final settlement of these claims through negotiation, governments must consult with the communities that hold those potential rights concerning impacts of government decisions on those rights.

Both Aboriginal and treaty rights in Canada have traditionally been considered to be held by Aboriginal communities rather than by individuals. Aboriginal rights are rights held by communities due to their long-standing use and occupancy of land, and they arise from certain legal tests. Treaty rights are rights held by communities that signed treaties with the Crown, based on the terms of those treaties. Because both have been thought to be held by communities rather than by individuals, the duty to consult has always been thought to be owed to the “rights-bearing community”, with that consultation taking place through the community’s legal representatives. That said, the nature of Aboriginal rights is actually more nuanced. Many communally-held Aboriginal or treaty rights are actually exercised by individuals. Although harvesting rights are held by Aboriginal communities, it is individual traditional resource users who will actually exercise the right. When these issues were raised by some Aboriginal communities in a recent case, the Supreme Court of Canada chose to leave them for another day, meaning that the law could still be developing on this point.³ However, thus far, the duty to consult is a duty owed to Aboriginal communities, with consultation taking place through their legal representatives.

The 2004 case that first enunciated the duty to consult in this manner, *Haida Nation v. British Columbia*,⁴ concerned a government approval of a transfer of tree farm licences to a major logging company. The Haida Nation asserted that the transfer would have negative effects on its Aboriginal rights. It originally sought from the courts an injunction – a court order – that would have blocked the transfer until there was a final resolution reached concerning the Aboriginal rights claim at issue. The government argued that it should simply be able to go ahead and make the decision, potentially paying compensation after if it had actually breached an Aboriginal right.

Drawing on some case law that had referred to consultation as an element to consider in whether a particular limit on an Aboriginal right was constitutionally justified, the courts developed the duty to consult as a sort of middle path. By requiring governments to consult proactively concerning the impact of their decisions, the duty offers some protection to Aboriginal rights. Indeed, as

In 2004, Haida Nation v. British Columbia enunciated the duty to consult, and clarified it is not a veto.

explained in *Haida Nation*, consultation in advance of a possible rights infringement is necessary to maintain the honour of the Crown and for the government, then, to avoid unfair dealings with Aboriginal communities.

At the same time, both the Supreme Court of Canada in *Haida Nation* and numerous later court decisions have reiterated that the duty is not a veto power. In other words, the way in which the duty to consult is constructed tries to reach a middle ground between Aboriginal and non-Aboriginal communities so that government decisions can continue to be made in the context of uncertainties on the final shape of Aboriginal rights while offering an appropriate degree of protection to Aboriginal rights.

The *Haida Nation* decision in 2004 was extended and clarified in 2005 in the *Mikisew Cree* decision.⁵ This case arose from issues related to the construction of a road in the vicinity of Wood Buffalo National Park in northern Alberta, where there were uncertainties about the scope of treaty rights and whether construction of the road raised treaty rights issues. The Supreme Court of Canada in this case made clear that the duty to consult arises in the context not only of Aboriginal rights but also treaty rights, and in the context of established rights as well as asserted rights.

At the same time, the discussion in this case emphasized the role of the duty to consult doctrine in attempting to find paths toward reconciliation between Aboriginal and non-Aboriginal communities in Canada, thus connecting the duty to consult doctrine to a broader policy goal. For Aboriginal communities to have more say on resource development in their traditional territories, and thus potentially to derive greater benefits from those developments, better engages Aboriginal Canadians. At the same time, allowing governments to continue to make decisions avoids the prospect of non-Aboriginal Canadians seeing Aboriginal and treaty rights as an obstacle to economic development or other policy goals.

The duty to consult originates in its modern form in these cases, but a full understanding of it is actually now based on a much broader body of case law that has developed since in numerous lower court decisions.⁶ This report does not seek to describe all of that lower court case law in full detail but to highlight some key points that give rise to policy questions and policy recommendations.

Because the duty to consult originated in case law under section 35 of the *Constitution Act, 1982*, the section through which “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”, the duty to consult has a constitutional status. Governments must comply with it. Indeed, something with constitutional status takes priority over legislation, and the report will later explore the implications of the duty to consult for government legislation.

In much of the case law on section 35, the Supreme Court of Canada has now fairly consistently said that section 35 aims at the reconciliation of Aboriginal and non-Aboriginal Canadians. In addition, the duty to consult is one of a number of doctrines under section 35 that attempts to enforce what is called the “honour of the Crown”, which originated in a principle that governments should not engage in “sharp dealing” but has grown into a broader requirement that they interact with Aboriginal communities in a manner consistent with an ideal of honourable conduct.⁷

The duty to consult is “triggered” when the “Crown” or government knows or ought to have known of an established or asserted Aboriginal or treaty right that could be negatively impacted by a contemplated government action. In a resource context, because of primary provincial jurisdiction in relation to natural resources, it will often be the provincial government that owes the duty. Gradual devolution to the territories has created resource jurisdiction in the territorial governments comparable to that held by provincial governments, such that the territorial governments will properly be consulting, although with some further complex dimensions such that the federal government is also involved. However, there can also be certain resource contexts – certain kinds of environmental

assessments, interprovincial pipelines, and uranium-related decisions, amongst others – where the federal government has primary constitutional jurisdiction and thus owes the duty outright.⁸

Once the duty to consult is triggered, then the applicable government must carry out consultation to a level determined by a further “spectrum analysis”. The depth of the duty owed in particular circumstances is determined based on, first, the *prima facie* strength of the Aboriginal or treaty rights claim at issue and, second, the severity of possible impact from the government action. Where the claim is very uncertain and the impact is limited, the consultation owed is not deep, and it may consist simply of providing notice to the rights-bearing community, with obviously a chance to respond if the community identifies some bigger impact on rights. At a medium level, the consultation would involve notice of the project, sharing of information about the project, and more substantial opportunities for responses. The consultation required can be deeper yet, based on the factors in the spectrum analysis.

