

TREATY FEDERALISM:  
BUILDING A FOUNDATION FOR DUTY TO CONSULT IN SASKATCHEWAN

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By

Katherine Walker

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## **ABSTRACT**

In Canada, the duty to consult doctrine has been articulated as a legal remedy to address the potential infringement of Aboriginal and treaty rights by the Crown. The political dimension and implications of this legal duty on the evolving federal relationship between First Nations and the provincial Crown concerning lands and resources have yet to be fully explored. This research presents the argument that the duty to consult jurisprudence and the ‘new relationship’ policy in British Columbia are moving towards the articulation of a treaty federalism relationship between the Crown and First Nations. The implications of these findings are then analyzed within the Saskatchewan policy environment, and a potential consultation framework is offered for this province. Crucial linkages between duty to consult jurisprudence and Aboriginal governance, and their implications for policy are highlighted, which contribute to further understanding the complex relationship between First Nations and the Crown in Canada on land and resources.

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## Chapter 1: Introduction

When the current Saskatchewan government was elected in 2007, it announced the dawn of a new relationship with First Nations based on “mutual respect and trust” that would allow everyone to “move forward together.” A key driver in this process was the need for the Province to address the question of the duty to consult.<sup>1</sup> As an embodiment of this new relationship, the Premier invited Chiefs from across the province to the first traditional feast ever held on the grounds of the legislature.<sup>2</sup> Later that same year, the Premier attended a Chiefs’ Legislative Assembly and pledged his intention to hold a “historic” roundtable with Aboriginal people, industry and government to discuss consultation on lands and resources within the next 180 days.<sup>3</sup> Such consultation held the promise of truly bringing the parties together in a practical way. However, rather than serving as a vehicle for furthering this new relationship, the negotiations illustrate the difficulty in translating the rhetoric of mutuality and cooperation into a workable process with designated roles and responsibilities. What began as a pragmatic process for tackling the duty to consult has quickly become a question of what exactly the concept of the new relationship entails. At present, the provincial government and the Federation of Saskatchewan Indian Nations (FSIN) appear to be at a block in the road.

Several other provincial and territorial governments across Canada have committed themselves to improved Aboriginal relations under the banner of building a ‘new relationship.’ Although the relationship between territorial governments and Aboriginal peoples probably has undergone the most significant restructuring, e.g. Yukon, some important differences exist with respect to the territories that limit their application to Saskatchewan. The case of First Nations in British Columbia offers the most insightful example of how the concept of a new relationship can actually take root in policy. Since the concept of a new relationship between First Nations and BC is still at an emergent stage, it is difficult to evaluate its long-term outcomes, but some

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<sup>1</sup> Please note that the phrase ‘duty to consult’ as used in this thesis denotes the duty to consult and accommodate, except in Chapter 3, where the two legal concepts are discussed separately.

<sup>2</sup> Saskatchewan. First Nations and Métis Relations “First Ever Chiefs’ Feast at the Legislature Marks a New Relationship,” News Release, December 18, 2007, <http://www.gov.sk.ca/news?newsId=47281237-3862-44bf-8f01-9b87e3d1f2f6> (accessed October 5, 2008).

<sup>3</sup> Federation of Saskatchewan Indian Nations, Lands and Resources Secretariat. *Portfolio Report: Lands and Resources Secretariat*, November 25, 2008, <http://www.fsin.com/landsandresources/downloads/Lands%20Resources%20Commission%20Portfolio%20Report%20Nov%202008.pdf>, (accessed March 9, 2009), 7.

preliminary observations can be made. The most striking observation so far is that the principles guiding the new relationship are based on real power sharing, within the scope of what some might call the expansion of treaty federalism. With its long history of exploring the ‘Indian land question,’ British Columbia<sup>4</sup> offers Saskatchewan a glimpse of how its own relationship with First Nations may unfold, with regard to lands and resources. Such a comparative analysis holds much promise in moving the relationship in Saskatchewan from the level of vision to a workable process.

This thesis investigates how treaty federalism is being advanced through ‘new relationship’ policy in British Columbia and duty to consult jurisprudence, and the resulting implications for Saskatchewan. Two questions are driving this research:

1. How have the competing rights and jurisdiction of First Nations and the Crown on lands and resources been reconciled through consultation in British Columbia?
2. What type of consultation framework will work for Saskatchewan?

### **A Policy Priority**

The design and implementation of a consultation policy on lands and resources is currently a priority in Saskatchewan for a number of reasons. First, heightened opportunities for resource development, particularly in the provincial north, have increased the potential benefits and pitfalls for the parties. The northern part of Saskatchewan is a vast expanse of land, rich in resources, totalling almost half of the province’s entire land mass. The vast majority of the province’s future energy resources—uranium, oil sands, and hydro—as well as other mineral resources, forest and non-timber resources, and northern tourism lie in Northern Saskatchewan. Although development has occurred in the north already, it promises to rise significantly in the near future as evidenced by the increasing number of industry players vying for provincial exploratory and development permits and licenses in the area.<sup>5</sup> The direct and indirect economic benefits to be reaped from the land are immense. However, the impact of impending

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<sup>4</sup> Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849–1989*. (Vancouver: University of British Columbia Press, 1990).

<sup>5</sup> Saskatchewan. Ministry of Energy and Resources. “Boyd Takes Saskatchewan’s Mining Success Story to Vancouver, News Release, January 28, 2008 - <http://www.gov.sk.ca/news?newsId=f36747ac-80e7-47ee-954d-e146ea96ef05> (accessed February 24, 2008); Saskatchewan. Ministry of Energy and Resources. “October Land Sale Generates \$32.4 million,” News Release, October 8, 2009 - <http://www.gov.sk.ca/news?newsId=91daccff-b3dc-4e93-8e11-61868420fb73>. (accessed October 31, 2009).

development on existing Aboriginal and treaty rights promises to be extensive. Although constituting mostly ‘unoccupied’ Crown land under provincial jurisdiction, the north has been occupied and used by Aboriginal people for centuries. Their attachment to the land and the right to use it for subsistence (hunting, fishing, trapping and gathering purposes) and ceremonial purposes is recognized in historical treaties and affirmed in case law. Further recognition and affirmation of Aboriginal and treaty rights has yet to be negotiated. Meeting industry’s timelines and adequately consulting with First Nations is the current challenge of realizing Saskatchewan’s looming resource development opportunities.

The demographic characteristics of the First Nations population in Saskatchewan is another important factor driving the pre-consultation process. The First Nation population is rapidly growing, has solid and longstanding political organization, and is determined to improve its poor socio-economic conditions through the duty to consult. From 2001 to 2010, the Aboriginal population in Saskatchewan increased by almost nine per cent, while the provincial population shrunk by almost 3 per cent during the same period.<sup>6</sup> As of 2009, First Nation people comprised nearly 13 per cent of the total Saskatchewan population.<sup>7</sup> If you travel to Northern Saskatchewan, the concentration of Aboriginal people jumps to almost 86 per cent.<sup>8</sup> Projections suggest that the population of Saskatchewan will be 40 per cent Aboriginal by 2025.<sup>9</sup> Although linguistically diverse<sup>10</sup> and comprised of 74 Bands, each with its own elected Chief and Council—virtually all of these Bands belong to one of ten regional Tribal Councils and a single provincial body, the FSIN.<sup>11</sup>

Saskatchewan First Nations have an important legacy of political activism related to Aboriginal and Treaty rights. The roots of First Nation political activism may be traced back to the point of first contact, and arose in order to protect the political sovereignty and basic self-

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<sup>6</sup> Saskatchewan Bureau of Statistics. <http://www.stats.gov.sk.ca/>.

<sup>7</sup> This percentage is based on data from the Government of Saskatchewan. Saskatchewan Bureau of Statistics. <http://www.stats.gov.sk.ca/> as of January 2009 (Total Saskatchewan population of 1,023,810 as of January 1, 2009, and Indian and Northern Affairs Canada First Nations in Saskatchewan data - <http://www.ainc-inac.gc.ca/ai/scr/sk/fni/pubs/fnl-eng.asp>. as of February 28, 2009).

<sup>8</sup> Saskatchewan. Ministry of Ministry of Advanced Education, Employment and Labour, Northern Region Office. *Northern Saskatchewan Regional Training Needs Assessment Report 2008-2009*, April 2008.

<sup>9</sup> Gary Tompkins, “Aboriginal Socioeconomic Status and Development”, Department of Economics, University of Regina, January 2008. Paper Presented at the conference Saskatchewan Economic Boom - Challenges and Opportunities.

<sup>10</sup> The First Nations are comprised of five distinct groups: Cree, Dakota, Dene (Chipewyan), Nakota (Assiniboine) and Saulteaux. Source: Canada. Indian and Northern Affairs Canada, <http://www.ainc-inac.gc.ca/ai/scr/sk/fni/pubs/fnl-eng.asp>.

<sup>11</sup> Federation of Saskatchewan Indian Nations. [www.fsin.com](http://www.fsin.com) (accessed June 2009).



determination of First Nations.<sup>12</sup> As Beatty points out, the “First Nations in Saskatchewan have a legacy of strong political governance systems in their own respective communities, which have evolved over the years into equally complex institutions of local, regional, provincial, national and international organizations.”<sup>13</sup> The political effectiveness of First Nations in Saskatchewan is further evidenced by their proven ability to establish and operate institutions such as the Saskatchewan Indian Federated College, Saskatchewan Indian Cultural Centre, Saskatchewan Indian Institute of Technology, Saskatchewan Indian Gaming Authority and First Nations Bank of Canada.<sup>14</sup> In addition, among the First Nations, all but four are signatory to one of the six historical numbered treaties covering the entire land mass of the province.<sup>15</sup> This shared history is the foundation of First Nations’ unity, bringing them together for the common purpose of honouring the treaties, according to their shared understanding.<sup>16</sup>

Despite their strong political organization and unwavering commitment to upholding the treaties, the socio-economic conditions of First Nations in Saskatchewan still lag behind those of non-Aboriginal residents. On the whole, the average First Nation person experiences poorer health, possesses less formal education, tends to lack adequate housing and is more likely to be unemployed or incarcerated than the typical Saskatchewan resident.<sup>17</sup> With such pressing issues on their agenda, First Nations desire greater control to forge a better future for themselves and the necessary resources to support their self-governance. As has been illustrated, time and time again, greater First Nation self-determination leads to improved economic and social.<sup>18</sup>

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<sup>12</sup> Bonita Beatty, “Saskatchewan First Nations Politics: Organization, Institutions and Governance”, In *Saskatchewan Politics: Crowding the Centre*, ed. Howard A. Leeson, Regina: Canadian Plains Research Centre, University of Regina, 2008, 202.

<sup>13</sup> *Ibid.*, 202.

<sup>14</sup> Office of the Treaty Commissioner, *Statement of Treaty Issues: Treaties as a Bridge to the Future*, October, 1998. [http://www.otc.ca/pdfs/OTC\\_STL.pdf](http://www.otc.ca/pdfs/OTC_STL.pdf) (accessed April 2009), 79.

<sup>15</sup> Treaties 2, 4, 5, 6, 8, and 10 cover the Province of Saskatchewan. INAC, <http://www.ainc-inac.gc.ca/ai/scr/sk/fni/pubs/fnl-eng.asp>.

<sup>16</sup> Beatty, 202.

<sup>17</sup> Canada. Statistics Canada. *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census*. <http://www.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=97-558-XIE2006001&lang=eng> (accessed May 2009).

<sup>18</sup> Stephen Cornell, Catherine Curtis, and Miriam Jorgensen. (2003) *The Concept of Governance and Its Implications for First Nations, A Report to the British Columbia Regional Vice-Chief, Assembly of First Nations*. Vancouver: Native Nations Institute for Leadership, Management, and Policy. [http://www.fngovernance.org/pdf/BCAFN\\_Governance.pdf](http://www.fngovernance.org/pdf/BCAFN_Governance.pdf); Stephen Cornell, (2006) *What Makes First Nations Enterprises Successful? Lessons from the Harvard Project*. Native Nations Institute for Leadership, Management, and Policy, Harvard Project on American Indian Economic Development; Paul Barnsley, “Strong Native government way to viable businesses,” *Windspeaker*, May 10, 1993; Jacquelyn Thayer Scott, “Doing Business with the Devil: Land, Sovereignty and Corporate Partnerships in Membertou Inc.,” Halifax: Atlantic Institute for Market Studies, July 2004 - <http://www.aims.ca/library/membertou.pdf> (accessed Oct 1, 2008).

The duty to consult is viewed as a key vehicle in garnering a greater share of the control of, and benefits from, lands and resources in the province. Buckley Belanger, an MLA from northern Saskatchewan, describes consultation from the First Nation point of view as “their last stand, so to speak, when it comes to land, resource development, opportunity, and power.”<sup>19</sup> Overall, the status quo of First Nations in the province is becoming increasingly unacceptable, or has been for some time, and politically active First Nations are determined to bring about change, particularly where consultation on lands and resources is concerned.

The design of a new consultation policy also has been sparked by the election of a new provincial government committed to forging a new relationship and consultation policy with Aboriginal people. The Saskatchewan Party was elected on December 11, 2007. One of its election platform pillars was ‘Strengthening the Partnership with First Nations,’ which included commitments to “[w]ork with First Nations and Métis peoples to develop a protocol that will protect their rights and interests, ensuring the provincial government fulfills its duty to consult and accommodate” and to “[c]onsult with First Nations and Métis peoples in the development and implementation of all provincial legislation and policy that impacts or has the potential to impact their jurisdiction.”<sup>20</sup> In addition, two months before the last election, party leader Brad Wall attended a FSIN Legislative Assembly, and pledged to host a consultation roundtable on lands and resources with Aboriginal leaders and industry representatives within 180 days of taking office.<sup>21</sup> In May 2008, the new Premier made good on his promise and held a ‘historic’ two-day roundtable with Aboriginal leaders and industry representatives to discuss the creation of a new consultation process on lands and resources.<sup>22</sup>

Adding to the necessity of formulating new policy is the fact that no definitive provincial consultation policy is in place in Saskatchewan. Previous policy guidelines developed under the leadership of the former NDP government in 2006<sup>23</sup> were rejected by First Nations, because they did not have input into their design; the content described only “the minimum legal requirements of government departments to consult” and “their implementation created conflict and

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<sup>19</sup> Saskatchewan. Standing Committee on Intergovernmental Affairs and Justice, Hansard Verbatim Report No. 7 – April 28, 2008, Legislative Assembly of Saskatchewan, 26<sup>th</sup> Legislature, 128.

<sup>20</sup> Saskatchewan Party. “Securing the Future: New Ideas for Saskatchewan,” September 24, 2007. <http://www.saskparty.com/assets/pdf/New%20Ideas/SecuringTheFuturePlatform.pdf>, 25

<sup>21</sup> FSIN, *Portfolio Report*, 6.

<sup>22</sup> This roundtable was held 173 calendar days after the swearing in ceremony of Premier Brad Wall.

<sup>23</sup> Saskatchewan. First Nation and Metis Relations. *Government of Saskatchewan Guidelines for Consultation with First Nations and Métis People: A Guide for Decision Makers*, May 2006.

controversy.”<sup>24</sup> Indeed, stated explicitly in the preface of the guidelines is the acknowledgement that the guidelines outline only the legal minimum of consultation. However, each department was encouraged to tailor consultation to its “unique needs,” which could be more “expansive” than the minimum requirements; and in addition, the consultation approach set out did not have to “replace” or “supercede” existing internal policy and practices.<sup>25</sup> Such a preface suggests that the guidelines are little more than an unfinished green paper, offering no real policy direction. It is little wonder that problems ensued concerning the implementation of the guidelines, as stated by the FSIN. These guidelines became ‘interim’ policy in January 2008 and continue to guide consultation in the province. The former NDP government also established a First Nations and Métis Consultation Participation Fund worth \$2 million in March 2007 that was renewed by the Saskatchewan Party government and increased to \$3 million in the 2008-09 fiscal year.

Following the roundtable discussion, a report of the proceedings was released on October 6, 2008<sup>26</sup> and a draft consultation framework was issued on December 22, 2008<sup>27</sup> for review by First Nations and industry stakeholders. In addition to the roundtable conference, additional meetings were held with smaller groups of First Nations in the province, primarily regional tribal councils, in order to produce the draft framework.<sup>28</sup> The provincial government anticipated that a final policy would be in place by early 2009.<sup>29</sup> Although some progress was made in producing a draft consultation policy, the process has stalled. In February 2009, the draft framework was rejected unanimously by First Nations at a special FSIN Legislative Assembly, which called for more time and meetings to discuss the duty to consult.<sup>30</sup> The “extended deadline” of June 1, 2009 for a final policy also has since passed,<sup>31</sup> and to date, no final consultation policy is in place.<sup>32</sup>

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<sup>24</sup> FSIN, *Portfolio Report*, 5.

<sup>25</sup> Guidelines, 2006, no page number.

<sup>26</sup> Saskatchewan. First Nations and Metis Relations. *Seeking Common Ground: Roundtable Conference Report*, October 6, 2008, <http://www.fnmr.gov.sk.ca/Consultation-Roundtable/> (accessed January 10, 2009).

<sup>27</sup> Saskatchewan. First Nation and Metis Relations. *Draft Government of Saskatchewan First Nation and Métis Consultation Policy Framework*, December 2008 <http://www.fnmr.gov.sk.ca/Consultation-Framework/> (accessed January 24, 2009).

<sup>28</sup> *Draft Framework*, 2008, 3.

<sup>29</sup> Saskatchewan. Ministry of First Nations and Metis Relations. 2008-09 Annual Plan.

<sup>30</sup> Luke Simcoe. "FSIN rejects proposal." *Leader Post*, February 20, 2009, <http://www.proquest.com.cyber.usask.ca/> (accessed May 20, 2009).

<sup>31</sup> Saskatchewan. Saskatchewan Hansard, 2521-2522, March 24, 2009.

<sup>32</sup> As of December 1, 2010.

## **A Way Forward**

This thesis argues that addressing the question of the duty to consult cannot be accomplished as a technical policy problem in and of itself. Rather, the duty to consult needs to be addressed within a broader framework of building a new relationship through the principles of treaty federalism. This type of political investigation represents a break from the largely legalistic analysis of the duty to consult and to accommodate that dominates the literature on the topic.

A corollary of this argument is that the ‘new relationship’ that falls within the treaty federalism approach may be utilized to structure First Nation-state relations, whether the First Nation has signed a historical treaty, a modern treaty or has yet to sign a treaty. Although the impetus for greater control of lands and resources may differ, ranging from the existence of Aboriginal title to the supposed ceding of Aboriginal title through modern or historical treaties, the First Nation-state relationships analyzed here are approaching the same type of power-sharing arrangement vis-a-vis lands and natural resources. In the case of British Columbia, many First Nations have yet to sign a treaty (a notable exception, of course, is the modern-day Nisga’a Treaty), while Saskatchewan is representative of a jurisdiction where much of the land is subject to historical treaties.

The development of land and natural resource policy, based on a framework that benefits all parties is important to the economic, social and political future of Canada. Generally, this research is significant because it will further the understanding of the complex relationship between government and First Nations regarding lands and natural resources. In particular, this research highlights the important linkages between duty to consult jurisprudence and Aboriginal governance, and their implications for ‘duty to consult’ and ‘duty to accommodate’ policy. In addition, since key sectors of the resource industry are being rapidly developed in Saskatchewan, a workable and beneficial Aboriginal consultation policy will be a definite advantage in this province. Saskatchewan has an opportunity to avoid the lengthy litigation, failed negotiations and civil disobedience characterizing the process of land and resource development in many jurisdictions across Canada. Also, First Nations in Saskatchewan have an opportunity to participate in decision-making on lands and natural resources that will better serve their economic and social development. Finally, to date, no such comparison of BC and Saskatchewan

policy as it relates to the political dimension and implication of the duty to consult has been researched, nor has much attention been paid to the Saskatchewan Party's articulation of a new relationship with First Nations.

A marked limitation of this research is that although the duty to consult and to accommodate pertains to all Aboriginal peoples, which includes Métis, non-status Indians, Inuit and First Nations, this paper deals only with the obligation to First Nations. This decision should not be construed as implying that the duty owed to other Aboriginal peoples is not as equally worthy of consideration or research. In fact, other Aboriginal peoples may stand to gain much more from inclusion in policy-making concerning lands and resources than First Nations, owing to their unique social, political and economic history and circumstances.

This thesis consists of six chapters. Chapter one has provided the background, purpose and focus of the thesis. Chapter two provides a discussion of the context and concept of treaty federalism. Chapter three focuses on how the legal principles of the duty to consult may act as a mechanism for restructuring Aboriginal-state relations according to a treaty federalist relationship. Within this conceptual framework, Chapter four examines how treaty federalism is being articulated and implemented through the development of a new Aboriginal-state relationship in British Columbia. Chapter five identifies policy principles, based on treaty federalism, on which a new relationship framework in Saskatchewan could be built and within which the question of the duty to consult could be successfully addressed. Chapter six provides conclusions based on the preceding analysis and offers options for future research.

The methodology employed in this research is a qualitative policy analysis of land and resource policy in BC and Saskatchewan, as it relates to Aboriginal and treaty rights. Any given policy analysis may be concerned with determinants of policy, policy content and the impacts of policy.<sup>33</sup> In order to gain a solid understanding of the direction of the new relationships concerning lands and resources in the jurisdictions studied here, my analysis is concerned primarily with the policy processes, which involved a focus on the structural determinants of policy, the policy content and its impacts. Inherent in process analysis is the presumption that “the political process and all of its complex interactions are responsible for the policy profile of a state at any given time.”<sup>34</sup> There is also an evaluative aspect to my analysis in that the policy

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<sup>33</sup> Leslie A. Pal, *Public Policy Analysis: An Introduction* (Toronto: Methuen, 1987), 22-23.

<sup>34</sup> *Ibid.*, 30.

instruments are measured against the concept of treaty federalism. The primary documents consulted consist of the relevant case law; government regulations, guidelines and reports from BC and Saskatchewan; and First Nations reports, resolutions, press releases, guidelines and responses to government policy. Secondary sources of information include analysis by legal scholars and practitioners on Aboriginal rights discourse and the principle of the duty to consult and accommodate; policy analysis by various think tanks and academics; and magazine and newspaper articles.

My own personal worldview, assumptions and position undoubtedly have influenced my research. It is a truism that: “[t]he answer to a question can often depend on who is doing the asking.”<sup>35</sup> As a Cree person, and a member of the Okanese First Nation, which is signatory to Treaty 4 in Southern Saskatchewan, I grew up with a keen awareness of the treaties, and their impact on the political relationship between First Nations and the Crown. I believe that this awareness enabled me to more readily consider the treaty federalism framework as a viable option, than perhaps an individual with a dissimilar background.

That said, however, I would like to emphasize that I strove to manage my own position, by approaching the research from the ‘ground up.’ My research began with analysis of the legal jurisprudence on duty to consult, and then proceeded to explore the duty to consult policy of other jurisdictions, most notably British Columbia. Finally, I carefully examined the nascent policy and current positions of the political players in Saskatchewan. It was after investigating these three streams, and then during the development of my thesis proposal, which involved valuable input from professors in the Department of Political Studies at the University of Saskatchewan, that the concept of treaty federalism was introduced to my research. In short, the treaty federalism framework evolved from the research, rather than dictated its flow.

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<sup>35</sup> Zina O’Leary, *The Essential Guide to Doing Research*, (Los Angeles: Sage Publications, 2004), 45.

## **Chapter 2: Treaty Federalism**

The concept of a ‘new relationship’ lies at the heart of the consultation process between First Nations and the Province of Saskatchewan, because before consultation can proceed, each party’s specific decision-making role and responsibilities must be determined. Put simply, agreement must be reached on how to consult, before consultation can begin. At one end of the spectrum is the concept of a relationship based on absolute provincial power with minimal consideration of First Nation rights and interests. At this end of the spectrum, First Nations are invited to the feast, but it is the province dictating the menu and who gets served when and how much. At the other end, is a relationship based on complete First Nation jurisdiction and authority over lands and resources on their traditional territories (Crown lands) effectively overriding the provincial ability to govern. At this end of the spectrum, the province may have sent the invitation, but First Nations have brought their own food and servers, and now the province must sit quietly by and eat their share. At the end of the day, both parties will feast on some benefits, but neither scenario is especially attractive nor in keeping with the protocol and spirit of a jointly hosted and mutually beneficial feast.

### **Present Relationship**

Efforts to redefine and renew the treaty federalism-relationship between Aboriginal and non-Aboriginal peoples have been underway for decades. Treaty federalism is one of many models that promises better relations between the two groups, and hence, a more workable federation. In this chapter, the context and concept of treaty federalism will be described, and literature analyzing the validity and desirability of the concept will be presented.

Aboriginal peoples have long decried the fact that they are often ‘outside looking in’ with regard to Canadian federalism. When jurisdictional powers originally were divided among Parliament and the legislatures and enshrined in the Constitution Act, 1867, the consent of Aboriginal peoples was neither sought nor given, and for this reason the division of powers lacks legitimacy for Aboriginal peoples.<sup>36</sup> Rather than being partners in Confederation, Aboriginal

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<sup>36</sup> Martin Papillon, “Canadian Federalism and the Emerging Mosaic of Aboriginal Multilevel Governance.” In *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, edited by Herman Bakvis and Grace Skogstad, 291-313. Don Mills, Ont.: Oxford University Press, 2008, 295.

people became “an object of federal jurisdiction according to section 91(24) of the Act.”<sup>37</sup> In keeping with colonialist attitudes at the time, any status that Aboriginal peoples may have possessed as original inhabitants of the land was ignored as the “dominant society simply imposed its conception of sovereignty and claimed exclusive jurisdiction over the territory.”<sup>38</sup> The colonial notion of sovereignty or what Ladner calls the “official history”<sup>39</sup> allowed for only two constitutionally recognized levels of government, and so Aboriginal peoples were afforded no political space to participate directly in the formal institutions of “intrastate federalism.” This trend continues today, and includes exclusion from the mechanisms of “interstate federalism” or the “growing web of intergovernmental processes and institutions.”<sup>40</sup> When a matter involving Aboriginal people straddles jurisdictional boundaries, both orders of government are unwilling to assert their jurisdiction or take responsibility,<sup>41</sup> leaving many Aboriginal issues and people abandoned in a jurisdictional limbo.

The area of lands and resources is an exception to the rule. In matters concerning lands and resources that involve Aboriginal rights and interests, both the federal and provincial governments have weighed in on the issues. For the most part, the area of lands and resources has created “tense relations” between Aboriginal peoples and the provinces, rather than cooperation.<sup>42</sup> Provincial governments and Aboriginal peoples historically have had few occasions to interact with one another through the processes and institutions of Canadian federalism, given that matters involving ‘Indians’ fall under federal jurisdiction. This may soon change. The conflict regarding lands and resources between the Province and First Nations may be a harbinger of things to come, as First Nations continue to assert and legally gain influence or even authority in other jurisdictions falling under provincial power.

Clearly, the status quo of Canadian federalism needs to change if Aboriginal people are going to be able to participate fully in its ongoing evolution. Papillon concludes that “the institutions and processes of Canadian federalism have exacerbated conflicts with Aboriginal people and have contributed significantly to the reproduction of the system of exclusion inherited

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<sup>37</sup> Ibid., 295.

<sup>38</sup> Ibid., 292.

<sup>39</sup> Kiera L. Ladner, “Treaty Federalism: An Indigenous Vision of Canadian Federalisms.” In *New Trends in Canadian Federalism*, 2<sup>nd</sup> edition, edited by Francois Rocher and Miriam Smith, Toronto: Broadview Press, 2003, 167.

<sup>40</sup> Papillon, 295.

<sup>41</sup> Ibid, 296.

<sup>42</sup> Ibid.



from the colonial period.”<sup>43</sup> Henderson describes the situation slightly differently, “There is little interconnectedness between Canadian politics and Aboriginal politics. The existing connection can be viewed as domination by the colonialists. Aboriginal peoples seldom love such relationships.”<sup>44</sup>

However, avenues for change have been identified. Abele and Prince analyze four competing Aboriginal-state federalist relationships in Canada, including the model of Treaty Federalism. The four models are: "mini-municipalities" embedded in federalism-as-usual; new subnational entities in a modest adaptation of Canadian federalism (adapted federalism); a fully-developed third order of government in the federation (trilateral federalism); and Aboriginal governments as part of a treaty-based alliance between the Aboriginal governments and the Crown in Canada (nation-to-nation or treaty federalism).<sup>45</sup> The authors describe Treaty Federalism as advocating the greatest degree of change in terms of its constitutional status and the relationship envisioned among Aboriginal communities and the Crown.

The mini-municipality has powers similar to those of Canadian cities, but since the Aboriginal form would be smaller than your average city, it would be ‘mini.’<sup>46</sup> To date, the authors find that no Aboriginal nations are supportive of the ‘mini municipalities’ model.<sup>47</sup> The second model—adapted federalism—encapsulates the idea of an ‘Aboriginal province’ or at least a territory where a new public Aboriginal government is created. The only example of this model is Nunavut. The authors conclude that this model doesn’t have a future, because the conditions that led to its creation, such as the demographics of Nunavut, with its population being 85 per cent Inuit, make it unique. Even other Inuit groups contemplating self-government models do not have this large of a population.

The third model, trilateral federalism, advocates a third order of government for Aboriginal peoples that is part of the constitutional structure on par with the provincial and federal governments. It is built upon the recognition of an inherent right to self-government for

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<sup>43</sup> Ibid.

<sup>44</sup> James (Sakej) Youngblood Henderson, "Empowering treaty federalism." *Saskatchewan Law Review* 58.n 2 (Summer 1994), 323.

<sup>45</sup> Frances Abele and Michael J Prince. "Four Pathways to Aboriginal Self-Government in Canada." *The American Review of Canadian Studies* 36, no. 4 (December 1, 2006): 568-<http://www.proquest.com.cyber.usask.ca/> (accessed May 7, 2009), 571.

<sup>46</sup> Ibid., 572.

<sup>47</sup> Ibid.

Aboriginal peoples.<sup>48</sup> It involves a new division of powers, whereby the federal and provincial governments would share jurisdictional authority and power with Aboriginal peoples.<sup>49</sup> The specific areas of jurisdiction would be negotiated by all levels of government, with Aboriginal peoples having sole jurisdiction in some respects; sharing jurisdiction and the delivery of goods and services in others; and in areas of national interest, the federal government would maintain its jurisdiction and authority.<sup>50</sup> It would also involve a fair share of natural resources, based on Aboriginal rights, such as title. The instruments for achieving such a model of governance include “treaty negotiations, interim measures, administrative arrangements, and policy innovations” which would entail the transferring of certain jurisdictions and authorities to Aboriginal governments and institutions.<sup>51</sup> As a result, other “cooperative measures between governments with respect to jurisdictions, laws, and service” would also be required to make this model workable.<sup>52</sup> The authors believe that this model of government would ensure “financial stability” and increased decision-making powers for Aboriginal governments.<sup>53</sup> Its implementation would require the creation of special institutions,<sup>54</sup> but is supported by the historical status of Aboriginal nations and their current constitutional position.<sup>55</sup> The authors argue that this model has been gaining dominance in Canada since the 1970s, because it is consistently supported in case law through the recognition of Aboriginal governance as an inherent right,<sup>56</sup> and through public policy developed by the federal government and various public bodies, such as the Royal Commission on Aboriginal Peoples (RCAP). This model is commonly regarded as “offering a new and better relationship between Aboriginal peoples and the Canadian state.”<sup>57</sup>

The fourth and final model described by the authors is the “nation-to-nation” model or the concept of ‘treaty federalism.’ The authors describe the concept as the realization of the treaty-based relationship with First Nations. A First Nation does not “join” federalism, instead it is a sovereign nation that has relations with the Crown in Canada, and this relationship is defined

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<sup>48</sup> Ibid., 578.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid., 577.

<sup>51</sup> Ibid., 578.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid., 579.

<sup>54</sup> Ibid., 576.

<sup>55</sup> Ibid., 578.

<sup>56</sup> Ibid., 574.

<sup>57</sup> Ibid., 579.

by a treaty.<sup>58</sup> Integral to this model is the belief that the power of Aboriginal self-government existed prior to the Canadian state and is derived from outside the Crown, and that Aboriginal nations exist “with distinctive traditions and practices of self-determination, including governance.”<sup>59</sup> This nation-to-nation model is embedded in the Royal Proclamation of 1763.<sup>60</sup> The authors present the argument of Tully on this model. He argues that this “post colonial paradigm” is just emerging, overshadowed by what he regards as colonial perspectives still embedded in the mini-municipalities model, and to a degree, the vision of a third order in Canadian federalism.”<sup>61</sup>

### **Destination: Renewed Relationship**

At its core, Treaty Federalism<sup>62</sup> may be regarded as the construction of a mutually-agreed upon balance between autonomy/freedom and interdependence /belonging.<sup>63</sup> Through a treaty, the equal worth and value of each nation is recognized, and each retains its space or separate sphere of autonomous jurisdiction to continue to live freely in accord with its own rules, laws, traditions, etc., beholden only to the will of its people.<sup>64</sup> Since the intent of belonging to the union is to live peacefully together on the same land, this necessitates a degree of interdependence among the parties. In Canada, this is accomplished through the creation of

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<sup>58</sup> Ibid.

<sup>59</sup> Ibid., 580.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid., 581.

<sup>62</sup> Whether ‘federalism’ is the best term for this type of arrangement is still under debate, with Tully preferring the word ‘constitutionalism’ (James Tully, 1995. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge:Cambridge University Press.); Hueglin opting for ‘confederal’ (Thomas O. Hueglin, *Exploring Concepts of Treaty Federalism*, In *For seven generations [electronic resource]: an information legacy of the Royal Commission on Aboriginal Peoples = Pour sept générations: legs documentaire de la Commission royale sur les peuples autochtones*. Canada. Royal Commission on Aboriginal Peoples, 1997.); and Ladner (Ibid., 175) hesitantly resigning herself to the use of the phrase ‘treaty federalism. In articulating the phrase, Barsh and Henderson also referred to the concept as the “federal-tribal compact” (Russel Lawrence Barsh and James (Sakej) Youngblood Henderson. *The Road: Indian Tribes and Political Liberty*. Berkeley: University of California Press, 1980, xii). This paper will comply with the common usage of the term ‘treaty federalism.’

<sup>63</sup> Tully, 33.

<sup>64</sup> James (Sakej) Youngblood Henderson, "Empowering treaty federalism," *Saskatchewan Law Review* 58.n 2 (Summer 1994), 301, stated “The treaty order creates jurisdictional borderlines. It was not designed to replace either First Nations or British legal systems.” Self-rule as a key aspect of treaty federalism has been affirmed by numerous other scholars, including Hueglin, 10: “They [indigenous nations] never perceived of themselves, or consented to, being subjected to one common legal (British) authority, and they continued to conduct their own business in a plural rather than a unified fashion.”; and John Borrows, "Ground-rules: indigenous treaties in Canada and New Zealand." *New Zealand Universities Law Review* 22.2 (Dec 2006): 188-212. LegalTrac. Gale. University of Saskatchewan, July 24, 2009. <http://find.galegroup.com.cyber.usask.ca/itx/start.do?prodId=LT>> (accessed August 1, 2009), 192: “The treaties did not erase the pre-existing laws of each party, though they did introduce a new legal framework to govern the relationship between these laws.”

concurrent areas of jurisdiction where the autonomy of both nations is redefined in relation to the other, creating an “innovative transnational covenant”<sup>65</sup> or unity.<sup>66</sup> This area of ‘relational autonomy’ delegates certain rights, responsibilities and obligations to both nations.<sup>67</sup> The entire process must receive the consent of the signatories in order for it to be legitimate. No single nation has absolute autonomy over the other or the land. The terms of how the land and its bounty are to be shared have been agreed upon, and may only be renewed or renegotiated through the same process. Mutual recognition and respect of nationhood, mutual consent and dialogue, and trust are the guiding principles of the treaty-making process that ultimately results in a treaty federalist arrangement.<sup>68</sup>

Treaty federalism holds the promise of balancing the public goods of civic dignity (freedom) and civic participation (belonging) by providing a framework for genuine exchange. The practice of treaty federalism is the facilitation of “intercultural dialogue”<sup>69</sup> or “rational thinking, constructive dialogue and true exchange of ideas”<sup>70</sup> between diverse peoples. In order for intercultural dialogue to work in practice, it must be guided by the same principles that led to the initial arrangement. This is why treaty federalism has been called both an idea and a relationship.<sup>71</sup> Even when disputes arise regarding the interpretation of a treaty, then the process of treaty federalism or intercultural dialogue may be utilized to resolve the dispute.<sup>72</sup> Although anchored to its fundamental principles, intercultural dialogue is a dynamic process that must also

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<sup>65</sup> James (Sakej) Youngblood Henderson, “Treaty Governance.” *Aboriginal Self-government in Canada: Current Trends and Issues*, 3rd edition. edited by Yale D. Belanger, 20-38. Saskatoon: Purich Publishing Ltd., 2008, 20.

<sup>66</sup> Hueglin refers to the resulting interdependence as that which “seeks to establish a social compact of a more lasting kind. It contains a mutual obligation to adjust and reorganize internal affairs in such a way as to ensure that the council can come to one mind. (Hueglin. 16) In addition, Borrows describes how the structure of treaty federalism “could permit all who live under treaties to become “one people”, harmonising a nations’ unity with its diversity.” (Borrows, 193); This concept was first articulated by Barsh and Henderson, who wrote: “Treaties are compacts[...] Their object is to restructure the parties and create or enlarge some common, national sovereignty.” (Barsh and Henderson, 271)

<sup>67</sup> Colin Scott coined the phrase “relational autonomy” to refer to the power-sharing structure of treaty federalism. (Colin Scott, “Co-Management and the Politics of Aboriginal Consent to Resource Development: *The Agreement Concerning a New Relationship between le Gouvernement du Quebec and the Crees of Quebec (2002)* pp.133-163 in *Reconfiguring Aboriginal-State Relations*, edited by Murphy, Michael (Institute of Intergovernmental Relations School of Public Policy Studies, Montreal: Queen's University by McGill-Queen's University Press, 2005.), 135.)

<sup>68</sup> Tully – three conventions of constitutionalism are evident in the intercultural dialogue of treaty federalism, mutual recognition, continuity and consent.

<sup>69</sup> Tully, 26.

<sup>70</sup> Andrew Bear Robe, (on behalf of the Siksika Nation Indian Government Committee). “Treaty federalism: A Concept for the Entry of First Nations into the Canadian Federation and Commentary on the Canadian Unity Proposals.” Gleichen: Siksika Nation Tribal Administration, 1992, 2.

<sup>71</sup> Henderson, 329.

<sup>72</sup> John Borrows, “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission.” *McGill Law Journal* 46 (2000-2001), 630.

respond to the popular will of the people rather than some higher abstract notion of sovereignty.<sup>73</sup> Put another way,

... the purpose of treaty politics is to provide channels of communication that establish and preserve unity and consensus on the basis of a common cultural heritage, especially when dealing with outsiders. There is no abstract concept of sovereignty. Sovereignty exists only when the process of consensus building works.<sup>74</sup>

The concept of treaty federalism and the other competing federalist arrangements outlined here have been advanced with some success in Canada, and each continues to have its advocates, all of whom are dissatisfied with the status quo. However, the *Indian Act* style of governance remains the dominant guiding structure for First Nation-Crown relations. Abele and Prince do not identify the *Indian Act* band model as a path to self-governance; instead, the authors describe it as constituting a ‘minus municipality,’ because an *Indian Act* Band lacks even the basic self-governing authority of a municipality. Similarly, Ken Coates asserts that the Act embodies the “basic assumptions” that “assimilation, civilization and protection” are necessary, and grants authority to the federal government to pursue these ends.<sup>75</sup>

To date, the theory of treaty federalism has yet to be implemented in Canada. That is, unless one accepts the argument that the third order of government and treaty federalism are essentially one and the same. The Royal Commission on Aboriginal Peoples (RCAP), which articulated a vision of treaty federalism, has been criticized as advocating Aboriginal governance models that, in practice, fail to realize this vision.<sup>76</sup> In fact, Abele and Prince argue that the nation to nation model and the third order of government model are very similar in their “mechanisms of coordination, policy discussion” and mode of decision-making.”<sup>77</sup> The only real difference is in each model’s formal, *dejure* power arrangements.<sup>78</sup> The authors believe the RCAP actually advocates a nation to nation model in theory, but a third order of government model in practice.

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<sup>73</sup> Tully, 26-27.

<sup>74</sup> Hueglin, 15.

<sup>75</sup> Ken Coates, “The Indian Act and the Future of Aboriginal Governance in Canada,” Research Paper for the National Centre for First Nations Governance, May, 2008 <http://www.fngovernance.org/research/coates.pdf>.

<sup>76</sup> Kiera L. Ladner, “Negotiated Inferiority: The Royal Commission on Aboriginal People’s Vision of a Renewed Relationship,” *American Review of Canadian Studies* 31, no. 1/2 (2001): 241-264. Academic Search Complete, EBSCOhost (accessed April 6, 2009).

<sup>77</sup> Abele and Prince, 582

<sup>78</sup> *Ibid.*, 582.