Especially at the upper end of the spectrum, where the claim verges on certain and the impact is very severe, the duty to consult will also include a duty to accommodate. Accommodation will often involve a change in the project to lessen its impact, or it may involve compensation. At all points on the spectrum, the courts have enunciated some key principles about the duty to consult. The ideal and the aim is meaningful consultation that has the potential to protect Aboriginal and treaty rights. Accordingly, the consultation must be approached with good faith on both sides, and it must represent a good faith effort to take account of Aboriginal and treaty rights in an honourable way, which may well mean that efforts at accommodation properly extend to various points on the spectrum. These principles of meaningful consultation and good faith efforts at consultation are admittedly less than precise, but they reflect real expectations, and governments do endeavour to live by them in their consultation activities.

When the Aboriginal claim verges on certain and the impact is very severe, the duty to consult includes a duty to accommodate.

Common Misunderstandings

There are in circulation various common misunderstandings of the doctrine, where people have unrealistic and/or inaccurate understandings of various elements of the duty to consult. A number of these common misunderstandings are worth setting out and correcting.

A first misunderstanding is a perception that the duty to consult gives Aboriginal communities a legal veto power over development. The courts have consistently reiterated that the duty to consult is *not* a legal veto power.⁹ The consultation involved is not aimed at determining whether the rights-bearing communities consulted do or do not support the projects. The consultation is not a public opinion poll of Aboriginal communities. Rather, consultation is aimed at determining if there is an adverse impact on established or asserted Aboriginal or treaty rights in order to see if it can be mitigated or, in some circumstances, if a project needs to be revised or abandoned.

The duty to consult, notably, is a doctrine concerned only with new impacts. Where a historic breach of Aboriginal or treaty rights simply continues without a new impact from a government decision under current contemplation, there is no duty to consult issue. There may be an issue as to a past breach of an Aboriginal or treaty right, but that is dealt with under other doctrines.

The duty to consult is a doctrine concerned only with new impacts.

An example arose in the case that enunciated most clearly this principle, which considered a dam and reservoir that affect water flows in the Nechako River. This case, the *Rio Tinto* case, considered the approval by the British Columbia government, through its Utilities Commission, of new energy purchase agreements for energy from a hydroelectric facility constructed in the 1950s.

There had been no consultation about the original construction of the dam or hydroelectric facilities. However, because the renewals did not change anything today, they did not trigger the duty to consult. Any issues about 1950s-era construction are not duty to consult issues.¹⁰

This particular element of the doctrine has great significance to the doctrine having very different effects on different projects, depending upon whether they can use existing rights of way or not. The portions of the Keystone Pipeline built in Canada, for example, were able to use existing rights of way or at least privately held lands and thus did not trigger the duty to consult or, at most, did so in minimal ways.¹¹ A pipeline reversal like the recently approved Enbridge Line 9 reversal similarly does not have new impacts, so it does not evoke duties of consultation with Aboriginal communities. The proposed Kinder Morgan expansion of the Trans Mountain Pipeline filed with the National Energy Board in December 2013 to carry bitumen from Strathcona to Burnaby similarly benefits from using existing rights of way. By contrast, the Northern Gateway Pipeline project would make use of new rights of way over Crown lands within the traditional territory of many Aboriginal communities with unresolved land claims issues, with the result that the duty to consult issues arising are substantial. In the context of the duty to consult, projects that can restrict themselves to existing rights of way and/or privately held lands have major economic and strategic advantages.

A different misunderstanding on the other side is a perception that the duty to consult is meaningless because the government ultimately has the authority to go ahead and approve the project, even after consultation has revealed issues. Here, though, the fact that governments are required to act in good faith means that they are to take account of the issues identified. Indeed, they could be liable under other Aboriginal and treaty rights doctrines if they do not. There certainly have been instances where the outcome of consultation has led to either significant modification of a project or even cancellation of a development.

An example comes from Taseko's proposed Prosperity Mine in British Columbia. The initial proposal showed a significant impact on a lake that held spiritual significance to a local Aboriginal community. Although the record involved showed a combination of these concerns along with other environmental issues that are tough to untangle, the end result was that the mine development was not approved. Taseko came back with another proposal, which was again rejected. The final outcome is still not clear. But this instance stands as an example of Aboriginal rights apparently having played an important role through consultation in at least the modification of a major mining project.

The part of government that carries out consultation or that evaluates the adequacy of consultation is sometimes complex. On this point, ultimately considered by the Supreme Court of Canada in 2010 in the *Rio Tinto* case, the courts have ended up saying that governments have the right to organize themselves how they choose. In particular, an administrative board or tribunal may be empowered by its statute to assess whether the duty to consult has been fulfilled. Or it may even be empowered to carry out consultation. Or it may have no role related to the duty to consult, even though it is making a decision that triggers consultation. In this latter instance, government does not escape the duty to consult but is simply required to fulfill it in some other way.

Role for Project Proponents

A further choice for governments is what role they will have project proponents play in fulfilling the duty to consult. The Supreme Court of Canada decision in *Haida Nation* had to consider whether the duty was owed not only by the Crown but also by corporations. The Court held that it was owed only by the Crown. However, in *Haida Nation* the Court also said that “[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development” (53). As a practical matter, industry will often play a role going even beyond this legal delegation, to be discussed later in the report, but the possibility of legal delegation of aspects of consultation warrants close attention first.

The doctrine discussed thus far leaves this issue of delegation to industry amongst other choices on how, practically, to implement the duty to consult. Governments in each jurisdiction (each province and the federal government) have ultimately responded by creating consultation policies. Many of these policies create particular procedures, such as decision matrices concerning the depth of consultation and then creating timelines for consultation. So long as these decisions are not inconsistent with the constitutional doctrine, they then specify how, for instance, a particular province will consult on certain kinds of issues.

The role of project proponents in the duty to consult is an issue on which different provinces have made some different choices. Some provinces, such as Saskatchewan, have kept the duty essentially as one carried out by government, although with the possibility of involving project proponents in delivering some information on proposed projects. Other provinces, such as Alberta, have delegated very significant parts of the duty essentially to be carried out by industry on many projects. Uniquely, Ontario has put extensive consultation-related requirements into its mining legislation and legislation related to development in northern Ontario. The Ontario mining provisions establish procedures for exploration plans and permits during early-stage exploration and clarify various requirements related to Aboriginal consultation.¹² First Nations' involvement in land use planning in northern Ontario is also more generally entrenched.¹³

The unevenness of the policy environment between provinces on such matters has potential advantages and disadvantages. For example, like all differences in policy approaches enabled within a federal system, it allows for experimentation by different provinces. At the same time, apart from the need for careful attention to different policies in different jurisdictions, this policy experimentation complicates the challenge for those developing resource projects in terms of the predictability of the policy environment. Many resource projects involve very long-term commitments, making policy stability or predictability a significant factor in the risk assumed by project developers. The lifespan of a mining project is often measured, for instance, in multiple decades. The increased possibility of shifts in the policy environment arising from ongoing experimentation in different jurisdictions may raise complications for projects.

In addition, some jurisdictions may not have sufficiently clear policies. For example, the 2013 Eyford Report on Aboriginal Canadians, the Northern Gateway project, and energy development rightly notes that the federal government has sometimes been quite unclear on what responsibilities industry is expected to assume (36). There is an ongoing need for more detailed study of the advantages and disadvantages of various aspects of different provincial and federal duty to consult policies. These policy frameworks have become increasingly important in how the duty to consult plays out on the ground. Around the role of project proponents, and on other matters, the details of these policies matter. They may have significant economic effects, and effects on prospects for reconciliation between Aboriginal and non-Aboriginal communities.

The policy environment between provinces is remarkably different.

SECTION TWO

PROTECTIONS ENABLED BY THE DUTY TO CONSULT

Protection of Core Interests

The nature of the duty to consult analysis is that it does provide protection for key Aboriginal interests. Where a government decision potentially has a negative impact on established or asserted Aboriginal or treaty rights, the spectrum analysis within the duty attempts to tailor a protective response based on how likely and how severe the negative impact is. The natural result is that a likely, severe impact on Aboriginal treaty rights gives rise to deep consultation and accommodation. There is thus proactive protection against a government decision with such impacts.

Lever for Impact and Benefit Agreements (IBAs)

Another positive protection enabled by the duty to consult actually arises from what might initially look like a significant problem, the negative impacts that uncertainty surrounding these issues can have on industry. But that is exactly what gives the doctrine an effective role as a lever toward the development of impact and benefit agreements (IBAs) that see industry and Aboriginal communities come to common terms. To see why, it is necessary first to consider how the duty to consult doctrine can cause problems for industry.

Those developing resource projects want to ensure that those projects can proceed in a timely manner. Indeed, unexpected delays can significantly affect the complex calculations that go into the economic prospects for a project. One of the largest examples of this sort, the Mackenzie Valley Pipeline, saw a long timeline for consideration leave room for changes in market conditions, in this instance a collapse in natural gas prices and shift in perceptions concerning future gas prices, so that it ceased to be economically viable to build the project. Similarly, uncertainties on whether a project will be able to proceed will also cause major problems for those planning a project, and they may result in the waste of sunk costs in a scenario where a project does not proceed.

Unexpected delays can significantly affect the complex calculations that go into the economic prospects for a project.

When industry does not know in advance the Aboriginal and treaty rights issues in a particular locale, its project may be subject to unexpected issues that give rise to consultation, including a likelihood of unexpected increased project costs. If there are legal uncertainties on what is required in terms of consultation, there is also the risk that consultation may occur but the

development may still be subject to a claim of inadequate consultation in the courts. Even if that claim is ultimately unsuccessful, it may still cause a problematic delay for a project.

One example of national significance arises from the set of legal challenges currently being threatened against the Northern Gateway Pipeline. If the federal Cabinet approves that pipeline, these legal challenges may nonetheless slow different parts of construction, particularly if any courts grant interim injunctions. If that occurs, the question arises of whether the pipeline will be built in time for Canada to supply energy to Asian countries or whether some Asian countries will have already developed supply routes from elsewhere, such as Brazil.

The frequent choice by governments of divided responsibility for consultation between government

and industry can give rise to challenges where government and industry are not on the same page. Where governments were held by the courts in 2006 through 2008 not to have adequately consulted on the Mackenzie Gas Project,¹⁴ the result was an interim injunction that set back industry development by years. However, there have been other situations in which government thought industry had carried out steps that it had not, with equally problematic results for consultation. Any divided responsibility requires government and industry to have clear knowledge of what the other is doing and not doing if consultation requirements are to be met in a timely fashion.