The Royal Commission, through its final report of five major volumes, fudged the choice between the third-order and nation-to-nation models. Besides the elaborate commitment to a nation-to-nation approach and to the principles of recognition, respect, and reconciliation, when the RCAP got down to cases, it talked about mechanisms for integration and a third order. Discussions among Commission staff reconciled the matter, at least for some, by saying that at the level of principle, Commissioners were arguing for nation-to-nation; while at the level of practicality, they talked in terms of government-to-government. We are not sure that this actually works, yet we readily concede it is still early days in the post—Royal Commission period of interpretation and implementation.<sup>79</sup>

If one accepts this comparison of trilateral and treaty federalism, then, in practice, Canadian federalism has been able to achieve the ideal of Aboriginal governance. As Coates and Poelzer point out, the Nisga'a model of governance in north-western British Columbia actually constitutes a “constitutionally protected, third order of government.”<sup>80</sup> Despite their similarities, a treaty-federalist arrangement remains the most desirable model for Aboriginal-state relations. Coates and Poelzer make note of the potential for Canadian federalism to accommodate treaty federalism: “The notion of treaty federalism fits closely with the idea of building a common future along the lines of extending our current practice of federalism and of recognizing the common institution of the Crown.”<sup>81</sup>

Despite support for treaty federalism or its practical-minded cousin, the third order model, both the concept of treaty federalism itself and its historical context in Canada are still the object of much debate. The concept is often perceived as an idealized dream of Aboriginal self-government, with detractors spurning the notion on both practical and theoretical grounds. In practice, federalism simply cannot be stretched to accommodate a scattered, diverse Aboriginal population. Even if it could, the stretching would lead to disunity and either ‘two solitudes,’ or a multiplicity of solitudes, and ultimately, the tearing apart of an interconnected citizenry. In addition, the dominant ideas underpinning the Canadian state—liberal individualism, majoritarianism and absolute sovereignty divided between provincial and federal governments—are incongruent with treaty federalism. Some analysts also contend that the balance between autonomy and interdependence offered through treaty federalism is neither necessary nor desirable. Alan Cairns’ prescription for Aboriginal-state relations stresses interdependence over

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<sup>79</sup> Ibid., 588.

<sup>80</sup> Ken Coates and Greg Poelzer. “Aboriginal Peoples and the Crown in Canada: Completing the Canadian Experiment.” *Continuity and change in Canadian politics : essays in honour of David E. Smith* / edited by Hans J. Michelmann and Cristine de Clercy, 147-169. Toronto: University of Toronto Press, 2006, 148.

<sup>81</sup> Ibid., 166.

autonomy, with Aboriginal peoples incorporated into the full body politic of Canada while maintaining some rights under the terms of historical treaties, or what he refers to as ‘Citizens Plus.’ Taiaiake Alfred would rather err on the side of greater freedom for Aboriginal nations.<sup>82</sup> Tom Flanagan advocates the full integration of Aboriginal peoples, arguing, (*ironically*), that their differentiated or separate status in Canada has undermined their very existence.<sup>83</sup>

The history of treaty-making also remains highly contested among and between Aboriginal and non-Aboriginal legislators, adjudicators and academics. Problems with interpretation and implementation of the treaties have ensued since the years immediately following treaty-signing.<sup>84</sup> The current problems may be attributed to the fact that when indigenous and European nations were originally signing the treaties, both held different perceptions of the intent of treaty-making. According to Abele and Prince, even at the time of treaty-making, despite apparent assurances to the contrary, European signatories to the treaties “always” had “the clear intention of asserting dominance and control, blended with the recognition that particular Aboriginal nations presented an obstacle to this goal.”<sup>85</sup> Treaties were the “prelude to subjugation” for Europeans.<sup>86</sup> Non-Aboriginal signatories conceived of the treaties as formal Aboriginal surrender of lands and jurisdiction “in exchange for exclusive rights to particular lands and guarantees of matters important to indigenous peoples.”<sup>87</sup> Although the Indigenous view of the treaties has already been presented— it is the concept of treaty federalism<sup>88</sup>—it is important to note that indigenous nations do not believe they ever consented to the blanket sale of the land.<sup>89</sup> As Henderson notes, “The First Nations’ relationships with the land have always defined their identity, their spiritual ecology and their reality. The sale of the

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<sup>82</sup> Gerald R Taiaiake Alfred, *Peace, Power and Righteousness: An indigenous Manifesto* (Don Mills, Ont: Oxford University Press, 1999).

<sup>83</sup> Tom Flanagan, *First Nations? Second Thoughts* (Montreal: McGill-Queen’s University Press, 2000).

<sup>84</sup> Arthur J. Ray, Frank Tough and Jim Miller. (*Bounty and Benevolence: A History of Saskatchewan Treaties*. Montreal: McGill-Queen’s University Press, 2000), 214.

<sup>85</sup> Francis Abele and Michael J. Prince. “Aboriginal Governance and Canadian Federalism: A To-do List for Canada.” *In New Trends in Canadian Federalism*, 2nd edition, edited by Francois Rocher and Miriam Smith, 135-166. Toronto: Broadview Press, 2003, 139; Hueglin, 10. “there can be little doubt about the Crown’s intensified attempts from the Royal Proclamation onward to make Aboriginal-British relations more and more consistent with European concepts of undivided sovereignty and property rights.”

<sup>86</sup> D.N. Sprague, “Canada’s Treaties with Aboriginal Peoples,” *Manitoba Law Journal* 23 (Jan. 1996): 341.

<sup>87</sup> Abele and Prince, 2003, 140.

<sup>88</sup> Tough et al., 1: Of course, this brief rendering of the First Nations’ perspective is incomplete, as Elder Jimmy Myo points out: “You cannot begin to understand the treaties unless you understand our cultural and spiritual traditions and our Indian laws.”

<sup>89</sup> Hueglin, 10: ““They never perceived of themselves, or consented to, begin subjected to one common legal (British) authority, and they continued to conduct their own business in a plural rather than a unified fasion.”

land, the sale of the rights of future generations, is beyond the linguistic comprehension of most Aboriginal languages.”<sup>90</sup> Depending on who is reading the treaties, proprietary title to the land and all other political and social rights associated with it were ceded and surrendered by First Nations; Or, only certain treaty rights and obligations were delegated to the Crown by First Nations for mutual sharing and stewardship of the land.

Consentino categorizes the evolving interpretation of the treaties in political science literature according to four themes. The themes are ‘treaties as political accords’; ‘contractualist vision’; ‘new interpretative framework’; and ‘treaties as constitutional accords.’<sup>91</sup> Proponents of the treaties as political accords view them as unenforceable political agreements with indigenous peoples, not nations. Those who view the treaties as ‘ordinary contracts’ are mostly concerned with getting the Crown to fulfill its obligations under the contract, but do not advocate a restructuring of Crown sovereignty to reflect treaty federalism. The third theme recognizes and supports the principles of the treaties based on a post-imperial political ethic that includes principles of “fairness, distributive justice, recognition and meaningful and effective Aboriginal participation rather than legalistic and formalistic interpretations of treaties and federal-provincial division of powers.”<sup>92</sup> The fourth and final theme flows from the third, but extends it further, viewing treaties as constitutional accords that require accommodation in the form of treaty federalism in order for a post-colonial Canadian state to prevail. The new interpretative framework is driving the reinterpretation of treaties and Canadian constitutionalism and paving the way for treaty federalism. But those operating within the new interpretative framework are hesitant to challenge the values, beliefs and ideas that underlay the Canadian federation.<sup>93</sup> Consentino supports the view of treaties as constitutional accords because it represents a catalyst for overcoming the biases of their earlier interpretation and their institutionalization, but she admits that adopting this view is no easy task as it requires nothing less than “transcending traditional understandings of federalism and Aboriginal-Crown relations.”<sup>94</sup> All four themes

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<sup>90</sup> Henderson, 1994, 263.

<sup>91</sup> Gina Consentino, “Treaty Federalism: Bridging Praxis, Theory, Research and Pedagogy” (136-152) in *Racism Eh? A Critical Inter-Disciplinary Anthology of Race and Racism in Canada*. Eds. Camille A. Nelson and Charmaine A. Nelson. (Concord: Captus Press, 2004), 143.

<sup>92</sup> *Ibid.*, 144.

<sup>93</sup> *Ibid.*, 146.

<sup>94</sup> *Ibid.*



currently are evident in the literature, and a similar understanding of the treaties operates among legal scholars.<sup>95</sup>

The reinterpretation of the treaties and their acceptance as constitutional accords according to treaty federalism is far from becoming the prevailing view in Canadian law, politics or society. Treaties as mere political accords or contracts have dominated the views and institutions of Canadian constitutionalism. For the most part, Aboriginal peoples have been powerless to formally contest this interpretative control by the Canadian state through the mechanisms of federalism.<sup>96</sup>

However, in just the last two decades, the mounting ‘reinterpretation’ of the treaties by academics from multiple disciplines, including members of the Supreme Court of Canada, suggests that the prevailing interpretation of the treaties rests on a narrow reading of the treaties, and that a fuller reading, which captures the true nature or ‘spirit and intent’ of the treaties, will lead inevitably to their status as constitutional instruments. Although an examination of the entire body of case law on the treaties is not within the scope of this paper, some key principles calling for a different sort of interpretation of treaties have been articulated by the Supreme Court. When interpreting the text of a treaty, the Courts have stipulated that “a generous and liberal” interpretation must be used, and “extrinsic evidence”, such as oral history, must be considered in addition to the written text itself.<sup>97</sup> To do otherwise might compromise the “integrity and honour” of the Crown because it would entail a failure to fulfil promises that caused a First Nation to sign a treaty.<sup>98</sup>

According to academics, Ray, Miller and Tough, past works offered biased, uncritical accounts of the government as “all-wise and generous” and “operating with foresight, honour and generosity.”<sup>99</sup> Such an account of any government today would be laughed off its pages as blatant propaganda. At the same time, the indigenous nations were portrayed as “passive” signatories to treaty “contracts” that extinguished their original property rights.<sup>100</sup> The authors

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<sup>95</sup> Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, (Toronto: University of Toronto Press, 2001).

<sup>96</sup> Abele and Prince, 2003, 140.

<sup>97</sup> Maria Morellato, “The Crown’s Constitutional Duty to Consult and Accommodate Aboriginal and Treaty Rights,” (Research paper) National Centre for First Nations Governance (February, 2008) - [http://www.fngovernance.org/pdf/CrownDuty\\_MM\\_0208.pdf](http://www.fngovernance.org/pdf/CrownDuty_MM_0208.pdf) (accessed Oct 25, 2008),12.

<sup>98</sup> *Ibid.*, 14.

<sup>99</sup> Tough et al, 205.

<sup>100</sup> *Ibid.*, 205.

contend that early accounts of treaty-making were based on the few sources of written evidence supporting this view—mostly the papers of treaty commissioners.

Using a more critical, comprehensive methodology, the authors contend that the treaties, as agreed upon by *both sides*, were supposed to ensure the continued livelihood of First Nations, in both traditional (hunting, fishing, trapping) and contemporary forms (agriculture),<sup>101</sup> and that indigenous nations would be allowed to maintain their self-rule. Interdependent relations with newcomers were represented thusly:

[Treaty Commissioner] Morris expounded a negotiation strategy he had developed in Treaty 4, which involved stressing that treaties provided “gifts” from a beneficial queen mother that took away “nothing” from Indian nations “ways of living,” but rather added to them.<sup>102</sup>

Taking into account the oral history of First Nations, the treaties represented not only binding agreements, but solemn and sacred documents that bound the signatories together under the law of the Creator or natural law. By their participation in sacred ceremony, such as smoking the peace pipe, the non-Aboriginal signatories demonstrated their acquiescence to this principle, and seemed to further show their understanding in other ways.

In view of the Elders, the treaty nations – First Nations and the Crown – solemnly promised the Creator that they would conduct their relationship with each other in accordance with the laws, values and principles given to them by the Creator. Treaty 6 Elder Norman Sunchild stated “When [Treaty 6 First Nations] finally agreed to the treaty, the Commissioner took the promises in his hand and raised them to the skies, placing the treaties in the hands of the Great Spirit.

[...]

The duties and obligations that arise from the laws, ceremonies, and traditions that form a way of life for the First Nations are clear. The Elders, for example, explained that when promises, agreements, or vows are formally made to the Creator (*wiyohkawimawi*) through ceremonies conducted in accordance with the laws governing them – the promises, agreements, or vows so made are irrevocable and inviolable.<sup>103</sup>

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<sup>101</sup> Ibid., 214.

<sup>102</sup> Ibid., 212.

<sup>103</sup> Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our Peoples Will One Day be Clearly Recognized as Nations*, (Calgary: University of Calgary Press, 2000), 7.

Whether the non-indigenous negotiators were simply paying lip service or going through the motions to induce Aboriginal nations to sign is debateable, but also irrelevant under any law. The agreed upon understanding at the time must prevail.<sup>104</sup>

In sum, the arguments for treaty federalism or treaties as constitutional accords flow along three streams, depending on whether one looks to the past, present or future. Taking a look back, treaty federalism is arguably the only model consistent with the foundations of Canada's constitution and creation, and so any further delay in its implementation perpetuates an unjust and illegitimate system of governance. Under this argument, the treaties are regarded as constitutional documents that provided for the creation and development of Canada. Proponents then describe the ways in which treaties were subsequently "ignored, disregarded and trivialized by governments and courts."<sup>105</sup> As a result, Aboriginal peoples were not allowed to 'belong' to the federation, and at the same time, their 'freedom' to engage in their own traditional political systems was outlawed by government policy. The implementation of treaty federalism represents the bringing to light once again of a "hidden constitution" overshadowed by the dark days of colonialism.<sup>106</sup> Thus, the new relationship offered through treaty federalism is not new at all, but a renewal of a relationship conceived of generations ago.

Looking to the present, treaty federalism is regarded as the only model with the potential to address the current vestiges of colonialism embedded in Canadian federalism. Instituting minimal Aboriginal self-determination or self-administration is not enough. A more equal relationship between First Nations and the Crown, consistent with their political and legal treaty history is necessary. The current lack of efficacious autonomous Aboriginal participation within the Canadian Federation is cited as evidence of the colonialist bias in favour of Crown power and Aboriginal disempowerment.<sup>107</sup>

The final argument looks to the future, and is not overly concerned with Canada's constitutional history, only in so far as it constitutes an exemplar of a moral, philosophical alternative to the current federal accommodation of cultural diversity. One thread of this argument highlights the fact that federations around the world, including the Canadian provincial-federal arrangement are now turning towards a decentralized, interdependent state

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<sup>104</sup>Henderson, 1994, 296.

<sup>105</sup> Ibid., 247.

<sup>106</sup> Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada," *The American Journal of Comparative Law* 32, no. 2, The New Canadian Constitution (Spring, 1984): 361-391.

<sup>107</sup> Borrows, 2002, 152; Henderson, 1994.

with autonomous, self-governing units, and a conception of sovereignty that is invested in the people rather than in a single, indivisible and absolute authority.<sup>108</sup> As part of this argument, proponents assert that the present problems with most federations are the result of an ideological wrong turn towards nation-building through homogenization rather than through the negotiated accommodation of heterogeneity.<sup>109</sup> Hueglin points out that treaty federalism is not alien to European political thought; instead the idea was not pursued in practice as adherence to absolute sovereignty was chosen instead of popular sovereignty. The second thread argues that treaty federalism simply offers the best model for ensuring the peaceful autonomy and efficacious interdependence of culturally diverse peoples. In essence, the “refusal to grant recognition and autonomy to such groups [like Aboriginal peoples] is often likely to provoke even more resentment and hostility from members of national minorities, alienating them further from their identity as citizens of the larger state.”<sup>110</sup> When both Aboriginal and non-Aboriginal people understand that the survival of their respective rights, resources and livelihoods is assured through treaty federalism, then they are more likely to effectively engage with one another in building a unified state.<sup>111</sup> In response to the practical objections raised against treaty federalism, proponents of all these views are apt to point out that treaty federalism requires no formal constitutional change, except perhaps the inclusion of an addendum of the treaties to the written constitution. Instead, what is required is the political will and open-mindedness necessary to challenge conventional understandings of federalism, and its constituent elements—culture, the constitution and history. Granted, this is no easy task, but if the literature on the subject is any indication, momentum is building in this direction.

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<sup>108</sup>Julie Simmons, “Treaty Federalism: The Canadian Experience,” Paper prepared for the International Colloquium “Competitive Federalism – International Perspectives.” Liberal Institute, Friedrich Naumann Foundation, Potsdam, Germany (July 3, 2008): 1-28. <http://www.fnf.org.ph/downloadables/Treaty%20Federalism.pdf>. (accessed April 2009).

<sup>109</sup> Thomas O. Hueglin, *Exploring Concepts of Treaty Federalism*, In *For seven generations [electronic resource]: an information legacy of the Royal Commission on Aboriginal Peoples = Pour sept générations: legs documentaire de la Commission royale sur les peuples autochtones*. Canada. Royal Commission on Aboriginal Peoples, 1997.).

<sup>110</sup> Will Kymlicka and W. Norman, eds., *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000), 40.

<sup>111</sup> Borrows, 2002, 157.

### Chapter 3: The New Relationship and Duty to Consult Jurisprudence

The courts have played a central role in expanding Aboriginal peoples' participation in federalism. Traditionally, when resolving intergovernmental disputes between the federal and provincial governments, the courts commonly perform a valuable, albeit "supplemental" function.<sup>112</sup> Although not definitively resolving disputes between these two levels of government, court decisions inevitably confer "some bargaining power in negotiations" to one level of government over another when deciding questions of jurisdiction, which usually facilitates some sort of compromise.<sup>113</sup> In the case of Aboriginal peoples, the courts have played a similar role, except that the willingness of government to 'bargain' with or consider the interests and rights of Aboriginal peoples, at least in the area of lands and resources, began largely with their legal obligation to do so.<sup>114</sup> The constitutional protection of existing Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*, has played a major role in this process. The degree to which this entrenchment restrains the exercise of unilateral Crown power with regard to Aboriginal and treaty rights is still under debate. One could argue that the constitutional protection of Aboriginal and treaty rights has created a *de facto* division of powers between Parliament, legislatures and Aboriginal nations.<sup>115</sup> Or, that it merely created some "political space" for Aboriginal peoples in the Canadian federation, and a relatively *small* space.<sup>116</sup> At any rate, s. 35 has been a primary driver in negotiations between First Nations and the Crown as they work to reconcile the rights and interests of Aboriginal and settler societies.<sup>117</sup>

The duty to consult is significant within Aboriginal legal discourse because it offers a framework for structuring the relationship between First Nations and the state within the political space afforded through the constitutional protection of s.35 rights. According to *Sparrow*, consultation represents one of the means by which government is legally bound to justify its

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<sup>112</sup> Gerald Baier, "The Courts, the Division of Powers, and Dispute Resolution." In *Canadian Federalism : Performance, Effectiveness, and Legitimacy*, edited by Herman Bakvis and Grace Skogstad, Don Mills, Ont.: Oxford University Press, 2008, 27.

<sup>113</sup> *Ibid.*, 35.

<sup>114</sup> Brian Slattery, "The Generative Structure of Aboriginal Rights.(Canada)." *Supreme Court Law Review* 38 (Summer 2007): 595-628.

<sup>115</sup> Priscilla Kennedy, "The Duty to Consult: Constitutional Recognition of Treaty and Aboriginal Rights." *Law Now*, September 1, 2008, 1-5. <http://www.proquest.com.cyber.usask.ca/> (accessed December 26, 2008).

<sup>116</sup> Papillon, 298.

<sup>117</sup> Veronica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" *Journal of Environmental Law and Practice* 17, no.1 (Oct 2006), 29.

infringement of Aboriginal and treaty rights. While the notion of sovereignty is supposedly not at issue with the duty to consult, the legal necessity of consultation to justify Crown policy affecting Aboriginal and Treaty rights effectively accords a share of sovereign power to First Nations. The question of consultation then becomes: *how much* power rightfully must be shared with First Nations? Arguably, this question underlies most Aboriginal rights jurisprudence, but is indeed the primary preoccupation of duty to consult case law. Its principles speak directly to the question of how far the entrenched sovereignty of the provincial Crown over lands and resources (*Section 92, Constitution Act, 1867*) can intrude upon constitutionally protected Aboriginal and treaty rights (*Section 35, Constitution Act, 1982*) and vice versa. The concept of treaty federalism obviously purports to answer the question of power-sharing between Aboriginal and non-Aboriginal governments, but does the duty to consult jurisprudence advocate a similar relationship? I will argue in this chapter that, potentially, the principles do support a treaty federalist relationship between First Nations and the Crown.