One instance of a spectacular breakdown of relations between government and industry over their respective roles, to be discussed further later, is now seeing the corporation involved, Solid Gold Resources, attempting to sue the Ontario government for \$100 million. The corporation alleges that the government failed to fulfill its consultation duties. The fate of that litigation remains to be seen. But the case serves as a warning that failures on consultation might actually impose very significant economic costs, to be borne by someone.

The possibility that industry will sue governments when governments fail to deal with consultation issues is a real one. On December 23, 2013, the British Columbia Supreme Court ordered a payment of nearly \$2 million in damages to Moulton Contracting, a logging contractor, because the province had not warned the contractor of a likely blockade arising from consultation disputes. In northern Ontario, Northern Superior Resources filed a lawsuit against the province of Ontario in November 2013, alleging that the government had failed to carry out consultation requirements in an area near Sachigo Lake, with major damage allegedly resulting to the company. Whether or not this trend of lawsuits against governments continues, it serves as a real reminder that consultation failures do lead to economic costs.

The challenges with the duty to consult serve as a lever to a reasonably positive outcome.

Industry project proponents will typically, though, want to be able to carry on their main work and not be involved in lawsuits against governments. The result is that they may well not want to leave the fate of their projects to the vagaries of an imprecise duty to consult doctrine and policy environment. Interestingly, these very challenges with the duty to consult can actually serve as a lever to a reasonably positive outcome. In order to avoid these problems, industry may want to engage early on with Aboriginal communities – the very outcome often sought by Aboriginal communities – and to seek to negotiate win-win solutions with the communities that avoid the need to resort to the legal technicalities of the duty to consult.

A range of different forms of agreements can arise as between an industry proponent and an Aboriginal community. One particularly detailed form of agreement – and often one toward which earlier forms of agreement lead – is an impact and benefit agreement that will effectively seek some ways to lessen negative impacts and develop a series of negotiated benefits for the community so that the project works effectively and equitably for both industry and the Aboriginal community involved.

Such agreements can facilitate employment and training for community members, and potentially direct financial benefits, while facilitating for the project proponent both community support and availability of a workforce and local contractors in what may be a remote locale. Often, terms of an IBA are at least partly confidential, but some have been published (albeit with some terms absent), such as Cameco's IBA with the Pinehouse community in northern Saskatchewan (2012).

The content of an agreement need not, of course, be restricted to the terms of a traditional IBA but can extend to include joint venturing provisions or equity positions for Aboriginal communities, as well as various co-management regimes on environmental monitoring or impact assessment. The contents are determined based on what achieves a win-win solution.

In doing the things that it does, an IBA or other agreement between industry and an Aboriginal community can achieve positive solutions for both parties that go beyond what the government's application of a legal duty to consult would have. However, the duty to consult serves as a lever that encourages these solutions.

Early Engagement and Redefined Partnerships

Indeed, precisely because of the legal leverage applied by the duty to consult, it actually has the potential to help encourage the kind of early engagement and redefined partnerships that have the potential to achieve the doctrine's underlying purposes. Most consultation issues do not go to court. Although there are numerous judicial decisions on the duty to consult – and the duty to consult has effectively replaced much other Aboriginal rights litigation in recent years – the cases that go to court are a small fraction of the situations engaging consultation.

The principle of consultation at the early, strategic stages of development has developed in the context of the duty to consult doctrine, but the legal implications have not been entirely clear. Case law developed on this point initially in the Federal Court of Canada, with later supportive statements in the Supreme Court of Canada.¹⁵ This principle is suggestive of a legal mandate to involve Aboriginal communities as soon as decisions are being made that may have longer-term impacts on their rights. But its precise application is very challenging. Nonetheless, even this legal aspect of the

duty is encouraging of early engagement with Aboriginal communities. And that early engagement often facilitates relationship-building that may lessen the need for a focus on legal technicalities. If the duty to consult can be a legal doctrine that encourages less focus on law, it may ironically best contribute to redefined partnerships based on early engagement.

If the duty to consult encourages less focus on law, it may best contribute to redefined partnerships based on early engagement.

SECTION THREE

IMPACTS AND LIMITS OF DUTY TO CONSULT LAW

Although the courts developed the duty to consult with the best of intentions, the intentions behind a set of legal doctrines are not always achieved. To say that is not to deny the creativity of the Supreme Court of Canada's development of the duty to consult. But it can work in ways that run counter to its real purposes of advancing the position of Aboriginal communities. Some of the negative impacts can arise from an overly legalistic focus. Some arise from ongoing uncertainties in the law and its requirements. And some possible developments of that law could raise very significant challenges for good policy-making.

This section of the report will examine these claims in turn. But it also bears noting that the positive outcomes of the duty to consult referenced in the last section may actually have a complex flip side right from the outset. Namely, certain Aboriginal communities will be much better situated than others in terms of resource development, both physically and in terms of governance. The second of these challenges can be faced with good policy. But combinations of both may lead, over time, to

inequalities between different Aboriginal communities that will change some of the policy discourse around Aboriginal issues in Canada. When some Aboriginal communities are prospering even more than at present and others continue to struggle, different discourses may emerge that shift some of the political terrain related to Aboriginal rights generally. But that particular issue may still be some ways off. In the meantime, some challenges arise specifically from the duty to consult doctrine itself.

Conflicts About Minimum Legal Requirements

The fact that the duty to consult has developed specifically as a legal doctrine can naturally lead to a temptation to focus on it in a legalistic way. The question can become what the bare minimum legal requirements of the duty are. But considering the duty in that way can actually work counter to its underlying objectives.