An extensive overview of the history and evolution of the jurisprudence on the duty to consult would fill several pages. For the purposes of my research, this chapter focuses only on how the principles of the duty support a more equitable relationship between the Crown and First Nations on par with treaty federalism. First, the case law mandates consultation in virtually all instances involving a potential Aboriginal or treaty right, and sets out consultation as a requirement beginning with the pre-consultation stage. The consequence of this insistence is that a much larger share of decision-making power on lands and resources is afforded to First Nations than existed prior to the articulation of the duty or even prior to the emergence of recent cases such as *Haida Nation*<sup>118</sup>, *Taku River*<sup>119</sup> and *Mikisew*<sup>120</sup>. Second, the case law emphasizes negotiation and rights protection, effectively dismissing unilateral Crown or Aboriginal action. This insistence adds much-needed political legitimacy to the process of consultation, and ensures the concerns of First Nations are substantially addressed and incorporated in a proposed action. Third, the courts have called for a two-way, equal exchange of information between the parties. Overall, the continuous exchange of information and research, and the joint consideration of mitigation measures in favour of Aboriginal rights must be entrenched in the process. In short, it would seem the courts are calling for a type of ongoing intercultural dialogue between

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<sup>118</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida Nation*].

<sup>119</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2004 SCC 74 [*Taku River*].

<sup>120</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 [*Mikisew*].

Aboriginal peoples and the Crown that necessitates a treaty federalism framework for consultation. For a summary of the comparison of the concepts, please refer to Appendix A.

The obligation to consult is widely recognized as being hybrid in nature, containing both procedural and substantive elements.<sup>121</sup> The procedural aspects are rooted in administrative law and are concerned with fair procedure, while the substantive elements, which are derived from various sources, are concerned with the content of the duty and the right outcome. This distinction has been used to explain the confusion regarding the evolution of the case law as courts often have varied in their emphasis on procedure and substance.<sup>122</sup>

The emphasis, or lack thereof, given to the substance of the consultative process has a direct bearing on the relationship between Aboriginal people and the Crown. According to Devlin and Murphy, a procedural approach conceives of the duty as a “defence” that amounts to a view of the obligation as a mere safeguard against state action that does little to impose positive duties on the state.<sup>123</sup> The *Sparrow* test<sup>124</sup> is used as a case in point here, because it can and has been interpreted as a way for the Crown to demonstrate that its actions were in minimal

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<sup>121</sup> Thomas Isaac and Anthony Knox. “The Crown’s Duty to Consult Aboriginal People,” *Alberta Law Review* 41 (2003), 56; Sonia Lawrence and Patrick Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult,” *The Canadian Bar Review* 79, no. 252 (2000), 278; Veronica Potes, “The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?” *Journal of Environmental Law and Practice* 17, no.1 (Oct 2006), 35; Monique M. Passelac-Ross and Veronica Potes, (2007) “Crown Consultation with Aboriginal Peoples in Oil Sands Development: Is it Adequate, Is it Legal?” Calgary: *Canadian Institute of Resources Law*, University of Calgary. <http://cir.ca/files/cir/OP19AboriginalOilsands.pdf>. (accessed October 2008), 3.

<sup>122</sup> Lawrence, Sonia and Patrick Macklem. “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult,” *The Canadian Bar Review* 79, no. 252 (2000) , 254-255.

<sup>123</sup> Richard F. Devlin and Ronald Murphy, “Reconfiguration through Consultation? A Modest (Judicial) Proposal” in *Canada: The State of the Federation 2003 – Reconfiguring Aboriginal-State Relations*, ed. Michael Murphy, Published for the Institute of Intergovernmental Relations, School of Policy Studies. Montreal: McGill-Queen’s University Press, 2005: 271.

<sup>124</sup> When the nature of Section 35 rights were first considered by the court in *R v. Sparrow*, [1990] 1 S.C.R. 1113 [*Sparrow*], it was decided that constitutionally protected Aboriginal and Treaty rights were not absolute, or could be justifiably infringed according to the following test:

- (1) Is there an existing Aboriginal or treaty right?
- (2) Has there been a prima facie infringement of that right?
- (3) Can the infringement be justified?
  - (a) Is there a “compelling and substantial” objective?
  - (b) Were the Crown’s actions consistent with its fiduciary duty towards Aboriginal people?

The onus was placed on the Crown to establish a ‘valid legislative objective,’ and then “prove that the measures taken to meet that objective are consistent with its fiduciary duty towards the aboriginal people” bearing in mind that “the honour of the Crown is at stake in dealings with Aboriginal peoples.” The origins of the duty to accommodate are also found in *Sparrow*. While the court did not use the term “accommodation,” it did provide options for forms of accommodation, such as “minimizing the infringement and paying compensation.”

conformity with its fiduciary duty.<sup>125</sup> Additionally, subsequent case law has rendered the Crown requirement of a compelling and substantial objective virtually non-existent, because the parameters are so broad “as to encompass practically every sort of objective the Crown might ever have in mind.”<sup>126</sup>

Potes analyzes the procedural approach in terms of how it views the accompanying duty to accommodate. In her view, accommodation, which is supposed to be the substantive aspect of consultation, is perceived as nothing more than an obligation to “listen attentively.”<sup>127</sup> All decision-making authority remains vested with the Crown, albeit with an obligation to ‘balance’ Aboriginal and non-Aboriginal interests.<sup>128</sup> However, with the aforementioned broad range of valid legislative objectives open to the Crown, the ‘balance’ is shifted considerably in the Crown’s favour.<sup>129</sup> Essentially, under the procedural approach typified in *Sparrow*, some priority is afforded to Aboriginal interests, but the emphasis remains on minimal infringement rather than consulting with Aboriginal people.<sup>130</sup> Hence, consultation is actually more a ‘defence’ utilized by the Crown and industry to justifiably infringe Aboriginal and treaty rights. Overall, Aboriginal people are not afforded increased powers or any real alteration of their relationship with the Crown under this approach.<sup>131</sup> This minimalist, procedural approach often has been used as the guiding legal rationale for government consultation policy in Canada.

The polar opposite of a procedural approach to consultation does not exist, since focusing on the substance of consultation can involve a number of different approaches. What the alternatives do share in common though is, first and foremost, a universal rejection of the

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<sup>125</sup> Devlin and Murphy, 270-271, point out that the duty to consult is activated quite late in the test—only at stage 3b—lending credence to the nature of the duty as a mere safeguard.

<sup>126</sup> Gordon Christie, “Developing case law: the future of consultation and accommodation,” *University of British Columbia Law Review* 39.1 (March 2006): 151, cites *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, 66 BCLR (3d) 285, 153 D.L.R. (4<sup>th</sup>) [Delgamuukw] para 165 as evidence:

“In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with [reconciliation] and, in principle, can justify the infringement of [A]boriginal title.”

<sup>127</sup> Potes, 33.

<sup>128</sup> *Ibid.*, 34.

<sup>129</sup> *Ibid.*, 41.

<sup>130</sup> Heather L. Treacy, Campbell Tara L., and Dickson, Jamie D. The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development, *Alberta Law Review*, 44, (2006-2007): 583.

<sup>131</sup> *Ibid.*, 271.



“emaciated” conception of consultation as a mere procedural right.<sup>132</sup> Unlike the procedural approach, which bases the duty primarily on the principle of fair procedure according to administrative law, a more substantive approach recognizes that the duty originates from the assertion of an Aboriginal right, and so the legal sources of Aboriginal rights also form the basis of the rationale for consultation.<sup>133</sup> The first legal rumblings suggesting that an actual Aboriginal right to land may exist, arose in *Guerin*. The Court decided that First Nations did indeed possess some *sui generis* (unique/special) land ‘interests’ and that the surrender of such lands gave rise to a fiduciary duty on the Crown to deal with the lands for the benefit of the First Nation.<sup>134</sup> In addition, the finding in *Calder* that Aboriginal title pre-dates and exists independently of the Crown gave legal credence to and precipitated the negotiation of outstanding Aboriginal land claims across Canada.<sup>135</sup> Later, in *Sparrow*, Aboriginal interests in land were considered for the first time in light of their constitutional protection under s.35. The justification test outlined in *Sparrow* was not meant to be exhaustive, it was supposed to ensure that Crown infringement of Aboriginal rights was consistent with its fiduciary duty, and bore in mind that “the honour of the Crown is at stake in dealings with Aboriginal peoples.”<sup>136</sup> As well, the principle that s.35 “shapes, informs and curtails the free exercise of [Crown] legislative power” and “the purpose of reconciliation embodied in s.35” were also identified as applicable to the duty to consult and accommodate. The precise nature and origin of Aboriginal rights and the purpose of Aboriginal rights as per s.35 has been succinctly described by the Supreme Court in *Van der Peet*:

In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.

More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s.35(1) must

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<sup>132</sup> Devlin and Murphy, 277, The authors describe the procedural approach to consultation in such terms.

<sup>133</sup> *Ibid.*, 278.

<sup>134</sup> Christie, 143.

<sup>135</sup> John Borrows, "Uncertain Citizens: Aboriginal Peoples and the Supreme Court," *Canadian Bar Review* 80, no. 1/2 (March 2001): 15. Academic Search Complete, EBSCOhost (accessed June 23, 2009).

<sup>136</sup> Morellato, 8.

be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown<sup>137</sup>

The laws of procedure also apply to the duty. Although the duty to consult and accommodate may be a relatively new concept, its roots run fairly wide and deep, anchored in decades of Aboriginal rights jurisprudence.

Whether drawing upon one or all of the sources of the duty to consult and accommodate, the process of consultation under a more substantive approach differs significantly from its procedural-based interpretation. For instance, in 2000, Lawrence and Macklem argued that the proper substantive approach to the duty meant recognizing and affirming Aboriginal and treaty rights through joint negotiation, before any infringement occurs.<sup>138</sup> In their words: “What lower courts have failed to grasp is that the duty to consult in these cases requires the Crown to negotiate in good faith and make every reasonable effort to reach an agreement that delineates the rights of the parties to the territory in question.”<sup>139</sup> They argued that only this type of approach would fulfill the ultimate purpose of consultation—reconciliation.<sup>140</sup> The Supreme Court’s insistence on negotiation points to the fact that “the resolution of competing claims to territory and authority are complex, involving the consideration of political, economic, jurisdictional and remedial judgments,” which are best resolved through negotiation, not litigation.<sup>141</sup> In addition, negotiated rights protection promotes legitimacy and is consistent with a nation-to-nation relationship between the Crown and First Nations.<sup>142</sup> In effect, the authors are arguing that, in order for consultation to truly achieve reconciliation, a government-to-government relationship between First Nations and the Crown to jointly negotiate the substance of Aboriginal rights is necessary.

Fast forward almost a decade and a similar argument that the evolving case law is indeed moving towards a more substantive approach can be made. However, this argument derives its guidance from the unique relationship between Aboriginal peoples and the state, rather than from the process or outcome [e.g. reconciliation] of consultation.<sup>143</sup> Along this vein, consultation is viewed as a solidarity right, which means to ““give legal form to social relations of reliance and

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<sup>137</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*] at paras 30-31.

<sup>138</sup> Lawrence and Macklem, 254-55

<sup>139</sup> *Ibid.*, 271.

<sup>140</sup> *Ibid.*, 255.

<sup>141</sup> *Ibid.*, 258.

<sup>142</sup> *Ibid.*

<sup>143</sup> Devlin and Murphy, 279.

trust' by imposing an obligation on those who are in a position of power to 'take other people's situations and expectations into account.'"<sup>144</sup> In the case of Aboriginal people and the Crown, this means recognizing that their special, fiduciary relationship requires "the state to develop concrete processes that respond to, incorporate, and accommodate the social, political, and economic needs and rights of Aboriginal people."<sup>145</sup> So, in the end, the consultation process would involve the consideration of both process and outcome. It is important to note that, similar to Lawrence and Macklem, the author's emphasis on incorporating the interests of Aboriginal peoples likely will involve the 'mechanism' of negotiation and a focus on rights protection. According to Devlin and Murphy, this conception of consultation, gives rise to a "functionalist" Aboriginal-state relationship that occupies the middle ground between Aboriginal idealism and Crown unilateralism.

The duty to consult and accommodate now has emerged from the shadows of Aboriginal rights discourse to become the main attraction in three relatively recent Supreme Court decisions, *Haida Nation*, *Taku River* and *Mikisew*. In all of these cases, it is clear that the Court is continuing to call for a consultation process based on negotiation that emphasizes rights protection. First, consider the Supreme Court's answers to the following outstanding consultation questions: Does the duty apply to third parties, namely industry? Does the duty apply where an Aboriginal right has yet to be proven in a courtroom? In answer to the first question, the Court ruled in *Haida Nation* that the duty can only be properly discharged by the Crown, which also includes the provincial Crown.<sup>146</sup> However, the Crown may delegate certain procedural aspects of consultation to industry, but is ultimately responsible for monitoring the process.<sup>147</sup> The key element to note in this principle, which was later clarified in *Mikisew* is that the onus is on the Crown, and only the Crown, to demonstrate that it has provided for meaningful consultation, while the First Nation need not prove that the Crown failed to consult adequately.

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<sup>144</sup> *Ibid.*, 278.

<sup>145</sup> *Ibid.*, 287.

<sup>146</sup> "The duty to consult and accommodate...flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. ...The Crown alone remains legally responsible for the consequences of its actions and interactions of third parties, that affect Aboriginal interests." *Haida Nation*, *supra* note 113 at para 53, cited by Morellato, 30.

<sup>147</sup> *Haida Nation*, *supra* note 113 at para 10: "The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations."

This rather onerous onus upon the Crown ensures that the Crown engage in consultation in a meaningful way.<sup>148</sup>

In regard to the second question, the Court has set the trigger for consultation so low that the prevailing wisdom now is that there is always a duty to consult where Aboriginal and treaty rights are concerned.<sup>149</sup> Specifically, the duty is triggered when “the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.”<sup>150</sup> Since consultation must be conducted when action is *contemplated* that could *potentially* affect an Aboriginal right, and may be based on *real* or *constructed* knowledge, the Court has clearly indicated that the duty applies in cases of unproven rights and also that consultation must take place as early as possible, such as in the strategic-level planning phase.<sup>151</sup> This decision soundly rejects the Crown’s ‘only after’ argument, which had been employed with success in previous cases.<sup>152</sup> The Crown had reasoned that the duty applies ‘only after’ an Aboriginal right has been “definitively defined and proven,” because before that time “it could not know what rights were there to be respected.”<sup>153</sup> In addition, the decision rejects the other Crown ‘only after’ policy, namely that it will consult with First Nations *only after* the major strategic decisions are made. The Court reasoned that if consultation occurs only at the operational level, well after the conduct has been *contemplated*, then it “would have little effect and would be less meaningful.”<sup>154</sup> The Court clearly indicated that the “Crown’s traditional strategy of hardball legalism” is unacceptable, and only “good faith” consultation based on “engagement, not denial or deference” will pass legal muster.<sup>155</sup>

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<sup>148</sup> Devlin and Murphy, 282.

<sup>149</sup> Passelac-Ross and Potes, 4.

<sup>150</sup> *Haida Nation*, *supra* note 113 at para 35.

<sup>151</sup> Treacy et al., 593-595.

<sup>152</sup> *Haida Nation*, *supra* note 113 at para 26-27:

Is the Crown under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants? The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof...To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

<sup>153</sup> Christie, 158.

<sup>154</sup> Morellato, 26.

<sup>155</sup> Devlin and Murphy, 277.

The answers to both questions are grounded in the *honour of the Crown*. In *Sparrow*, such honour was established as the “fundamental principle of the interpretation of aboriginal rights.”<sup>156</sup> Specifically, the “honour of the Crown obliges the Crown to respect Aboriginal rights, which in turn requires it to negotiate with Aboriginal peoples with a view to identifying those rights. It also obliges the Crown to consult with Aboriginal peoples in all cases where its activities affect their asserted rights and, where appropriate, to accommodate these rights by adjusting the activities.”<sup>157</sup> In situations where Aboriginal rights are claimed, but not yet proven, the fiduciary duty does not apply, but the Court has held that the honour of the Crown does. With regard to third parties, since the honour of the Crown cannot be delegated to another party, the Crown is the sole legal bearer of the duty. Overall, the impact of the ‘honour’ doctrine is that “even potential rights must be “determined, recognized and respected” through a process of consultation[...].”<sup>158</sup>

In contrast to its restrictive principles concerning the *when* of consultation, the *how* and *what* of the duty remain quite flexible. The Court affirmed the sliding scale of consultation set out in *Delgamuukw*, whereby consultation ranges in nature and scope according to the degree of impact on the Aboriginal or treaty right and the nature of the right.<sup>159</sup> However, since in the case of unproven rights, the duty is rooted in the honour of the Crown, rather than in fiduciary doctrine, the standard of consultation is downgraded,<sup>160</sup> with the range of possibilities for claims not yet established in court or through negotiations less obligating.<sup>161</sup> The requirement of consent, which is at the top of the spectrum in cases concerning established Aboriginal title, is

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<sup>156</sup> Slattery, Brian, “Aboriginal Rights and the Honour of the Crown,” *Supreme Court Law Review*, v.29 S.C.L.R. (2d) (2005), 433.

<sup>157</sup> *Ibid.*, 436.

<sup>158</sup> Devlin and Murphy, 288.

<sup>159</sup> *Delgamuukw*, *supra* note 121 at para 168.

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases 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.

<sup>160</sup> Christie, 159.

<sup>161</sup> “In relation to claims that are *not yet established* in court or through negotiations the array ranges from a bare obligation to “...give notice, disclose information, and discuss any issues raised in response to the notice...” up to an obligation that “...may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision.” (Christie citing *Haida*, 159.)

noticeably removed from the range of possibilities for unproven rights.<sup>162</sup> This lessening of the obligation of consultation may seem to lessen the duty owed by the Crown to First Nations, therefore allowing for decisions more consistent with Crown interests, and less negotiating power for First Nations.

However, the nature of the process for assessing the level of consultation for unestablished rights seems to necessitate increased and more meaningful negotiation between a First Nation and the Crown. In order to assess the type of consultation that must be engaged in with respect to unestablished rights, the Crown must assess the *prima facie* evidence of rights and titles. As with the conventional sliding scale, “the stronger the evidence, and the more significant the potential impact is on such rights and title, the greater the depth and scope of the consultation efforts.”<sup>163</sup> In its assessment, the Crown must work closely with the First Nation to determine: “what point along the Court-created spectrum of consultation the First Nation will be engaged” and “what type of consultation activity will be adequate to satisfy the duty?”<sup>164</sup> For this reason, the Crown has placed a reciprocal duty on the First Nation at this juncture to “outline their claims with clarity, focusing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements.”<sup>165</sup> In addition, the Court has directed that the First Nation must negotiate in good faith and “not frustrate the Crown’s reasonable good faith attempts” or “take unreasonable positions to thwart government from making decisions.”<sup>166</sup> In order for the Crown to make its initial assessment, it requires significant back and forth communication with the First Nation, and it has a vested interest in making the most accurate determination possible, because if the original assessment is later contested through litigation and is found to be incorrect as a result of its actions or lack thereof, then the Crown is held responsible.<sup>167</sup> Also, in cases where the first part of the assessment is wrong, the Crown is held to a higher standard—of correctness—as compared to instances where its initial assessment may be accurate but its subsequent consultation or accommodating measures are found lacking; in this instance, it will

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<sup>162</sup> Tara Marsden, “From the land to the Supreme Court, and back again: Defining meaningful consultation with First Nations in northern British Columbia,” (master’s thesis, University of Northern British Columbia, 2006) (In Dissertations & Theses: Full Text [database on-line]; available from <http://www.proquest.com.cyber.usask.ca> (publication number AAT MR28387; accessed April 9, 2009), citing *Haida*, para 48.

<sup>163</sup> *Ibid.*, 49.

<sup>164</sup> *Ibid.*, 50.

<sup>165</sup> *Haida Nation*, *supra* note 113 at para 36.

<sup>166</sup> *Ibid.*, para 42.

<sup>167</sup> Marsden, 50.

be held only to a standard of reasonableness.<sup>168</sup> In addition, the wrong determination on the strength of the claimed right, may mean that, once the right *is* proven, then the consultation process will be deemed inadequate. To aid in the negotiations, the Court has also suggested that the assessment be conducted by an independent tribunal rather than a government official.<sup>169</sup> If the Crown's consultation is found to go beyond or be consistent with the legal requirements set by the Court, *once the right is proven*, then there will be no need to re-initiate the entire consultation process or engage in further litigation, which in the long run will be less expensive and detrimental to Aboriginal-state relations. Despite the strong incentives for meaningful negotiation, the decision in *Taku River*<sup>170</sup> demonstrates that the appropriateness of a consultation process ultimately will not be dependent upon the capacity of negotiations to reach agreement, but must be determined on a case by case basis.<sup>171</sup>

In *Mikisew*, the Supreme Court decided that the two-part assessment not only applies to treaty situations, but provided additional factors for the Crown to consider if it is to negotiate meaningfully with a treaty First Nation. These include: “the specificity of the treaty promises” and “the history of dealings between the Crown and the First Nation.”<sup>172</sup> In the words of the Court, the existing treaty was to be utilized to ““explain the relations” to “govern future interaction” between the Crown and the Mikisew people.”<sup>173</sup> The Court rejects the view of the treaty as “a finished land use blueprint.”<sup>174</sup> Instead, the Court regards the negotiation of the numbered Treaty 8 as “the first step in a long journey that is unlikely to end any time soon.” Such a perspective “underscores” the honour of the Crown and the “ongoing” purpose of reconciliation.<sup>175</sup> The *Mikisew* case is also instructive as to what the Court will accept for minimum consultation, since the facts of the case dealt with a relatively minor infringement on *surrendered* lands which were expressly subject to the ‘taking up’ clause of the treaty. The requirements of minimal consultation must include tailored engagement with the First Nation rather than assuming that Aboriginal input will be included in general public consultation; the provision of all relevant information, not merely ‘giving notice’ of the Crown’s intended action;

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<sup>168</sup> Ibid.

<sup>169</sup> Marsden citing *Haida Nation*, *supra* note 113 at para 47.

<sup>170</sup> *Taku river Tlingit First Nation v. British Columbia (Project Assessment Director)* (2004) S.C.R. 29146.

<sup>171</sup> The court stated “it is impossible...to provide a prospective checklist of the level of consultation required.” *Taku River*, *supra* note 114 at para 29146, cited by Marsden, 46.

<sup>172</sup> Morellato, 39.

<sup>173</sup> Ibid., 40.

<sup>174</sup> *Mikisew*, *supra* note 115 at para 27 cited by Morellato, 40.

<sup>175</sup> Morellato, 40.

a solicitation of and response to the First Nation’s concerns in order to address and minimize any adverse impacts on their treaty rights; and finally, it must consider the First Nation’s interests and how its actions would affect these interests.<sup>176</sup> Overall, the Court concluded in *Mikisew* that “the Crown has failed to demonstrate an “intention of substantially addressing [Aboriginal] concerns...through a meaningful process of consultation.”<sup>177</sup>

To a certain extent, the courts have also mandated a pre-consultation stage of negotiation, in keeping with the overall purpose of reconciliation. The need for pre-consultation was explicitly stated in *Gitksan*: “[th]e first step of a consultation process is to discuss the process itself.”<sup>178</sup> Additionally, as per *Mikisew*, the Crown is obligated to “engage with the First Nation through a *distinct* consultation process.” Granted, this distinctiveness may be incorporated into a general consultation process, such as an environmental review, as was the case in *Taku River*. However, post-*Haida Nation*, *Taku River* and *Mikisew*, the British Columbia provincial court in *Huu-Ay-Aht*<sup>179</sup> has gone one step further by mandating that the consultation process not focus on procedure to the detriment of the substance or facts of a given situation.<sup>180</sup> In essence, a one-size-fits-all consultation process, such as the forest and range agreements implemented in BC—which became the source of the dispute in *Huu-Ay-Ah*—may not be acceptable for every First

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<sup>176</sup> *Ibid.*, 41-42: “This decision is instructive in that it articulates the following **minimum** standard for accommodating treaty rights:

- (1) The Crown must provide notice of the proposed infringement and engage directly with the treaty nation in question;
- (2) The Crown has a duty to disclose relevant information in its possession regarding the proposed development or decision;
- (3) The Crown is under an obligation to inform itself of the impact of a proposed project on the treaty nation in question;
- (4) The Crown must communicate its findings to the affected treaty nation;
- (5) The Crown must, in good faith, attempt to substantially address the concerns of the treaty nation;
- (6) The Crown cannot act unilaterally;
- (7) Administrative inconvenience does not excuse a lack of meaningful consultation;
- (8) The Crown must solicit and listen carefully to the expressed concerns and attempt to minimize the adverse impact on the treaty interests; and
- (9) The concerns of the treaty nation must be seriously considered by the Crown and “whenever possible, demonstrably integrated into the proposed plan of action.”

Logically, if a high standard to consult were to be invoked, the Crown obligations would be more onerous than those delineated above.”

<sup>177</sup> Morellato, 42.

<sup>178</sup> Passelac-Ross and Potes cite Tysoe J. in *Gitksan First Nation v. British Columbia (Minister of Forests)*, [2003] 2 C.N.L.R. [2004] B.C.J. No. 2714, B.C.S.C. 1734 at para 8.

<sup>179</sup> *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, [2005] 3 C.N.B.L.R. 74 at 120 [*Huu-Ay-Aht*]

<sup>180</sup> Passelac-Ross and Potes, 20.



Nation, as they clearly were not in this situation.<sup>181</sup> In *Huu-Ay-Aht*, the court ruled that the Crown must design its consultation processes in consideration of potentially affected Aboriginal interests.”<sup>182</sup> This same notion was reinforced in *Hupacasath FN*<sup>183</sup>, where the court decided that the consultation process must take into account “the particular concerns of the potentially affected Aboriginal nation.”<sup>184</sup> The implications of these decisions is that although pre-consultation *per se* may not be explicitly mandated by the courts, it will be “impossible” for the Crown to design a consultation process that will “after the fact, satisfy a court that the Crown had put in place a reasonable process for consulting about, and possibly accommodating, potentially affected Aboriginal rights and title without consulting with the potentially affected Aboriginal nation(s) beforehand.”<sup>185</sup> The fact that even the design of consultation cannot take place without input from the potentially affected First Nations is a definite improvement in relations between the two, as it mandates negotiation at the earliest point possible in the process and on terms acceptable to the parties.

Perhaps the most important aspect of consultation is its primary substantive component, the duty to accommodate. It speaks directly to the question of how substantive or sensitive to the rights being claimed the process must be. However, its nature and scope have yet to be definitively addressed by the courts. The outstanding questions are: *when* is the Crown’s duty to accommodate triggered; *what* accommodating measures will be required of the Crown to fulfill its duty;<sup>186</sup> and *how* is the level of accommodation to be determined. If the Court opts to focus on the substance of the duty, then probable answers to these questions can be formulated, which will have major impacts on the Aboriginal-state relationship.

Thus far, it would seem that the trigger for accommodation has been set relatively high. The duty does not come into play until the consultation process indicates that changes to the proposed Crown action are necessary. Thus, accommodation represents “the responsiveness owed by the Crown to the Aboriginal concerns identified during the consultation process.” Such a concept of the duty has led the Court to conclude in *Haida Nation*, and affirm in *Mikisew*, that

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<sup>181</sup> *Ibid.*, 21

<sup>182</sup> Christie, 163.

<sup>183</sup> *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.*, 2000 BCSC 1712 at 126-128 [*Hupacasath*].

<sup>184</sup> *Ibid.*, 164.

<sup>185</sup> *Ibid.*

<sup>186</sup> Treacy et al., 572.

accommodation may not be necessary in all cases, only “if appropriate.”<sup>187</sup> However, Passelac-Ross and Potes point out that accommodation will be deemed unnecessary only for instances when the Aboriginal group is completely satisfied with the proposed action. In their view, this is unlikely to happen, as “[m]ore often than not, legitimate concerns will arise that require changes to or even the dismissal of the whole proposal. The correct mindset of the Crown in any consultation process should be to expect that its duty to accommodate will arise in most situations.”<sup>188</sup> Thus, one may construe the duty to accommodate as having a low trigger, on par with the duty to consult. The fact that accommodation will be mandated in every instance of consultation further removes the future possibility that the Crown will be able to implement unilateral action, based upon meeting minimal procedural requirements, rather than in consideration of how its actions will affect the rights in question.

Although the courts have provided some guidance on the content of accommodation, it ultimately will vary with the circumstances.<sup>189</sup> Though the courts have not explicitly articulated a sliding scale of accommodation, one can be constructed from the principles already set out.<sup>190</sup> Just as with the duty to consult, the resulting substantive outcome or accommodation owed depends on whether a right is established or not. The court in *Delgamuukw* stated that at the high-end of accommodation, in cases of established Aboriginal title, Aboriginal consent may be required. However, the Courts have stated explicitly and repeatedly that Aboriginal people do not hold a veto power over proposed Crown action.<sup>191</sup> Instead, in the absence of agreement, the Crown is called upon to ‘balance interests.’<sup>192</sup> For all established rights, the minimum considerations that must guide accommodation, based on a purposive reading of *Sparrow* are as follows: “to cause the least infringement possible, to give priority to Aboriginal interests, to avoid irreparable damage, to compensate, to recognize the Aboriginal preferred means of exercising their rights, etc. And to recognize that only demonstrably compelling and substantial

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<sup>187</sup> *Haida Nation*, *supra* note 113, cited by Potes, 31.

<sup>188</sup> Passelac-Ross and Potes, 17.

<sup>189</sup> Morellato, 29.

<sup>190</sup> Passelac-Ross and Potes, 16.

<sup>191</sup> Morellato, 29.

<sup>192</sup> *Taku River*, *supra* note 114 at para 2, cited by Potes, 33:

Where the accommodation is meaningful, there is no ultimate duty to reach agreement. Accommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with competing societal concerns. Compromise is inherent to the reconciliation process.

objectives can trump Aboriginal or treaty rights.”<sup>193</sup> In addition, the Court in *Haida Nation* clearly describes the “*preservation* of the Aboriginal interest as the guiding principle of the process of consultation.”<sup>194</sup> Essentially, as the Court in *Mikisew* ruled, the minimum accommodation required is the demonstrable incorporation of Aboriginal concerns into the proposed Crown action.<sup>195</sup> Anything less constitutes simply “blowing off steam”<sup>196</sup> or “participating in participation.”

The accommodation owed in cases of unproven rights is supposedly less than the case with established rights, but upon closer examination it may be on par. In cases of unproven rights, the option of consent is removed from the range of possible accommodations, just as is the case with the duty to consult. In addition, accommodation appears to require a process based on the lesser standard of ‘balancing interests,’ as opposed to substantially addressing the concerns of Aboriginal peoples.<sup>197</sup> However, Christie points out that before any ‘balancing’ occurs, the principles guiding proven rights, e.g. *least infringement possible, accordance of priority, etc.*, may also be required in the case of unproven rights, in instances “where a strong prima facie case for the asserted rights has been made out, and Crown activity seriously threatens the asserted rights.”<sup>198</sup> This will be necessary in order to find the “satisfactory interim solution,” which is the ultimate aim of accommodation in cases of unproven rights, as stated by the Court in *Haida Nation*.<sup>199</sup> In addition, Potes argues that if the Crown is going to truly effect reconciliation, it must first always address Aboriginal concerns by “incorporating in a substantive way the rights, interests and concerns of the beneficiaries,” before proceeding to other interests. Potes defends her argument for greater rights protection on several grounds. First, “[t]he interest of the Crown in furthering its own or third parties’ economic interests cannot

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<sup>193</sup> *Sparrow* test cited by Passelac-Ross and Potes, 18.

<sup>194</sup> Passelac-Ross and Potes, 18.

<sup>195</sup> In *Mikisew*, *supra* note 115 at para 67, cited by Morellato, 71. The Court concluded that, in approving the proposed road, the Crown had failed to demonstrate an “intention of substantially addressing [Aboriginal] concerns... through a meaningful process of consultation.”

<sup>196</sup> *Mikisew*, *supra* note 115 para 54, cited by Passelac-Ross and Potes, 17.

<sup>197</sup> *Haida Nation*, *supra* note 113 at para 45 cited by Morellato, 29:

The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. **Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.** (emphasis added)

<sup>198</sup> Christie, 177.

<sup>199</sup> *Ibid.*

override its obligation to protect constitutional rights”<sup>200</sup>; second, although accommodation may not be translated as a duty to agree, it must be regarded as ‘inclusive’ by Aboriginal people if it is to be workable;<sup>201</sup> and finally, if the concerns of Aboriginal people are substantially incorporated and addressed, then the process of consultation has the potential to become a constitutional mechanism that “may capture intercultural allegiance.”<sup>202</sup> Thus, the standard of accommodation can and should be set “sufficiently high to protect rights.”<sup>203</sup> Only in this way can reconciliation truly be achieved.

Additional analysis of *Taku River* and *Haida Nation* reaffirms that the courts now are insisting on negotiated settlements. Slattery argues that with these cases, s. 35 is recognized as a “generative constitutional order, which “mandates the Crown to negotiate with Aboriginal peoples for the recognition of their rights in a contemporary form that balances their needs with the interests of the broader society.”<sup>204</sup> Similarly, Tzimas argues that these decisions “urge everyone to work together within the existing constitutional structure to find common ground and common solutions.”<sup>205</sup> Even analysis of the case law that derives its *raison d’être* from administrative law recommends that government consultation guidelines “are not dependent upon minimalist legal interpretations of the case law regarding consultation.”<sup>206</sup> Rather, they advocate that governments consult “broadly and thoroughly with Aboriginal people,” since in the long run it is less expensive than litigation and will result in greater certainty for industry.<sup>207</sup> They also recognize that even a procedural reading of the case law necessitates that consultation not only be “fair”, but that a “fair outcome” must also result from the process.<sup>208</sup>

Slattery also takes the rulings in *Taku River* and *Haida Nation* one step further than other legal scholars and practitioners, arguing that the Supreme Court has introduced a new function for s. 35. Originally, s. 35 served only as the “basis for the judicial identification and protection of historical Aboriginal rights, through the application of general constitutional principles.”<sup>209</sup> In

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<sup>200</sup> Potes, 43.

<sup>201</sup> Potes, 44.

<sup>202</sup> Ibid. quoting Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press. 2001).

<sup>203</sup> Potes, 28.

<sup>204</sup> Slattery, 2005, 436.

<sup>205</sup> Tzimas, E. Ria. “Haida Nation and Taku River: A Commentary on Aboriginal Consultation and Reconciliation,” *Supreme Court Law Review*, v.29 S.C.L.R. (2d) (2005), 462.

<sup>206</sup> Knox and Isaac, 75.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid., 68.

<sup>209</sup> Ibid., 445.

Slattery's opinion, today, it "serves as a springboard for negotiations leading to just settlements, in which Aboriginal rights are recognized in a modern form and reconciled with the interests of the larger society."<sup>210</sup> The primary result of this paradigmatic change is a shift in viewing Aboriginal rights as static to dynamic.<sup>211</sup> The dynamic view of Aboriginal rights "involves the active participation of indigenous peoples and the Crown in the identification of Aboriginal rights."<sup>212</sup> Historical rights are static, based on "the application of general legal criteria to historical circumstances."<sup>213</sup> Slattery does not perceive a major problem with reconciling the recognition of modern Aboriginal rights with larger societal interests, because he views the recent court decisions as representing a major paradigm shift in favour of Aboriginal rights. In his view, the new paradigm of the Court views Crown sovereignty as simply "asserted" and being "de facto," which means it is legally deficient "until there has been a just settlement of their [Aboriginal] rights through negotiated treaties."<sup>214</sup> In addition, since Aboriginal rights no longer must be proven to mandate consultation and accommodation; and must instead be negotiated with Aboriginal people, or through the achievement of "a just settlement of Aboriginal claims by negotiation and treaty,"<sup>215</sup> the latest developments on consultation ring in a new era of Aboriginal rights discourse.

Although Tzimas recognizes that the Supreme Court in *Haida Nation and Taku River* emphasize reconciliation through negotiation, she believes that such a goal is unattainable for practical reasons. Unlike Slattery, she does not believe that a major paradigm shift has occurred. She argues that the Court has ruled that "the diversity of interests, Aboriginal and non-Aboriginal alike can be reconciled within the unity of the principles of federalism encompassed by the Constitution."<sup>216</sup> To determine whether reconciliation is a practical goal, she first looks at how the concept was applied to Aboriginal discourse in 1996 with *R. v. Van der Peet* and in *Delgamuukw*, and whether the concept, as articulated in the *Secession Reference* case is applicable to Aboriginal issues.<sup>217</sup> She concludes that according to the model of reconciliation set out by the courts, it's implied that the:

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<sup>210</sup> Ibid.

<sup>211</sup> Slattery, 434.

<sup>212</sup> Slattery, 445.

<sup>213</sup> Ibid., 440.

<sup>214</sup> Ibid., 438.

<sup>215</sup> Ibid., 440.

<sup>216</sup> Tzimas, 463.

<sup>217</sup> Ibid., 481.

“Aboriginal group advancing an assertion [of rights] and the relevant government decision makers, in conjunction in many cases with third party proponents, can evaluate the strength and credibility of the assertion, reach agreement on the scope and content of the assertion, and then fashion interim arrangements that presumably minimize the impact on the asserted rights, but in most instances, enable the particular activity to proceed.”<sup>218</sup>

Tzimas then goes on to outline the practical problems with this prescription, based on the current federalist arrangement. First, she argues that this view of reconciliation presupposes that Aboriginal groups and government have equal bargaining power, when in fact, a number of issues tip the scales in government’s favour. Even if the Honour of the Crown necessitates the government provision of resources for Aboriginal people to consult effectively, time would still be a barrier. She writes, “Empowerment, capacity building and respect are the kinds of elements that are essential to the success of reconciliation. That however cannot occur overnight.”<sup>219</sup> In addition, Tzimas concludes that the “timelines for reconciliation are out of step with timelines for authorizing development.” Lastly, Tzimas identifies that since consultation is now based mostly on unproven rights, once a right is proven or not in court, the victor can use this leverage to either demand less or more accommodating measures.<sup>220</sup> In her view, such a development may make consultation a long, drawn out and contentious affair.

## Summary

In sum, the ultimate purpose of consultation is to reconcile Aboriginal and settler societies. It is rooted in the constitutional protection of Aboriginal and treaty rights, which is derived from the special and unique historical and political relationship between Aboriginal people and the Crown in Canada. This duty is both procedural and substantive—concerned with both the process and outcome. The proper approach to the duty to consult and accommodate arguably entails an emphasis on negotiation over litigation and on the recognition and affirmation of Aboriginal and treaty rights rather than minimal infringement. The nature of the duty is not negative, meaning it is not meant simply to act as a minimal check and balance on unilateral Crown action, but represents a positive duty on the Crown. The consultation process must be jointly developed and implemented, as any unilateral Crown action is inconsistent with

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<sup>218</sup> Ibid.

<sup>219</sup> Ibid., 482.

<sup>220</sup> Ibid., 482-483.

the process of substantially and demonstrably incorporating the concerns of Aboriginal people. In some instances, where Aboriginal title is established, the consent of Aboriginal people may even be required, but Aboriginal people cannot unilaterally veto the process or outcome either.

In addition, if Slattery is to be believed, the function of s.35 as mandated by the courts in *Haida Nation* and *Taku River* indicates a paradigm shift that addresses many of the overarching difficulties with Aboriginal rights discourse. These include the notion of absolute Crown sovereignty, proof of Aboriginal rights, and the inability of Aboriginal rights to evolve. However, the practical problems outlined by Tzimas remain. It appears that these practical problems emanate from the current federalist relationship between the Crown and Aboriginal people—essentially, the Crown has more resources and authority to assert its will. This continuing power imbalance will undermine the process of reconciliation, which requires, at a minimum, a joint process for assessing the strength of a claimed right. However, Tzimas' criticism of the timing of consultation that leads to reconciliation need only be a barrier if political expediency is lacking.

In fact, the problem with the dictates of the court, ironically, seems to be that it conceives of a more equal relationship between the Crown and First Nations, than that which exists in practice. The practical problems with consultation and the purpose of reconciliation outlined by Tzimas would actually be alleviated if the Crown were willing to concede more authority to First Nations in decision-making on lands and resources and provide them with the funding to contribute equally to the process. If in deciding the strength of a claimed right, a more equitable process is instituted that includes the creation of an independent, impartial tribunal to resolve disputes, then reconciliation may actually be achieved. If the process focuses on negotiation where agreement between the parties is achieved, then the likelihood of either party seeking litigation, after the fact, would decrease significantly. The requirement of funding for adequate consultation remains an outstanding issue in duty to consult and accommodate jurisprudence; however, the provision of funding for First Nation participation in *Taku River* constituted one of the criteria on which the Court decided that the consultation process had been adequate.

At first glance, it may appear that two key inconsistencies exist between treaty federalism and the case law on the duty to consult and accommodate. First, no clearly defined area of autonomous jurisdiction is outlined for First Nations, where they may decide and regulate land and resources according to their own laws and customs. However, the entire jurisdiction of lands

and resources can conceivably be regarded as an area of concurrent jurisdiction where the autonomy of both nations must be redefined in relation to the other to create an innovative transnational covenant or unity. The substantial incorporation of First Nation interests coupled with the emphasis on rights protection should go a long way towards promoting a unified decision based on the values, interests and rights of both parties. As suggested by the Supreme Court, and demonstrated through the historical practice of treaty federalism itself, where unity of purpose fails to be achieved, then an independent council can be the final arbiter, and not the courts.