Some of the most difficult situations involving the duty to consult have arisen when parties have attempted to rest upon their strict legal rights. A particularly dramatic example arose in the context of Solid Gold Resources in Ontario. Although the government seemingly suggested to the company that it should engage with the First Nation in its area of exploration activity, the company decided not to pursue such engagement and rested upon the duty being on government (this being prior to Ontario's new legislated requirements being in force). The First Nation involved ended up pursuing litigation that resulted in an injunction against further activity, posing a problem for Solid Gold's ability to complete its work within a period required by the nature of its flow-through shares financing. By insisting upon its legal rights and responding to consultation expectations in the minimum legal way, the company thus ended up not being able to pursue its legal rights at all. Although the company is pursuing litigation against the Ontario government, it is unclear where this will lead.

Thinking about consultation in terms of minimum legal rights does not tend to support processes of relationship-building and reconciliation – some of the very aims of consultation. As an example of this point, one can also consider the initial approach of many governments under which they developed interim consultation policies shortly after the 2004 *Haida Nation* decision. They did so in order to try to come into compliance with the developing law, and policies from this era reflect this in that they are framed around the minimum legal expectations of the doctrine. However, they tended to give rise to controversy, in part because there was no consultation on the policies for consultation. These policies have in many provinces had to give way to new policies that grew out of broader discussions. In Saskatchewan, for example, such a policy shift occurred with the election of a new government, which then organized a roundtable between industry, Aboriginal communities, and government in order to develop a new consultation policy framework. This latter framework has not been accepted fully by all parties but is more accepted than the initial policy that was based on the minimum legal requirements. This history illustrates that even a policy framework founded on minimum legal requirements may not be seen as legitimate.

Another facet of this point, though, is that consultation cannot be all things to all people. In particular, calls for consultation should not become a means by which some call for consultation simply to prevent others from exercising their legal rights. If so, legal rights become meaningless, the rule of law is harmed, and bad consequences flow for the general stability of expectations around legal rights in Canada. However, the duty to consult is a doctrine that has arisen because of respect for rights that may yet be recognized. If all sides approach each consultation situation with healthy respect for one another, with good faith, and with an openness to meaningful consultation, those values are more important than minimum legal requirements, though such legal strictures must of course also be met. Moreover, governments may also be able to offer additional guidance to clarify requirements for companies.

At the same time, a willingness to work together positively in ways that work for different communities can also avoid some of the challenges that go with the legal strictures of the duty to consult. Some First

Nations in resource-rich parts of Alberta, for example, have spoken of receiving literally hundreds of consultation requests each year and the struggle to respond to these requests. The same situation may arise with a smaller number of requests for communities with varying levels of capacity to engage with those requests. Companies that enter into real engagement may actually be doing so in ways that are not focused on bombarding communities with paperwork so much as finding ways toward meaningful consultation. The law is an important background, but minimum legal requirements can pose a whole variety of challenges for different parties.

Misunderstandings and Disincentives to Invest

The duty to consult is an imprecise doctrine. The exact legal requirements flowing from it are not always clear, and the last section argued that they quite possibly should not be the focus anyway. It is a doctrine designed to deal with underlying rights that have uncertainties about them.

Some misunderstandings grow from unreasonable expectations about the doctrine. An earlier section of the paper discussing common myths about the duty to consult illustrated some of these unreasonable expectations. However, there is sufficiently common reference to some misunderstandings of the doctrine that resulting impressions may impact, for instance, on the readiness of foreign investors to consider involvement in at least some Canadian locales.

The duty to consult deals with underlying, uncertain rights.

One example of how such misunderstandings can appear to have real impacts comes from the 2008 decision of the Nunatsiavut Government, an Aboriginal governmental authority with the pertinent jurisdiction, to impose a three-year moratorium on uranium development on its Labrador Inuit territories. The moratorium did end in 2011. But, in the three-year interim period, the provincial government of Newfoundland and Labrador had to make special efforts to communicate that uranium development remained welcome on lands within the jurisdiction of the provincial government.

The complex layering of Aboriginal and treaty rights issues in Canada today, underlying the duty to consult with its additional complexities, requires ongoing and clear communication so that foreign investors are not put off by misperceptions or uncertainties. Canada's massive resource potential, and its potential to contribute to Aboriginal Canadians, should not be squandered by allowing loud voices to dominate discussions while trading in misunderstandings. Voices offering careful, rigorous analysis must be constantly present in public discussions. Those offering views must be expected to justify them in objective terms, and academics willing to pursue careful, objective analysis should be encouraged to help communicate clearly about the duty to consult in accurate, non-sensationalist ways. A similar point applies to Aboriginal communities themselves. Those that are open to business may wish to take further steps to keep communicating this both to industry and to the general public. The Fort McKay First Nation in northern Alberta has recently done so with its January 2014 conference on how First Nations can participate in oil sands developments. The Peter Ballantyne Cree Nation in northern Saskatchewan did so in late fall 2013 with a one-day workshop on how northern Saskatchewan First Nations can participate in mining developments. Obviously, responsible resource development will be carefully balanced with environmental concerns and Indigenous rights considerations. More such initiatives like those referenced will help to make clearer the desire of many Aboriginal communities to find paths forward with responsible resource development.

Particular Challenges with Complex Projects Affecting Multiple Aboriginal Communities

Some types of resource projects, particularly projects related to transportation of products such as pipelines, necessarily involve operations on the traditional territories of multiple different Aboriginal

communities. In such contexts, consultation issues can become especially complex. Government and/or industry will need to engage simultaneously with multiple communities, with these different communities sometimes having strong incentives to wait to be amongst the last communities to offer agreement to a project.¹⁶ At the same time, appropriate transportation infrastructure is essential in the context of resource development that benefits Canadians generally and that receives support from many Aboriginal communities who are participating in that resource development.

The duty to consult doctrine developed in Supreme Court of Canada cases involving impacts from a government decision on a particular Aboriginal community. The Court does not appear at any stage to have contemplated the particular challenges that arise in the context of duty to consult issues involving multiple Aboriginal communities at the same time.

There has been some lower court case law about Aboriginal claims of different communities that conflict. Some types of conflicting claims can weaken consultation obligations. However, others can simply cause greater complexity, in that attempts to fulfill one Aboriginal community's claims will lead to new consultation requirements with other communities. However, these cases consider only some of the scenarios that can arise.

A modern country needs appropriate transportation infrastructure so that products can access markets and so that economic prosperity can flow to all communities within the country. There will naturally be differences of opinion on specific infrastructure projects. However, a democratic state needs to be able to develop orderly ways of resolving disagreements rather than having disagreements simply generate interminable work for lawyers applying technical legal doctrines.

Given that the Supreme Court of Canada offers little guidance, courts and governments currently have room to operate so as to develop appropriate, flexible approaches that respect the ideal of meaningful consultation while finding orderly ways of facing differences of opinion. They must also show appropriate respect for those other Aboriginal communities who look toward economic development arising from resource development and transportation infrastructure in ways that are in keeping with broader aims of reconciliation. Courts should generally respect the complex work of governments in balancing different dimensions of the public interest and in pursuing reconciliation with diverse Aboriginal communities.

When multiple communities are involved, there is a strong incentive to be the last to offer agreement.

A Duty to Consult on Legislation?

One aspect of the duty to consult that remains unclear is whether governments are subject to the duty to consult before they enact new legislation. The case law from which the duty to consult came initially focused solely on administrative decisions made pursuant to legislation. But the question of whether there is a duty to consult before passing a law emerges naturally in thinking about possible applications of the duty so as to protect Aboriginal and treaty rights most effectively.

Advocates of this approach have referred to article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by a vote of the General Assembly in 2007. This article states that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

To be clear, this United Nations declaration does not automatically become part of Canadian law. It is not a treaty. Canada has not “ratified” it, as is commonly misreported, but has offered a statement of endorsement, subject to various qualifications. Nonetheless, article 19 is at least an aspiration and a persuasive consideration for the Canadian courts, with a recent comment to this effect being made

in the Federal Court in *Simon v. Canada (Attorney General)*, where the Court stated that “while this instrument does not create substantive rights, the Court nonetheless favours an interpretation that will embody its values” (121). So, it is possibly an indication of where the courts might go in the future in at least some respects.

That said, at this point, whether there is such a duty in Canadian law to consult about legislation remains unclear. The Supreme Court of Canada deliberately left the question open in its 2010 decision in the *Rio Tinto* case.¹⁷ There, it referred to prior lower court case law that had expressed skepticism about a duty to consult on legislation, before saying that this question was one for another day.

A recent decision of the Yukon Court of Appeal, *Ross River Dena Council v. Government of Yukon*,¹⁸ quite possibly reawakens the question for new legal argument. The decision considered a challenge to Yukon’s “free entry” mining regime. Under legislation in force prior to the decision, a prospector could carry out limited exploration activities and then stake a claim, which would be registered automatically – without consultation at that stage. The Yukon Court of Appeal held, however, that this legislation did not leave sufficient room for consultation, and it ordered the government to change the legislation. The Supreme Court of Canada decided in September 2013 that it will not hear an appeal of the decision. So, Yukon must change the legislation.

This decision appears to change the kinds of decisions to which the duty to consult doctrine applies. Previously, a duty to consult arose when government officials were making a decision based on their authority under a statute. This decision requires a government to change a statute so as to make more room for consultation. Such a decision is obviously a precedent for requirements to

change free entry mining regimes in other provinces – with some having already suggested as much for provinces like British Columbia and Newfoundland and Labrador – as well as other analogous resource policies, perhaps including oil and gas exploration activities. But it has potentially wider implications as well, in shifting to what the duty to consult applies. Moreover, if the duty to consult regulates the form of legislation, it is just one further step to say that it applies to the legislative process itself.

That issue is a big one for the courts in the years ahead. In the wake of the Idle No More movement and disputes about Bill C-45 – the budget implementation bill in 2012, also called the *Jobs and Growth Act*, which also implemented a number of regulatory changes – some Aboriginal communities commenced litigation seeking a declaration by the courts that there should have been consultation prior to the government’s pursuit of the measures in that legislation. So, there may be cases that consider the question head-on. And, if not now, it will not be long before the point will make its way again before the courts.

Some provinces have actually chosen to include consultation on legislation as part of their provincial consultation policies. For example, Saskatchewan’s latest consultation policy framework sees Saskatchewan committed to consulting on legislation and regulations that may affect Aboriginal rights, treaty rights, or traditional uses – thus going beyond the minimum constitutional requirements for the sake of better relationships. However, to say that consultation on legislative action is a constitutional requirement would still have consequences.

A constitutional requirement to consult prior to legislative action would, for instance, shift some elements of the democratic process, quite possibly making it much more difficult to pursue private members’ bills on any matter that could interact with Aboriginal or treaty rights. It could also complicate resource policy and Aboriginal policy generally. If any legislative change with a potential interaction with Aboriginal or treaty rights were subject to a full formal consultation process, any

If the duty to consult regulates legislation, it is just one further step to apply it to the legislative process.

such legislative changes would be significantly complicated, especially at the federal level with over six hundred First Nations, in addition to Métis and Inuit communities, potentially impacted by some types of legislative changes.