The second issue concerns the lack of Aboriginal consent to the entire process. Treaty federalism is dependent upon the mutual consent of the parties in order to work. The problem is that the Canadian common law only entertains the possibility of Aboriginal consent in instances of established Aboriginal title, and even then, not necessarily in all cases. However, this issue is overcome to a certain extent by the requirements for consultation and accommodation that mandate a focus on incorporating the rights and interests of Aboriginal peoples and demonstrating this incorporation. As well, the other principles that mandate minimal infringement, priority for Aboriginal interests, avoidance of irreparable damage, and recognition of the Aboriginal preferred means of exercising their rights, etc, not only during the process, but in its outcome, virtually amount to Aboriginal consent in practice. As Christie points out, “While Aboriginal nations will not be able to use the duties to consult and accommodate as veto-power over government decisions, the requirement that the Crown have its mind directed toward maintaining the core of the interests being asserted (so that future negotiations have things to serve as the subject matter of negotiations) should have the effect of turning the Crown into a more eager collaborator in negotiations.”<sup>221</sup>

However, the fact remains that the duty to consult and accommodate is situated within a larger Aboriginal rights discourse, which is almost exclusively dominated by non-Aboriginal notions of law and justice. Under treaty federalism, even in areas of concurrent jurisdiction, no single nation can impose its autonomy on the other or the land. However, as Slattery attests, the duty to consult and accommodate appears to be a pragmatic way to sweep away the colonialist mistakes of Canadian jurisprudence and politics, without having to entirely rebuild the foundations of Canadian federalism. To reiterate, in *Haida Nation and Taku River*, the purpose

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<sup>221</sup> Christie, 184.



of section 35 takes on a new role, becoming ‘a springboard for negotiations leading to just settlements, in which Aboriginal rights are recognized in a modern form and reconciled with the interests of the larger society.’ Such a purpose holds the promise of checking the inequities of current law and politics that elevate and maintain the sole authority of the Crown—the notion of absolute Crown sovereignty, the legal requirements for proof of Aboriginal rights, and the inability of Aboriginal rights to evolve. However, if consultation is to truly serve the purpose outlined by Slattery and achieve reconciliation, it also entails entertaining the possibility that Aboriginal law, customs and traditions must also come to bear on the process. This means recognizing that reconciliation is not simply a matter of “reconciling Aboriginal peoples to Canada,” rather it means “reconciling Canada to the existence of different social, cultural, and political indigenous entities within the state.”<sup>222</sup> By unifying their actions and melding their own unique values and objectives into the process of consultation, better land and resource decision-making will occur.

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<sup>222</sup> Borrows, 2000, 634.

## Chapter 4: The New Relationship Policy in British Columbia

A roadmap for navigating from the vision of treaty federalism to its embodiment in policy is useful if Saskatchewan is to realize its own ideal of a new relationship. This next chapter looks closer at the policy in BC to determine how this jurisdiction has translated the vision of treaty federalism into reality. The focus is on determining how power is shared between the province and First Nations on lands and natural resources, consistent with a treaty federalism relationship. Although policy in this province does not constitute treaty federalism in its purest form, this jurisdiction seems to have made great strides in moving towards this destination. Granted, its path has not been without its twists, turns and outright dead ends. British Columbia is experiencing a myriad of obstacles in its attempts to move towards a *de facto* form of treaty federalism that contemplates such a relationship in the virtual absence of any modern or historical treaty. However, much can be learned from the efforts in BC, successful or not. The most important aspect of this jurisdiction to keep in mind, however, is that it continues to move towards a treaty-federal arrangement with First Nations, despite its many challenges and obstacles.

### *British Columbia*

The new relationship between the government of British Columbia and First Nations began to unfold with the recognition that Aboriginal title existed prior to Confederation, independent of Crown sovereignty. The ‘old’ relationship with First Nations, which was characterized by the BC government’s denial of Aboriginal rights and title was successfully altered through First Nations opposition, primarily through successful legal action opposing resource development.<sup>223</sup> In order to secure ‘certainty’ of resource development, the government of BC became obligated to negotiate with First Nations. According to Tennant, the realization that “the province’s refusal to negotiate was no longer politically and legally defensible” occurred in 1989.<sup>224</sup> In 1990, the treaty-making process in BC laid the groundwork for a new relationship by effectively establishing new processes for government-to-government

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<sup>223</sup> Richard T. Price, "The British Columbia Treaty Process: An Evolving Institution." *Native Studies Review* 18, no. 1 (July 2009): 139-167. Academic Search Complete, EBSCOhost (accessed June 23, 2009), 144.

<sup>224</sup> Tennant, 237.

negotiations and mechanisms concerning lands and resources. As part of this new process, the BC Claims Task Force was established to address the issue of Aboriginal title. The three-party task force, composed of representatives from the First Nations Congress, the provincial and federal governments, issued a series of historic recommendations that were to guide treaty-making. Most notably, the task force called for “a new relationship based on mutual trust, respect, and understanding—through political negotiations.”<sup>225</sup> In 1993, a new protocol agreement was signed by BC and the First Nations Summit, setting out a government-to-government relationship recognizing Aboriginal title and the inherent self-government rights of First Nations and mandating regular meetings over a three-year period.<sup>226</sup>

In 2005, *The New Relationship* document drafted by BC First Nations and the provincial government was signed in March 2005, officially articulating the principles and mechanisms that were to guide Aboriginal–state relations in the province.<sup>227</sup>

According to the document, the new relationship signifies an effort to balance First Nations and provincial Crown autonomy and interdependence. Its three-paragraph vision statement begins with the oft-quoted acknowledgement from *Delgamuukw* that “We are all here to stay.”<sup>228</sup> The rest of the statement sets out how this is going to occur. It commits to a new government-to-government relationship that respects, recognizes and accommodates Aboriginal title and rights, but also offers respect for the respective laws and responsibilities of both parties. Then, it recognizes *both* Aboriginal and Crown title and jurisdiction, and promises to work towards their reconciliation. The next paragraph stipulates that both parties “agree to establish processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing,” based on the existence of Aboriginal title.<sup>229</sup> The jurisdictional aspect of Aboriginal title is then defined as the “inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions.”<sup>230</sup> After articulating the inherent political rights flowing from Aboriginal title,

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<sup>225</sup> British Columbia. Canada. BC First Nations. BC Claims Task Force. The Report of the British Columbia Claims Task Force, June 28, 1991.

[http://www.bctreaty.net/files/pdf\\_Marcuments/bc\\_claims\\_task\\_force\\_report.pdf](http://www.bctreaty.net/files/pdf_Marcuments/bc_claims_task_force_report.pdf) (accessed March 2009), 29.

<sup>226</sup> Price, 148.

<sup>227</sup> British Columbia. Government of BC The Ministry of Aboriginal Relations and Reconciliation. *The New Relationship with First Nations and Aboriginal People* (undated)

[http://www.gov.bc.ca/arr/newrelationship/down/new\\_relationship.pdf](http://www.gov.bc.ca/arr/newrelationship/down/new_relationship.pdf) - (accessed Nov 9, 2008).

<sup>228</sup> *Ibid.*, 1.

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

it justifies them according to “First Nations’ historical and sacred relationship with their territories” and their constitutional recognition in Section 35. No accompanying justification is provided for the assertion of provincial Crown jurisdiction and title.

The last paragraph is both backward and forward-looking. It recognizes that the ‘historical’ relationship between the Province and Aboriginal people has resulted in the present, sub-standard, socio-economic situation of First Nations. Then, it promises that the new relationship will work “to achieve strong governments, social justice and economic self-sufficiency for First Nations which will be of benefit to all British Columbians and will lead to long-term economic viability.”<sup>231</sup> A last stated intent of the new relationship vision is to celebrate the diversity of the parties and emphasize their commonalities.

The next section sets out four goals which focus on First Nation communities, culture and governments. The first and last goals commit to eliminating the socio-economic gap in living conditions between First Nations and other British Columbians and protecting the cultures and languages of First Nations to ensure their survival. The second goal further articulates that Aboriginal title entails the achievement of First Nations self-determination, which includes an “economic component” and jurisdiction over their lands and resources in accord with their own management structures.<sup>232</sup> The economic component is clearly a nod to resource revenue sharing. With the third goal, a commitment is made to incorporate First Nation laws, knowledge and values in the management of lands and resources, consistent with the principle of sustainability.

The principles to guide the new relationship call for new mechanisms, processes and institutional change that will make the vision a reality. These include “integrated intergovernmental structures and policies to promote co-operation”; “recognition of the need to preserve each First Nations’ decision-making authority”; “mutually acceptable arrangements for sharing benefits, including resource revenue sharing;” and “dispute resolution processes which are mutually determined.”<sup>233</sup> In addition, a principle to provide funding for these arrangements and their accompanying negotiations is also stated.<sup>234</sup>

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<sup>231</sup> Ibid.

<sup>232</sup> Ibid., 2.

<sup>233</sup> Ibid., 3.

<sup>234</sup> Ibid.

The elements of the action plan contained in the document reaffirm the commitment of the parties to work together, and translate the principles into specific actions. These include: “identify institutional, legislative and policy changes to implement this vision and these action plans”; “establish effective procedures for consultation and accommodation;” and also include a review of the forestry sector consultation mechanism, Forest and Range Agreements.<sup>235</sup> Lastly, the establishment and activities of a management committee and working groups are set out, with a date set for the development of the terms of reference, guidelines and timelines for the management committee and working groups.<sup>236</sup>

The vision as stated suggests that the BC government is prepared to go beyond consultation to shared decision-making on lands and resources consistent with many of the principles of a treaty-based relationship. The approach taken in implementing a new relationship in British Columbia is holistic, in that it does not compartmentalize the issues of duty to consult and accommodate, treaties and Aboriginal title as requiring separate approaches. Instead, it recognizes that all are interconnected<sup>237</sup>, and require a consistent relationship between the province and First Nations. The principles that must guide each are one and the same.

It advocates a government-to-government relationship with First Nations; recognizes the inherent right of Aboriginal self-government consistent with distinctive traditions and practices of self-determination; and agrees that the stewardship of the land and its resources should be shared by First Nations and the provincial Crown. This shared decision-making is also to occur at the level of content, process and implementation.<sup>238</sup> It also allocates some separate space for First Nation decision-making authority by recognizing that self-determination is a part of the exercise of Aboriginal title. In addition, the *New Relationship* articulates goals, a strategic vision, principles, action plans and a management committee and working groups to foster implementation of its vision. The principles, although not suggesting that First Nations are nations, still purports to treat them as partners in the design and implementation of the new relationship. The level of specificity of the action plans indicates that the new relationship is not

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<sup>235</sup> Ibid., 4.

<sup>236</sup> Ibid., 5.

<sup>237</sup> For instance, consultation on lands and resources is directly dependent upon the strength of an Aboriginal title or rights claim.

<sup>238</sup> Jessica Rogers, “Reshaping Crown-First Nation Relationships Amid changing Contexts: An examination of the intersection between the Crown’s promise of a New Relationship and the implementations of the Forest and Range Agreement.” (master’s thesis, The University of British Columbia, 2007), 53.

simply rhetoric, but is a working strategy for restructuring the relationship between First Nations and the provincial Crown.

To date, it seems that many of the actions identified in the new relationship document have indeed come to fruition. The First Nations Leadership Council (FNLC), comprised of the political executives of the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations, was created through a provincial Leadership Accord signed on March 25, 2005. The Council works together to represent the interests of First Nations in British Columbia and develop strategies and actions to bring about significant and substantive changes to government policy that will benefit First Nations in the province.<sup>239</sup> In addition, the Council meets regularly with provincial officials to “set direction, review progress and have high-level discussion on progress under the New Relationship and other matters of common concern.”<sup>240</sup>

A number of working groups have also been established to deal with specific issues. These include: A joint FNLC-BC Recognition Working Group tasked with the main deliverables from the New Relationship document, which include creating principles and mechanisms for recognition and Honour of the Crown, consultation/accommodation and revenue sharing. Other joint working groups achieving progress under the New Relationship include the Resolutions Strategy Side Table; Telling Our Stories Committee; Crown Land Allocation Framework Working Group; Aquaculture Working Group; and the Ecosystem Stewardship Planning Working Group. The province also established the New Relationship Trust on March 31, 2006 – \$100 million in funding intended to enhance the capacity of First Nations to participate in the processes and activities arising from the New Relationship.<sup>241</sup> Lastly, the provincial government has implemented the Transformative Change Accord to eradicate the socio-economic gap between Aboriginal and non-Aboriginal people in the province in the next ten years.<sup>242</sup>

However, the vision falls short of treaty federalism in some key areas. Its principles do not entail that equal consent of all parties on outcomes is required in order to move forward. Instead, the activities and practices need only “promote co-operation” or “practical and workable

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<sup>239</sup> British Columbia. Ministry of Aboriginal Relations and Reconciliation. “The New Relationship Progress Report,” 1, Issue 1, (April 2006)  
[http://www.gov.bc.ca/arr/newrelationship/down/new\\_relationship\\_progress\\_report.pdf](http://www.gov.bc.ca/arr/newrelationship/down/new_relationship_progress_report.pdf), (accessed February 2, 2009),

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<sup>240</sup> First Nations Leadership Council Information Bulletin – September 2007, Vol.2, Iss.7 -  
[http://www.ubcic.bc.ca/News\\_Releases/UBCICNews09260701.htm](http://www.ubcic.bc.ca/News_Releases/UBCICNews09260701.htm), 1

<sup>241</sup> Progress Report, April 2006, 4.

<sup>242</sup> Ibid., 3.

arrangements” for decision-making on lands and resources. The principle that perhaps goes the furthest in advocating equality among First Nations and the provincial Crown is the agreement that arrangements for sharing benefits must be “mutually acceptable.” Perhaps the biggest issue with the vision statement is that the level of First Nation ‘self-determination’<sup>243</sup> and the term ‘shared decision-making’ are not defined<sup>244</sup>. Self-determination may range from basic self-administration of existing government programs within limited or circumscribed areas of jurisdiction to full First Nation autonomy in determining the design and implementation of all areas of jurisdiction directly impacting their members. Sharing often connotes equality, but only partial decision-making powers dependent upon the will of the provincial government conceivably could be attributed to First Nations. In light of the new relationship document’s insistence on recognizing Crown title, jurisdiction and interests, it might be the case that First Nation interests will not receive equal weight in the case of a conflict.

Due to the aforementioned vagueness of the *New Relationship* document, as well as its high-level political formulation, issues concerning differing interpretations of its vision and its implementation in various policy sectors have arisen. In 2006, the *Interim Agreement on Forest and Range Opportunities*,<sup>245</sup> a new template for interim forestry agreements between the provincial government and First Nations, was implemented to apply the new relationship principles to the forestry sector. The UBCIC initially rejected the FRO/A on the grounds that it failed to properly recognize and accommodate Aboriginal title or to enact shared decision-making on “strategic, administrative and operational decisions.”<sup>246</sup> However, that same year, the FNLC did agree to an acceptable FRO template.<sup>247</sup> Since then, a report on the impact of the new relationship on the implementation of the Gitxaala Nation’s Forest and Range Agreement found that the new relationship vision is ‘ambiguous,’ which has led to “a lack of a shared

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<sup>243</sup> Rogers, 52.

<sup>244</sup> Caoimhe Kehler, "The Province of BC's New Relationship with First Nations: a review of the implications of shared decision-making for strategic Crown land use planning," *Society & Natural Resources: An International Journal* 17, 1, (2004):17-38.

<sup>245</sup> Government of British Columbia. Ministry of Forests and Range. Interim Forest and Range Opportunities document. January 2006. [http://www.ubcic.bc.ca/files/PDF/FRATemplate\\_011206.pdf](http://www.ubcic.bc.ca/files/PDF/FRATemplate_011206.pdf). (accessed January 2008).

<sup>246</sup> Union of BC Indian Chiefs. 2006. UBCIC Letter: Interim Agreement on Forest and Range Opportunities (February 6, 2006) [www.ubcic.bc.ca/News\\_Releases/UBCICNews02060601.htm](http://www.ubcic.bc.ca/News_Releases/UBCICNews02060601.htm) (accessed February 7, 2009).

<sup>247</sup> British Columbia. Ministry of Aboriginal Relations and Reconciliation. First Nations Leadership Information Bulletin, July 2006 [http://www.ubcic.bc.ca/files/PDF/LC\\_Information\\_Bulletin\\_No6\\_Jul\\_06.pdf](http://www.ubcic.bc.ca/files/PDF/LC_Information_Bulletin_No6_Jul_06.pdf) (accessed December 2008).

understanding concerning objectives and successful implementation.”<sup>248</sup> In the case of the Gitxaala, this dissonance has not only prevented the establishment of a truly new relationship whereby the Crown and the Gitxaala Nation can implement the FRA, but also illustrates that “provincial policy without clear directives allows for interpretation by local policy implementers which is resulting in discrepancies in policy outcomes.”<sup>249</sup> Furthermore, until the vision is “mutually understood” and is translated into clear policy and directives, then “the New Relationship and the FRA simply represent a ‘new’ Provincial tactic for the Province to maintain a hold on resources and create certainty for industry in an era of strengthened Aboriginal claims.”<sup>250</sup>

Yet, the FNLC continues to make progress in working with the BC government to manage the forestry sector. For instance, in 2006, the First Nations Forestry Council was created to represent BC First Nations interests in forestry-related matters, including working with other levels of government to ensure First Nations “needs, values and principles are factored into forestry-related policy and program development, including monitoring, evaluating, influencing and providing policy advice and research.”<sup>251</sup> In addition the provincial Ministry of Forests and Range created a new First Nations Initiatives Division to improve consultation processes and provided Aboriginal law and cultural awareness training for over 1,000 government employees to improve “government’s ability to support the New Relationship.”<sup>252</sup>

However, another report assessing how shared decision-making is being implemented in land use planning concludes that although the province of BC currently is engaging in collaborative decision-making or co-management of Crown land and resources with some BC First Nations, especially in the case of the recent North and Central Coast land use decision, only decisions concerning the planning process are shared, with the ultimate legal decision-making authority continuing to rest with the Crown.<sup>253</sup> According to Kehler, such a status quo does not meet First Nations expectations in participating in statutory decision-making, whereby “they will

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<sup>248</sup> Rogers, ii.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid., 4.

<sup>251</sup> BC First Nations Forestry Council website, <http://www.fnforestrycouncil.ca/home.php>

<sup>252</sup> British Columbia. Ministry of Forests and Range. 2008/09 Annual Service Plan Report.

[http://www.for.gov.bc.ca/hfd/pubs/docs/mr/annual/ar\\_2008-09/for.pdf](http://www.for.gov.bc.ca/hfd/pubs/docs/mr/annual/ar_2008-09/for.pdf) (accessed May 2009), 32.

<sup>253</sup> Kehler, 68.



be more involved in making land use decisions and sharing in benefits that those decisions generate in their traditional lands.”<sup>254</sup>

Perhaps the most telling example of how the New Relationship vision is being interpreted and implemented is by examining the recently proposed *Recognition and Reconciliation Act*. Although no draft legislation was introduced in the legislature, the FNLC and the provincial government released a jointly developed discussion paper describing its proposed content in February 2009.<sup>255</sup> Viewed as the “first priority” for implementing the new relationship, the purpose of the act was multifold. It was supposed to recognize the Aboriginal rights and title of indigenously defined territories and governments, without legal proof, and “enable and guide” both the establishment of mechanisms for shared decision-making on lands and resources and revenue and benefit sharing agreements.<sup>256</sup> In addition, it was to provide a vision and a new institution for reconstituting Indigenous nations according to their traditional territories and establish processes, mechanisms and a new institution for the resolution of disputes arising from the legislation and its pursuant regulations and agreements. The act was to be just one part of a “legislative package” that would develop regulations, template shared decision-making and revenue and benefit sharing agreements and a proclamation.<sup>257</sup> The scope of the proposed act was broad, applying to “all ministries and provincial agencies,” and overriding or “tak[ing] priority over” all other provincial statutes that deal with lands and resources.<sup>258</sup>

The “Recognition Principles” set out on in the discussion paper include the recognition of the inherent political rights of First Nations, independent of Crown sovereignty, and again, recognize pre-existing Aboriginal rights and title within the territory of each Indigenous nation, without legal proof.<sup>259</sup> There is also a recognition that Aboriginal and Crown title exist throughout British Columbia, which create “obligations and responsibilities.” Aboriginal title is also recognized to have a “jurisdictional and economic component.” Existing treaty rights in British Columbia that must be “honourably implemented” are also recognized. Lastly, the act recognizes that “the relationship between Indigenous Nations and the Crown is a government-to-

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<sup>254</sup> Ibid., 69.

<sup>255</sup> British Columbia. Ministry of Aboriginal Relations and Reconciliation. “Discussion Paper on Instructions for Implementing the New Relationship,” February 19, 2009 [http://www.newrelationship.gov.bc.ca/agreements\\_and\\_leg/recognition\\_and\\_reconciliation\\_act.html](http://www.newrelationship.gov.bc.ca/agreements_and_leg/recognition_and_reconciliation_act.html) (accessed May 1, 2009).

<sup>256</sup> Ibid., 1.

<sup>257</sup> Ibid.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid., 2.

government relationship in which both parties exercise authority to make decisions including about how the lands and resources will be used and the resources shared.”

The act proposes three levels of engagement—comprehensive, interim and default.<sup>260</sup> At the comprehensive level, all the recognition principles of the act will be applied through collaboratively-developed agreements concerning shared-decision making and revenue sharing within the territory of Indigenous Nations, in an effort to harmonize Crown and indigenous processes and decisions. Such comprehensive application will only occur if First Nations reconstitute themselves according to traditional territory boundaries. In the case of interim negotiations, the province will make decisions with the FNLC and the recognition principles will be applied through agreements that apply only to certain specified categories of development projects and defined “strategic decisions.” Revenue sharing is restricted to portions of provincial revenue from the specific projects or decision. An additional principle will be applied to this engagement, whereby the decisions taken must seek to accommodate rather than compromise the interests of the parties. Default engagement seeks to go beyond the status quo to apply recognition principles based on a mutually-agreed upon framework that would set out how provincial engagement must analyze impacts on Aboriginal rights and title and treaty rights, rather than focusing on the strength of a right or title claim.

Also proposed in the act is an amendment to the *BC Constitution Act* to enable a Council of Indigenous Nations.<sup>261</sup> Its mandate has yet to be determined, but will be the result of agreement between the FNLC and the provincial Executive Council. Until the nation-building process is complete, the council will be made up of FNLC members. Although it is hoped that the resolution of disputes will occur over the course of discussions, a stipulation for enabling formal mediation and dispute resolution, possibly a tribunal, regarding the act and its implementation, will be provided. The last section stipulates that as part of the proposed act, a proclamation will be issued that “should be eloquent and poetic,” in stating the history of British Columbia, from the pre-contact era to colonization to the present day, which is described as “a point in our collective history where there is huge opportunity to turn the page of history and establish a new relationship of respect and recognition.”<sup>262</sup> The intent of the proclamation is to educate all citizens and to foster reconciliation.

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<sup>260</sup> Ibid., 3.

<sup>261</sup> Ibid., 4.

<sup>262</sup> Ibid., 5.

The recognition legislation as set out does seem to advocate a treaty federalist relationship between First Nations and the province. By recognizing the laws, governments, political structure, territories and rights of First Nations, their autonomy is maintained. In addition, mechanisms are proposed for sharing in the decision-making on lands and resources, in order to promote harmonious interdependence. The recognition of both Crown and Aboriginal title, without legal proof of either, indicates that the imported common law of one nation will not take precedence over the relationship. Moreover, the recognition of Crown title actually puts the proposed legislation on par with a treaty, because it provides consent for the settlement and development of the land where no prior legitimacy exists through natural ‘inheritance’ by the settler population. As well, the proposed act implicitly addresses many of the common objections raised against treaty federalism. The diversity of First Nations is addressed through the aggregation of First Nations along traditional territorial borders, but still according to their own political structures and capacities, which provides a practical basis for negotiations and the implementation of decisions, albeit asymmetrically. The proposed proclamation would serve as a modern-day royal proclamation that would help educate the public about the special relationship between Aboriginal people and the Crown, which would help in overcoming the conventional view of federalism as existing only between the provincial and federal Crowns. The proposed act also addresses the lack of legitimacy towards the current federalist relationship held by many First Nations, because now they are active participants in the creation of this new federal relationship. The incremental approach, of proceeding from default to interim to comprehensive levels of engagement, would also assist First Nations in furthering their capacity to govern and in creating the political will necessary to revise the ‘old’ relationship structure. The legislation also goes one step further, offering a template for dispute resolution, when agreement cannot be reached through intercultural dialogue.

However, as with the original New Relationship document, the act itself still fails to define what is meant by shared decision-making or set out the specific roles and responsibilities concerning the joint application of Crown and Aboriginal title. The only clarification offered in the legislation is the assertion that the act will not affect the status of existing interests or tenures in land and resources already granted by the province or the constitutional and common law of Aboriginal rights and title and treaty rights. In addition, the act clarifies that it does not alter “positively or negatively” the federal-provincial division of powers or the jurisdiction of any

indigenous nation under the constitution, nor does it create any “new constitutional rights or law-making authority.”<sup>263</sup> Such clarification is somewhat perplexing, as how can a new commitment to share decision-making authority not alter the powers or jurisdiction of the province or Indigenous nations, positively or negatively? Doesn’t the concept of shared decision making with First Nations necessitate the ceding of some provincial authority on lands and resources?

The Union of BC Indian Chiefs released four discussion papers on the proposed legislation, one of which offers much-needed clarification on shared decision-making. The four papers were disseminated prior to a November 2008 Chiefs Forum, and discuss shared decision-making; revenue and benefit sharing; proper title and rights holder; shared territories/overlap resolution mechanism; and tools for shared decision-making – databases/information management.<sup>264</sup> The discussion paper on shared decision-making distinguishes this process from consultation, defining it as “a process where decision-makers with respective jurisdictions, authorities and laws engage in a joint process of decision-making towards reaching compatible or common decision.”<sup>265</sup> It entails accepting that both the Crown and the First Nations will make decisions, so that the central question becomes “how will Crown and First Nation decision-makers interact in making their respective decisions?”<sup>266</sup>

Five models of decision-making are offered, ranging from low levels of interaction to high levels of interaction between First Nations and the Province.<sup>267</sup> At the low interaction end, separate areas of decision-making authority for First Nations and the province are presented, with the separate spheres of jurisdiction gradually increasing in interaction, from parallel decisions made with limited interaction to parallel decision making processes with intensive interaction, to a joint recommendation body with two decisions, and finally a joint institution with decision-making authority. Underlying all of these models is the authority of First Nations to make their own decisions. The major problem with most of the models of decision making is that two separate decisions are allowed, which does not address the problem of how to reconcile the interests and rights of Aboriginal and non-Aboriginal societies. At the end of the day, if the decisions are inconsistent with one another, then who will become the final arbiter? This issue is

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<sup>263</sup> Ibid., 2.

<sup>264</sup> Union of B.C. Indian Chiefs. “Supporting documents for Recognition and Reconciliation Act” (<http://www.ubcic.bc.ca/issues/newrelationship/>) (accessed May 1, 2009)

<sup>265</sup> Discussion paper on Shared Decision-making. 5.

<sup>266</sup> Ibid.

<sup>267</sup> Ibid., 6.

raised in the discussion paper itself. However, as the level of interaction increases, the likelihood of a mutually acceptable decision actually increases. For instance, “category 5: Joint Institution with Decision Making Authority – One Joint Decision” would mean that “The Crown and the First Nation(s) establish a joint institution to which they each delegate, consistent with their own laws, the power to make binding decisions. At the end, there is one decision made, by the joint institution.”<sup>268</sup> The discussion paper does not recommend the implementation of any of the models of shared-decision, only noting that unilateral Crown decision-making is not an option. Kehler also offers a spectrum of possibilities for shared decision-making between the province and First Nations. However, she recommends that the province and First Nation seek to share jurisdiction and statutory decision-making or what she calls “co-jurisdiction and ownership”, either through treaty-making or the formal delegation of authority to First Nations through legislation.<sup>269</sup> The FNLC further clarifies its stance on shared-decision-making in its response to some objections to the legislation. It clarifies that First Nations consent is not being demanded as a requirement of shared decision-making. Instead, since the province and First Nations have already agreed to set out a dispute resolution process, then a mutually-agreed upon process for reaching agreement will ultimately decide the final outcome, which likely will not require the consent of the First Nation for moving forward. However, mutual consent to the dispute resolution process is required, and although not a direct endorsement of a decision, such an approach is in keeping with the treaty-federalist principles of mutual consent and cooperation. If shared decision-making follows the recommendations of Kehler, or proceeds to the final and most interactive stage of decision-making presented by the UBCIC, then the new relationship legislation would indeed be fostering in a new treaty federalist arrangement between the province and First Nations. However, both Kehler and the UBCIC agree that the status quo is characterized by unilateral Crown decision-making at some point in the decision-making process, which is inconsistent with the commitment to a new relationship and the concept of treaty federalism.

Despite the merits of the proposed legislation, it has drawn opposition from both Aboriginal and non-Aboriginal constituents.<sup>270</sup> Although not necessarily representative of the

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<sup>268</sup> Ibid.

<sup>269</sup> Kehler, 64.

<sup>270</sup> British Columbia. Government of B.C. Office of the Premier and First Nations Leadership Council. “Statement on Recognition and Reconciliation Act,” News Release, March 14, 2009.; Vaughn Palmer, “Campbell and crew

non-Aboriginal citizens of BC, two legal scholars released and disseminated widely, some objections to the paper. Their major objection is that the proposed legislation proposes too much power for First Nations, effectively giving them a veto over land and resource decisions. They also take issue with the recognition of Aboriginal title and the concept of such a relationship being forged between the provincial Crown and First Nations, stating that ‘Indians’ fall under federal jurisdiction according to section 92 of the *Constitution Act*.

First Nations take issue with the proposed legislation for a number of reasons. The discussion paper on revenue and benefit sharing raises doubts about the actual implementation of the new relationship and its proposed legislation. The UBCIC criticizes the provincial government’s new framework for revenue sharing in the mining sector, stating that it was unilaterally developed and ignores negotiations between the FNLC and BC towards mutually developed frameworks for shared decision-making and revenue and benefit sharing.<sup>271</sup> Specifically, UBCIC takes issue with the BC government’s proposal to tie resources for First Nations to demonstrated socio-economic purposes and to confine First Nations participation to the project approval process.<sup>272</sup> The BC First Nations believe that this form of revenue sharing is inconsistent with the commitment to a “shared decision-making role, based on co-existing titles.”<sup>273</sup> Such a practice by the province casts a long shadow on whether the new relationship and its enabling legislation truly will light the way to shared decision-making. In addition, upon reviewing the proposed legislation, First Nation citizens rejected its contents based on the following: “reconstitution’ will interfere with self-determination; that the Indigenous Nation Commission could become another bureaucracy; that there is risk of including Aboriginal title recognition in legislation which also recognizes Crown title in any form; that the nature, scope and substance of the title being recognized will weaken the title recognition within s. 35.”<sup>274</sup> In addition, concerns also were raised as to whether the provincial Crown has the jurisdiction to enact such legislation and whether the federal government must play a bigger role in

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have no time for critics of their Aboriginal plan; Opponents tagged with ‘denial and mistrust,’” *The Vancouver Sun*, May 8, 2009, A5; Jeffrey Rustand, “Campbell’s plan for Aboriginal title could turn into a complete mess,” *The Vancouver Sun*, March 27, 2009, A15.

<sup>271</sup> Union of B.C. Indian Chiefs. Preliminary Discussion Paper. Revenue & Benefit Sharing. November 2008, <http://www.ubcic.bc.ca/files/PDF/Doc5RBSFinalDiscPaper.pdf> (accessed May 2009) 12.

<sup>272</sup> *Ibid.*, 13.

<sup>273</sup> *Ibid.*

<sup>274</sup> Union of B.C. Indian Chiefs. “Proposed Recognition and Reconciliation Legislation Process-to-Date and Next Steps: Open Letter to UBCIC Chiefs Council”, July 14, 2009. [http://www.ubcic.bc.ca/News\\_Releases/UBCICNews07200901.htm](http://www.ubcic.bc.ca/News_Releases/UBCICNews07200901.htm).

negotiations. As a result of the concerns expressed from First Nations across BC, the FNLC set aside the proposed legislation on June 25, 2009, and has since decided to redirect its focus from legislative drafting to an “inclusive and cohesive dialogue” with the province.<sup>275</sup>

In sum, it would seem that the new relationship, as agreed upon by the province and First Nations, is on par with treaty federalism. However, some ambiguous phrasing must be clarified between the parties, before the relationship truly can proceed in this direction. In addition, the implementation of the new relationship thus far appears to be inconsistent with the vision in some respects, which is causing problems with its further advancement. Perhaps, the biggest lesson that may be learned from BC is that the realization of a treaty-federalist relationship is possible if the political will exists on both sides to clarify what exactly it means and then proceed in unity towards designing legislation, frameworks and mechanisms for its realization. The proposed options for shared decision-making offered by the UBCIC and the recommendations of Rogers and Kehler provide good starting points for advancing a new relationship built on the principles of treaty federalism.

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<sup>275</sup> Ibid., 1.

## Chapter 5: Forging a New Relationship in Saskatchewan

This chapter examines the current policy environment in Saskatchewan as it relates to the design and implementation of a provincial consultation policy with First Nations on lands and resources. As has been discussed, it is clear that a consultation policy is a much-needed and timely instrument important to the future well-being of the province. It impacts not only the relationship between First Nations and the Province, but is a matter of good governance necessary for enhanced economic and social development. It is important to note that the current consultation policy remains a work in progress, with no final endpoint at this time. The analysis presented here represents a relatively short window from May 2008 to April 2010. This window corresponds very closely with the short time frame in which the Saskatchewan Party has had an opportunity to truly forge a better and new relationship with First Nations in Saskatchewan.

The outstanding issues that must be overcome in order for the parties to agree on a consultation process can be identified in the Province's latest draft consultation framework. At the heart of many of the issues is what the Crown refers to as the 'treaty context,' whereby entrenched positions on both sides of the treaty divide are preventing the parties from reaching enough common ground to support consultation. The "Treaty context" is described in the draft framework as a fundamental source of conflict.

Unfortunately, different interpretations of the Treaty intent and of individual clauses have contributed to some fundamentally different interpretations of the duty to consult and accommodate. First Nations have said they do not accept that the written text of the treaties is an accurate record of what was agreed to in the Treaties and that they did not agree to the blanket extinguishment of their Aboriginal title by entering into the Treaty relationship.

Treaty First Nations often assert that they intended to share the territory, and jurisdiction and management over it, as opposed to ceding the territory, even where the text of an historical Treaty makes reference to a blanket extinguishment of land rights. Frequently, First Nations will state that they agreed to share the land to the depth of a plough. Thus, in the First Nations' view, the mineral resources below the surface were not ceded to the Crown and therefore still belong to, or the very least, must be shared with First Nations. While this is a commonly held First Nation Perspective, it is not one that has been accepted by the courts or by governments.

[...]



From Government's point of view, the purpose of the numbered Treaties entered into between First Nations and Canada was to create a new relationship between the Crown and First Nations. A key element of the Treaties was the extinguishment of Aboriginal title in order to open up the west for the peaceful settlement of Saskatchewan, and in return, First Nations received commitments that would provide for the continuation of their customs, lifestyles and traditions. As a result of the Treaties, any rights that First Nations had in the land, including the resources below the surface, were extinguished, subject to the rights set out in the Treaties.<sup>276</sup>

Although recognizing that the First Nations have a different perspective on the treaties, the Crown quickly concludes that such a perspective is unsupportable, and proceeds to outline a consultation process based on its own interpretation of the treaties. Such a stance seems a little hasty, given the fact that First Nations in Saskatchewan place paramount importance on honouring and implementing the treaties. As was mentioned, the treaties are the foundation of First Nation political action. In addition, the stance of the provincial government in this regard seems to forgo the very purpose, or at the very least, the *potential* of consultation, which is to determine how the interests and rights of Aboriginal people will be balanced with provincial objectives.

Since the Crown is unwilling to entertain or discuss the historical significance of the treaties to Saskatchewan First Nations in relation decision-making on land and resources, then a key subject area is exempted from the consultation process. The important subject omitted from consideration is 'sharing in the Province's economic growth,'<sup>277</sup> which is a thinly veiled reference to First Nations' request for resource revenue sharing. This request is based on the 'First Nation Perspective' of the treaties—since First Nations believe they never ceded their rights to the land, including mineral rights, then they argue that they are entitled to a portion of the revenue from development of these resources. However, as was mentioned, this stance has been declared illegitimate by the Province, and so the proposed policy does not consider this issue. The provincial rejection of a resource revenue-sharing agreement with First Nations has been explicitly stated as a major impediment to reaching an agreement on consultation.<sup>278</sup>

In addition, one of the 'key principles' of the policy is its exemption of authorization and approval of mineral dispositions from consultation.<sup>279</sup> First Nations also have cited this

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<sup>276</sup> Draft Framework, 2008, 4.

<sup>277</sup> Ibid., 3.

<sup>278</sup> James Wood, "FSIN, gov't miles apart: Joseph." *The Leader Post*, January 27, 2009 <http://www.proquest.com.cyber.usask.ca/> (accessed May 20, 2009).

<sup>279</sup> Draft Framework, 2008, 6.

exemption as unacceptable.<sup>280</sup> It would seem that decisions regarding the staking of claims by mineral companies constitute major land use decisions with the potential to seriously impact Aboriginal and treaty rights. However, the Crown has refused to allow for any First Nations input into this type of land use planning. The practical reason, of course, is that consultation on this issue will slow the pace of resource development, suggesting that such development is the major interest driving the Crown's negotiation of a consultation process, and not the protection of rights, as is mandated by the courts. This unilateral action by the Crown, again, is based on its understanding that all mineral rights to the land were ceded by First Nations through treaty.

The supremacy of Crown sovereignty also is rooted in the Crown's interpretation of the treaties. The emphasis in the consultation policy on unilateral Crown action is a manifestation of this position. From beginning to end, you have a provincial Crown in control of the whole process. The Crown recognizes that it bears the onus of assessing the potential impact a proposed activity will have on a specific right, but then appears to assume that this responsibility means it can unilaterally make this assessment. Although the draft framework states that assessing the impact of a proposed action on a right will be determined through consultation<sup>281</sup>, the following spectrum of consultation and the steps for assessing impact, belie such a statement. The range of consultation includes the following four levels: notification, limited, moderate and intensive. At the level of notification, the "[a]ssessment of the potential impact on rights is to be conducted by government and submitted to the First Nation or Métis group." If "any comments" are received during the notification stage, then they will be considered. This assessment perceives of a Crown acting alone to assess the potential impact of its proposed activity on a right, and *then* informing the First Nation of its findings. It fails to mention that this assessment must be made with input from the potentially affected Aboriginal group. In order for the Crown to make an accurate and balanced assessment, it requires significant back and forth communication with the First Nation; not merely the provision of information to the First Nation after the fact. All the subsequent levels build upon this initial assessment.

The more specific enunciation of the 'Steps in the Consultation Process' begins with Government assessing who is to be consulted, the potential impact on the Aboriginal and/or

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<sup>280</sup> Luke Simcoe, "FSIN rejects proposal." Leader Post, February 20, 2009, <http://www.proquest.com.cyber.usask.ca/> (accessed May 20, 2009).

<sup>281</sup> Draft Framework, 2008, 9.

treaty right, if consultation is necessary, and if so, what level of consultation is mandated.<sup>282</sup> This assessment is made “with information at hand.”<sup>283</sup> The source of this information is a mystery, especially since the need for traditional use studies and plans has not been deemed necessary until the intensive stage of consultation, and even then it may not be required. However, “When in doubt, Government *may* communicate with the First Nation or Métis leadership to *validate* its determination. [emphasis added]”<sup>284</sup> So, the intent of consultation is not to work and communicate with First Nations to clearly understand the nature of their rights and the potential impact upon them, but simply to validate decisions that have already been made by the Crown without it necessarily seeking further information to make its decision.

However, during Step 2, the process does allow for an affected First Nation to make its own assessment, which *may* result in a reassessment of the Crown decision. There are also provisions made here for more information to be provided from Government and industry, but oddly, not from the First Nation, and only if deemed necessary. By step 3, the consultation phase has already arrived at the stage of accommodation. It is important to note that in this section, a bias towards development rather than rights protection is apparent. In instances where accommodation is deemed necessary, and changes to the proposed activity are insufficient to protect the right, then the “appropriate accommodation” will be assessed. It seems implied that this ‘appropriate accommodation’ really entails compensation for rights infringement rather than, perhaps, halting development, especially since the “impact on project timing and cost” is a consideration during this stage.