The long history of attempts to deal with spousal property on reserve is an example of the complexities of legislative changes in the context of Aboriginal policy. A real need for new education policy and ongoing calls for amendment of the *Indian Act* are examples of policy changes that could face major obstacles from a formal, legal consultation requirement. These examples come from the Aboriginal policy context more broadly, but the same point applies to resource policy specifically. Scholars and policy analysts should be considering these issues carefully and rigorously, and the courts should consider extremely carefully the creation of any new application of the duty to consult. It is a doctrine that is apt to have unintended consequences that may actually sometimes work counter to its very purposes of improving the conditions of Aboriginal life in Canada.

CONCLUSION

Previous papers in MLI's *Aboriginal Canada and the Natural Resource Economy* series¹⁹ have rightly deflated stereotypes that Aboriginal people in Canada are opposed to resource development or are not interested in business. In fact, many Aboriginal communities are keenly aware of the great economic potential and are working to facilitate natural resource development, but they seek equitable participation alongside business and government. At roughly the same time in January 2014 that Neil Young was performing concerts to stop oil sands development, the Fort McKay First Nation was holding a conference on how it can participate in the economic opportunities offered through partnership in oil sands development. For many Aboriginal people in Canada, much of the struggle over Aboriginal rights, treaties, and Aboriginal self-government is really about trying to achieve an equitable place in Canada and trying to participate in future Canadian prosperity.

At the same time, previous pieces in this same MLI series have also rightly warned of the disruptive potential if Aboriginal aspirations are left unaddressed. Real problems of unemployment, poverty, social disruption, and associated challenges have fanned a real anger in Aboriginal communities. That anger could lead to confrontation and worse, but it does not have to. Development in the natural resource sector, in particular, has enormous potential to help with economic development in more remote regions, to facilitate Aboriginal participation in economic prosperity, and to bring together Aboriginal and mainstream societies in a common cause for Canada's future.

Several key conclusions emerge from the present study. The first is a call for all to speak about the duty to consult in responsible ways rather than to perpetuate misunderstandings. The duty to consult is a legal doctrine that interacts in very significant ways with all of the questions about resource development and its possibilities for Aboriginal Canadians. It can protect certain core interests of Aboriginal communities while asking Canadian governments always to be more engaged with Aboriginal issues.

Yet, even 10 years on from its creation in the courts, the duty to consult remains subject to many misunderstandings. Many incorrectly see or describe the duty to consult as giving rise to a veto

We must speak about the duty to consult in responsible ways rather than perpetuate misunderstandings.

power over developments when the courts have been very clear that it does not amount to a veto power. At the same time, on the other side, many incorrectly see or describe the duty to consult as an irritating burden, when it can actually be the source of some real opportunities for improved understandings, reconciliation, and prosperity for all Canadians. To be blunt, anyone who perpetuates misunderstandings about the duty to consult is standing in the way of Canada's future. This is a call to all engaged with the duty to consult, including the scholarly community, to engage with it in rigorous ways that describe it accurately, to try to study objectively the policy impacts, and to continue to make constructive recommendations on different approaches to the duty to consult that respect the broad public interest.

Second, despite the fact that it is a legal doctrine, the duty to consult needs to be approached in less technical ways. By its nature, the duty to consult as a legal doctrine has to be relatively technical. It is engaged or triggered relatively easily by governments' administrative decisions that have the potential to have adverse effects on Aboriginal or treaty rights. But there are then many complexities on what it might mean in particular circumstances as a minimal legal requirement. In many ways, the history of how the duty to consult has worked suggests that those who attempt to draw upon the spirit of the duty to consult may well attain better outcomes than those who attempt to follow the letter of the law.

Governments and industry stakeholders who engage early with Aboriginal communities find trust and relationships that help contribute to better outcomes than by trying to follow only the letter of the law, or by seeking the minimum legal requirements. Aboriginal communities need to recognize that the courts' decision to adopt the duty to consult rather than a system of injunctions means that governments still have the power to make many decisions. With this understanding they can engage with governments and industry in seeking protection of key interests while otherwise leveraging the duty to consult in the context of working collaboratively on natural resource development that contributes to prosperity for all. Early engagement and good faith efforts at meaningful consultation can work wonders, and we should all call upon governments, industry, and Aboriginal communities to work together in those ways. At the same time, ongoing development of informal policies on consultation and less formal handbooks on early engagement can provide further clarity around appropriate paths forward in these processes. We should expect of all actors a responsible approach that respects key Aboriginal interests and that furthers prosperity for all Canadians.

Third, the courts should be very cautious about continuing to expand the duty to consult doctrine into new contexts. Courts need to leave flexibility for governments to design appropriate procedures for complex scenarios involving multiple Aboriginal communities. Vital transportation infrastructure may well depend upon all taking reasonable approaches. Moreover, although some are referring to international developments such as the United Nations Declaration on the Rights of Indigenous Peoples to urge the application of the duty to consult to legislative action, and although such international developments could ultimately prove irresistible, any such application would severely complicate the policy environment in ways that could well be to the disadvantage of Aboriginal communities themselves. Governments should continue to build new ways of engaging with Aboriginal communities. But courts should be very cautious about adding further legal complications to the policy environment. In many ways, the first decade of the modern duty to consult doctrine shows us that pursuing the purposes of consultation has a lot to offer all Canadians but that extending its technical legal applications can create problems.

In sum, all of the challenges discussed here call for ongoing work to encourage careful and objective discussion of the actual implications of the duty to consult, and to encourage all involved to act in accordance with the spirit of the duty to consult, but also to recognize the duty to consult as perhaps best having limited roles when thought of only in terms of the letter of the law. The duty to consult doctrine can be a real reminder of the importance of building good relationships with Aboriginal

communities. But what is ultimately important is building those relationships. Aboriginal communities themselves, governments, and industry all have roles to play in fostering open communications, in realizing Aboriginal communities are not inherently opposed to business, in realizing that business is not opposed to Aboriginal communities, and in finding outcomes that benefit all.

Canada is a country that confronts real moral questions arising from its historical treatment of Aboriginal people and the challenging economic circumstances of Aboriginal Canadians today. At the same time, it is a country that can prosper with responsible resource development. Legal structures and legal rules, and the ways in which they are implemented and used, matter both to the fate of Aboriginal Canadians and to the prospects for responsible resource development. Used properly, the duty to consult doctrine can support a new era of partnerships that offer win-win-win outcomes from business-Aboriginal-government collaboration in the well-managed development of Canada's natural resource potential.

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ENDNOTES

- 1 For one informal tracing of the extensive Aboriginal court victories, see Bill Gallagher, 2012, *Resource Rulers: Fortune and Folly on Canada's Road to Resources*.
- 2 For one detailed account of the early case law, see Dwight G. Newman, 2009, *The Duty to Consult: New Relationships with Aboriginal Peoples*. A significantly expanded and revised version of that book addresses the ongoing development of the doctrine: Dwight G. Newman, 2014, *Revisiting the Duty to Consult Aboriginal Peoples*. For a summary of key recent duty to consult case law as part of a more technical legal discussion on natural resource decision-making powers, see Dwight Newman, 2013, *Natural Resource Jurisdiction in Canada* at 39–47.
- 3 *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26.
- 4 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.
- 5 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.
- 6 For a discussion of more of this case law, see: Dwight G. Newman, 2009, *The Duty to Consult: New Relationships with Aboriginal Peoples*; Dwight G. Newman, 2014, *Revisiting the Duty to Consult Aboriginal Peoples*.
- 7 This “honour of the Crown” principle has the potential to ground other duties on government as well. For an example, see *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623.
- 8 For a legal discussion of the division of powers in the natural resource context, see Dwight

Newman, 2013, *Natural Resource Jurisdiction in Canada*.

- 9 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, at para. 48.
- 10 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.
- 11 *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484.
- 12 In the mining context generally, these changes came from Phase 2 of the *Mining Amendment Act, 2009*, S.O. 2009, c. 21 and associated regulations.
- 13 This is in the new *Far North Act, 2010*, S.O. 2010, c. 18.
- 14 *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, affirmed by 2008 FCA 20.
- 15 *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354, affirmed by 2008 FCA 20. See also *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 at para. 44.
- 16 For a discussion of these and other dynamics in such situations, see Tom Flanagan, 24 March 2014, "Considering the Duty to Consult: A Legal Doctrine Discourages Cooperation Where Proposed Projects Affect Large Numbers of First Nations", *Alberta Oil Magazine*.
- 17 *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650, at para. 44.
- 18 *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14, leave to appeal to SCC denied.
- 19 Ken Coates and Brian Lee Crowley, 2013, "New Beginnings: How Canada's Natural Resource Wealth Could Re-shape Relations with Aboriginal People"; Douglas L. Bland, 2013, "Canada and the First Nations: Cooperation or Conflict?"; Brian Lee Crowley and Ken Coates, 2013, "The Way Out: New Thinking About Aboriginal Engagement and Energy Infrastructure to the West Coast".



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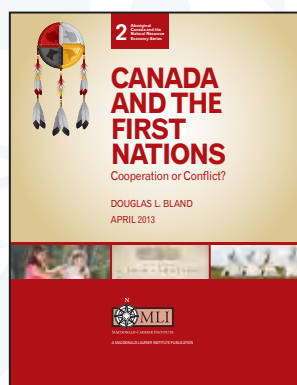
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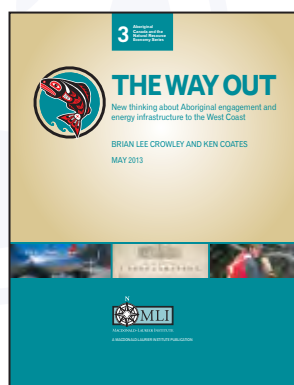
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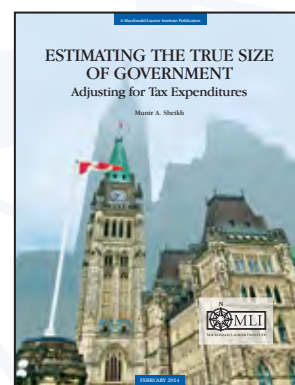
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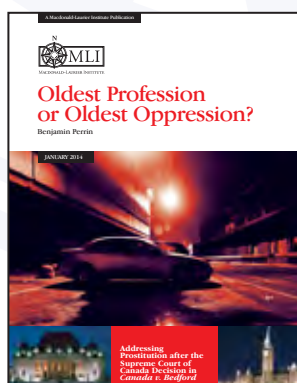
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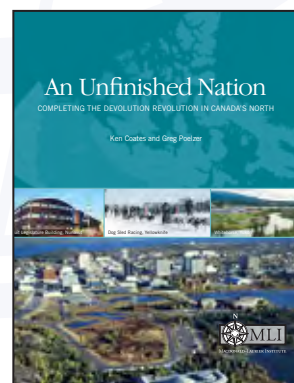
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