For the most part, the entire spectrum of consultation does not provide any provisions as to how the Province will demonstrate that it has incorporated First Nation concerns into its proposed plan of action. During the notification stage, “a response [to any concerns] is not required prior to a decision to approve an action.”<sup>285</sup> Even at the moderate and intensive levels, consultation seems to entail simply the sharing of information and the identification of issues related to impacts on Treaty or Aboriginal rights, and discussion over possible mitigation measures. At the latter two stages, rather than pinpointing exactly how feedback from First Nations will be incorporated, it is mentioned that more discussion will take place at these stages

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<sup>282</sup> Ibid., 10.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

<sup>285</sup> Ibid., 9.

over how to consult.<sup>286</sup> In addition, the intensive level of consultation does not differ significantly from the moderate level, except that more time and the introduction of traditional use studies or land use plans *may* be required. Thus, even during the process of consulting, the Crown supposes that it may act unilaterally to determine when the First Nation has been sufficiently consulted. Only at the final stage, after it is determined that the proposed activity will proceed, does the government interpret itself as obligated to “report back” to the affected First Nations on how its concerns were incorporated into the proposed plan of action.<sup>287</sup>

Lastly, the proposed policy emphasizes throughout its various elements that the Province is also in control of the outcome of the process. In the ‘key principles’ section, the fact that Aboriginal people do not have a veto over consultation is noted, while no mention is made of the specific limits on Crown unilateralism, such as to cause the least infringement possible, to give priority to the Aboriginal interest, etc. Then, in the first paragraph immediately before the specific consultation steps are set out, one is reminded that, ultimately, it is the Province with the authority to make the final decisions under the process.<sup>288</sup> In addition, no accompanying mention is made of the additional limiting factors on provincial Crown decisions where treaties are concerned. Given the prevalence of treaties in the province, it would be prudent to mention the special consideration that must be given to treaties as set out by the Supreme Court rulings, but the policy is silent in this regard. Finally, in the final step of the process, it is emphasized that agreement from First Nations and Métis is not necessary when the final decision is made by the Province.<sup>289</sup>

Another way in which the unilateralism of the provincial Crown is supported through the policy is an emphasis on minimal infringement as opposed to rights protection. Perhaps the most telling indication of the province’s minimalist approach is the fact that the policy is regarded as being applicable to only one Treaty right: “Although the obligation [to consult] can arise with respect to any Treaty or Aboriginal right, this policy focuses on the exercise of a right to hunt, fish and trap for food.” This position is again stated in one of its key principles of consultation: “The Crown has an obligation to assess the potential impact a proposed activity will have on hunting, fishing, trapping and gathering for food, as well as on spiritual and ceremonial sites, and

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<sup>286</sup> Ibid.

<sup>287</sup> Ibid., 12.

<sup>288</sup> Ibid., 10.

<sup>289</sup> Ibid., 12.

to clearly communicate its findings to the First Nations or Métis community/ies being consulted.” The assumption that consultation likely will only arise in this context is counter to the duty’s twin purposes of negotiating and protecting Aboriginal and Treaty rights. The policy deals only with a single relatively *established* right, when it must also consider the impact that its actions will have on unproven Aboriginal and Treaty rights. Most importantly, this approach precludes the possibility that consultation may lead to the recognition and affirmation of other Aboriginal and treaty rights, because only one type of right is admitted for consideration.

At its most basic, the proposed policy fails to fully grasp the important role that Aboriginal people must play in consultation. Under the ‘key process elements’ it is stated simply that “First Nations and Métis groups being consulted *should* have a say in how they would like to be consulted, particularly where there is potential for occasional to intensive impacts on rights. They *should* be involved in the process design and ideally, there *should* be agreement on how consultation will take place, within reasonable timelines and resources. [emphasis added]”<sup>290</sup> The Crown seems to be downplaying the importance of Aboriginal input into the design and implementation of consultation, by equating it as being on the same level as agreement on the outcome. Aboriginal feedback and participation *must* be an element of the process, whereas only agreement *should* be described as an optional feature. Even that, as has been demonstrated in the previous delineation of the duty to consult and accommodate jurisprudence is somewhat of an overstatement.

Lastly, the lack of a definitive dispute resolution process<sup>291</sup> within the consultation process also speaks to the asserted power of the Crown to act unilaterally. Dispute resolution has not been identified as an integral part of the process, because when disagreement occurs the Crown will be the sole decision-maker. This means that, if First Nations believe a Crown decision to be unjust, their only recourse will be civil disobedience and/or litigation. As well, without a dispute resolution process, the risk that Crown infringement of an Aboriginal or treaty right will result in irreparable damage rises, which may leave only limited accommodation as the possible redress. In both instances, consultation will be a failure, which is why it is imperative that a dispute resolution process be built into the design of the consultation process.

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<sup>290</sup> Ibid., 7.

<sup>291</sup> Ibid., 3.

Overall, the proposed policy not only fails to take into account the First Nation commitment to honouring the Spirit and Intent of the treaties, it practically represents the antithesis of such a position. On the whole, the FSIN believes that the draft policy puts too much control of lands and resources into the hands of government and corporations.<sup>292</sup> It wants a more equal relationship with the Crown, especially when it comes to lands and resources. This stance, again, is rooted in the First Nation understanding of a just treaty relationship. As the jurisprudence on duty to consult and accommodate indicates—the principles to guide consultation between the Crown and First Nations have the potential to bring about a more equitable partnership—but the political will must be present in order to realize the promise of the Court's dictates.

### **Why Treaty Federalism in Saskatchewan?**

Drawing upon its twenty-year involvement in political and scholarly work on the subject of treaties in Saskatchewan, the federally-mandated, Office of the Treaty Commissioner (OTC), has released a comprehensive plan for how to approach First Nation - Crown relations based on the treaties in Saskatchewan. It is titled *Treaty Implementation: Fulfilling the Covenant*.<sup>293</sup> The OTC was established in 1989 to review issues on the treaty land entitlement process and education in Saskatchewan and is credited largely with finding a workable process for resolving specific entitlement claims in an efficient and effective manner.<sup>294</sup> The OTC has not only commissioned valuable scholarship on the written and oral records of treaty-making in Saskatchewan, the office has strived to move First Nation – Crown relations towards a better understanding of the treaties. It has facilitated the Exploratory Treaty Table, between Canada and First Nations in Saskatchewan, with the Province as an observer, which has resulted in a number of political developments and documents, such as common understandings on 14 treaty principles underlying the treaty relationship.<sup>295</sup> In addition, in 1996, it co-established, with the Province and First Nations, a Common Table to “facilitate effective processes for negotiating

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<sup>292</sup> Luke Simcoe, "FSIN rejects proposal." *Leader Post*, February 20, 2009, <http://www.proquest.com.cyber.usask.ca/> (accessed May 20, 2009).

<sup>293</sup> Canada. Indian and Northern Affairs Canada. Office of the Treaty Commissioner. *Treaty Implementation: Fulfilling the Covenant*, 2007. [http://www.otc.ca/ABOUT\\_TREATIES/Treaty\\_Implementation\\_Report/](http://www.otc.ca/ABOUT_TREATIES/Treaty_Implementation_Report/) (accessed April 2009).

<sup>294</sup> "Statement From Minister Chuck Strahl on the 20th Anniversary of the Office of the Treaty Commissioner in Saskatchewan." Marketwire, October 30, 2009, <http://www.proquest.com.cyber.usask.ca/> (accessed November 1, 2009).

<sup>295</sup> OTC, *Treaties as a Bridge*, 5.

and implementing First Nations governance in Saskatchewan building on the treaty relationship, and for related jurisdictional and fiscal arrangements, in addition to discussions of treaty issues that affect all three parties.”<sup>296</sup> This Saskatchewan-based office is regarded as being on the forefront of treaty discussions and public education.<sup>297</sup> Its mandate has been broadened in its twenty years of work, so that it is now responsible for facilitating discussions and making recommendations on the resolution of treaty issues.

For the OTC, fulfilling the covenant made between Canada and First Nations in Saskatchewan means a fulfillment of their respective treaty obligations or, simply, implementation of the treaties. It would seem that the Crown has been able to achieve its objectives under the treaties, but the same cannot be said for First Nations:

The First Nations and Canada had their own goals and objectives when they came together to make treaties. Their collective common goals were to determine how they were going to live in harmony, with mutual benefit based on mutual respect, and to determine how First Nations were going to be part of the new economy that the newcomers were bringing. Unfortunately, these common goals have not been defined or achieved within a comprehensive treaty-based framework. The objective of the Crown, to settle and prosper on this new land without conflict from First Nations, has been achieved. Those of the First Nations, to share economic prosperity with the new society, secure a brother-to-brother relationship with the Crown, continue to nurture their communities and protect their right to govern themselves, have not. In order to implement the treaty relationship and fulfill the promise of the treaties, there needs to be revitalization based upon four pillars of reconciliation: political, legal, socio-economic, and spiritual. Each of these is equally important and should be given equal weight by the Parties.<sup>298</sup>

Although focused upon the relationship between Canada and First Nations, the document also describes the role that the provincial Crown must play in implementing the treaties. The Province has adopted a “position of non-participation,” asserting that “it was not a Party to the treaties, since the province did not exist at the time all but one of the treaties were negotiated, and consequently has no policy framework to mandate participation by the Crown in right of Saskatchewan in discussions to examine and implement the treaties and the treaty relationship.”<sup>299</sup> This stance seems a bit odd, given the Saskatchewan government’s enjoyment and full implementation of its constitutional powers, even though the province did not exist during Confederation when the *Constitution Act, 1867* was negotiated. In addition, Coates and

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<sup>296</sup> Ibid.

<sup>297</sup> "Minister Prentice appoints Bill McKnight and revitalizes the Office of the Treaty Commissioner for Saskatchewan." Canada NewsWire 28 June 2007 1. <http://www.proquest.com.cyber.usask.ca/> (accessed December 3, 2009).

<sup>298</sup> OTC, *Fulfilling the Covenant*, vii –viii.

<sup>299</sup> Ibid., 160.

Poelzer point out that Canada is a federation founded on “compound monarchies,” whereby the Crown has always been “divided” between federal and provincial authorities, each “led by their own powerful executives in possession of sovereignty in their own right.”<sup>300</sup> Despite its compound nature, the Crown in Canada is “a *basic principle organizing governance in Canada*.”<sup>301</sup> This translates into a political environment where, although separate, the provincial and federal Crowns act as a unifying force in Canada, sharing the sovereignty of the nation. For a province to unilaterally fail to acknowledge or incorporate the precise nature of the Crown in its dealings runs counter to the federal structure upon which the nation was built. On the flip side, First Nations must also acknowledge that the Crown with which they signed historical treaties includes provincial governments, and so they too ought to be willing to discuss the treaties with the province.

The OTC states that the Province’s position is unsustainable “if it becomes a barrier to treaty implementation.”<sup>302</sup> In fact, the province’s current position of non-participation *is* a barrier to treaty implementation. Whenever a modern-day treaty has been implemented, the province has played a vital role in the process, because many of the areas of jurisdiction covered by such treaties fall under provincial authority.<sup>303</sup> While the province may not have to play a role in treaty-making, it is a key player in treaty implementation.<sup>304</sup> As a matter of basic practicality, the province must participate in treaty implementation, whether modern or historical, because it must negotiate with First Nations on how jurisdictions currently under its authority will be shared under the terms of a treaty. If it refuses to do so, it will be impossible to implement any treaty in that province. As Russell notes, “the federal government has no mandate to negotiate the powers of the provincial governments found in Section 92 [of the *Constitution Act, 1867*].”<sup>305</sup> Here, we run again into the reality of a *divided* Crown in Canada.

The OTC recommends that high-level government officials “turn their minds to the potential impact of their work upon the rights and interests of the many Treaty First Nations.”<sup>306</sup> In fact, the report proposes the definition of a role for Saskatchewan in implementation.<sup>307</sup> A

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<sup>300</sup> Coates and Poelzer, 162-163.

<sup>301</sup> *Ibid.*, 149.

<sup>302</sup> OTC, *Fulfilling the Covenant*, 160.

<sup>303</sup> Dan Russell, *A People’s Dream: Aboriginal Self-Government in Canada*, (Vancouver: UBC Press, 2000), 41.

<sup>304</sup> OTC, *Fulfilling the Covenant*, 160.

<sup>305</sup> *Ibid.*

<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*, xvii.



treaty implementation framework agreement is recommended that includes negotiations to define and implement inherent (Aboriginal) and treaty rights; allow for the orderly exercise of First Nations' rights to hunt, fish, trap and gather renewable resources; and that First Nations' access to renewable resources and revenues from resource exploitation are settled through negotiation.<sup>308</sup> All the elements included in this proposed treaty implementation framework agreement mirror the issues that the province refuses to discuss within the scope of consultation. Just *when will* these matters be discussed, let alone resolved, if not through consultation?

Although the Province has engaged in some action supportive of greater self-governance for First Nations, it continues to hold the treaties at arms-length from its relationship with First Nations. The Province has recognized the inherent right of self-government for First Nations,<sup>309</sup> and, tripartite negotiations at the Common Table focusing on a comprehensive, final self-government agreement have led to the initialling of a draft tripartite agreement in principle being signed in 2003 between the Federation of Saskatchewan Indian Nations (FSIN), Canada and Saskatchewan.<sup>310</sup> Meanwhile, negotiations at the Exploratory Table have resulted in a bilateral protocol between the FSIN and Saskatchewan to guide relations between the two governments. However, both agreements continue to maintain that the “primary relationship between Saskatchewan First Nations and the Crown is, and will continue to be, between those First Nations and Canada” and the relationship between the Province and First Nations is one of a working relationship.<sup>311</sup> To date, this ‘working relationship’ has yet to be fully defined.

The most recent development in which the Province is engaged to support First Nations self-government is to continue discussions at the Exploratory Table. It has committed \$500,000 in its latest budget to funding these discussions. It is at this table that some of the current issues not dealt with through the framework on consultation are supposed to be addressed. These include the following: environmental stewardship, the opportunity to be involved in the wealth of the province, and traditional land use and mapping.<sup>312</sup>

Fulfilment of the OTC's recommendations need not be implemented through the establishment of another institutional mechanism, such as a treaty implementation framework

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<sup>308</sup> Ibid., xxvii.

<sup>309</sup> 16, 2006–2007 Saskatchewan Provincial Budget *Performance Plan First Nations and Métis Relations.*)

<sup>310</sup> Saskatchewan. Government Relations and Aboriginal Affairs. Annual Report 2003-2004: Saskatchewan Government Relations and Aboriginal Affairs Government of Saskatchewan, 17 <http://www.publications.gov.sk.ca/details.cfm?p=10177>. (accessed April 2009).

<sup>311</sup> Bilateral Protocol, 2003; 6, Tripartite Agreement.

<sup>312</sup> Saskatchewan Hansard, 2406, March 23, 2009.

agreement. Time and expense can be saved by tackling the issues enumerated above as part of the consultation process. These issues are already the fundamental stumbling blocks of designing a consultation process. In addition, industry's timelines for development and the motivation of resource development promise to move the process forward in a timely way. Lastly, consultation has a built-in source of funding to draw upon to not only fund participation, but to aid in fulfilling Crown treaty obligations to First Nations.

It's virtually impossible to have discussions about the land and its resources without adequate consideration of the wide-ranging impacts of potential decisions on the land. Although speaking in the context of comprehensive claims, negotiators eventually concluded that: "Land and the jurisdiction over it are bound up inseparably with the preservation of [A]boriginal societies as distinct, self-sufficient, social orders in Canada. This distinction applies particularly to [A]boriginal societies whose economies, religions, political systems, education systems, and family relations are established by reference to their traditional lands."<sup>313</sup> A workable consultation process for the duty to consult and accommodate cannot be established in the current policy environment in Saskatchewan, separate from the consideration of treaties. On the whole, a more comprehensive approach to implementing the treaties has been recommended by the Government of Canada. It recommended "an integrated approach concerning the treaties, whereby the treaties are linked with governance, jurisdictional and fiscal negotiations."<sup>314</sup> They call it a forward-looking and integrated approach that will lead to strong governments.

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<sup>313</sup> Canadian Arctic Resources Committee. *Changing Times, Challenging Agendas: Economic and Political Issues in Canada's North*. (Ottawa: M.O.M Printing, 1988), 24.

<sup>314</sup> OTC, *Treaties as a Bridge*, 72

## Chapter 6: Conclusions

The motto of Saskatchewan is '*from many peoples, strength.*' Borrowing the language of the courts, it is clear that, for the most part, the legal duty to consult has failed to reconcile the diversity of Aboriginal and settler societies. Rather than building better relations and a productive environment for decision-making on land and resources, consultation appears to be driving the Province and Aboriginal governments further away from a resolution. Saskatchewan is just the latest jurisdiction struggling to realize the potential of consultation. At this juncture, it is uncertain whether First Nations would accept an invitation to feast with the Province, or if the Province would be willing to extend one.

The intent of this paper has been to show how the concept of treaty federalism is not only desirable, but necessary, in order to overcome the differences in rights and interests on consultation on lands and resources in Saskatchewan. Treaty federalism is an attractive reality because it does not attempt to subvert or circumscribe differences dating back to the time of treaty-making, but instead embraces and builds upon the treaties to forge a stronger and more productive state.

Chapter two was devoted to explaining the concept of and historical backdrop to treaty federalism, and how it differed from other conceptions of the relationship between First Nations and the Canadian state. The main thrust of this examination was to push the notion of treaty federalism further towards the mainstream of political theory, by showing how it is already moving away from the margins and enjoying greater acceptance based on its historical significance and theoretical qualities. In addition, it provided a conceptual framework by which to analyze the remainder of the chapters.

The third chapter briefly explored the root of the duty—Canadian case law and section 35 of the *Constitution Act, 1982*—and the implications of the legal principles on the political relationship between First Nations and the Crown. The intent of this chapter was to show how this one small thread of a larger Aboriginal rights discourse was pointing to a new relationship between Aboriginal people and the Crown. The argument was made that the principles could be interpreted as calling for a treaty federal relationship between Aboriginal people and the Crown. As many legal scholars have pointed out, the law is just the starting point for negotiations in the political realm, and the law can be a powerful catalyst for change or it can sustain the status quo. Duty to consult is one of those rare areas of the law that has great potential to foster change that

will result in a stronger federal relationship between First Nations and the Crown. But the political will must be present in order to do so.

The fourth chapter examined how treaty federalism is being conceptualized and implemented through the articulation of a new Aboriginal-state relationship in British Columbia. There are three key lessons to be learned from British Columbia. First, a relationship founded upon the principles of treaty federalism is necessary. The history of the province indicates that other avenues, such as provincial Crown unilateralism and the outright denial of any Aboriginal title in the province have already been tried, and have been proven to be untrue or not a viable process for the resolution of competing rights and interests between the provincial Crown and First Nations. This conclusion, although not proven in this paper, is an important starting point for discussing First Nation – state relations in British Columbia, as it highlights the importance of the current new relationship, and so is included as a key lesson.

A second lesson from British Columbia is that the vision of a new relationship must be better articulated in practice. Agreement must be reached on at least the principles that will underpin its implementation, especially what ‘shared decision-making’ will entail. A third lesson is that mechanisms need to be in place to ensure the vision is implemented not only by high-level bureaucrats, but also by regional and local administrators. First and foremost, all government employees must have a clear understanding of what implementation of the new relationship involves and have concise guidelines on how to implement it in practice. Government must walk its talk. In this regard, British Columbia is a case of *what not to do*, because its lack of a clearly defined vision and implementation framework/strategy are preventing its proposal for a new relationship from being a reality. The overarching teaching from British Columbia is that the realization of a treaty-federalist relationship may be possible if the political will exists on both sides to clarify what it means and then proceed in unity towards designing legislation, frameworks and mechanisms for its realization.

The fifth chapter built upon the promise inherent in the concept of treaty federalism and the legal principles, and the BC experience to examine the policy environment in Saskatchewan. The obstacles to consultation were explored by analyzing the most recent policy developments in the province. The central issue preventing consultation from moving forward is the differing interpretation of the treaties. Valuable analysis on the treaties from the Office of the Treaty

Commissioner was provided in order to shed some light on how Saskatchewan can get past its current impasse.

A consultation policy based on a more equitable foundation of treaty federalism can overcome the current impasse in consultation, and lead to a better economic and social future for First Nations and the province as a whole. As described in chapter one, the Supreme Court and academics from various disciplines, most notably history, law and political science, are engaging in a re-interpretation of the treaties. This interpretation largely is consistent with the 'First Nation Perspective', and is based on a critical methodological approach to understanding the treaties that considers all the available evidence from the time of treaty-making, and is not limited to a 'selective' reading of the text of the treaties. Some academics go so far as to suggest that the treaties are constitutional accords that bind the Crown and First Nations together in a clearly defined, harmonious and unifying relationship. If the current trend or, perhaps, growing consensus, in law and academia is to be believed, then Saskatchewan would be well-advised to reformulate its consultation policy in a manner that is consistent with the most accurate interpretation of the treaties. The position of the provincial Crown on treaties soon may find little support in history, law and politics.

There is little reason why Saskatchewan cannot follow in the footsteps of its British Columbia counterpart. The two jurisdictions share more in common than not, and the differences are more in degree than kind. The policy in British Columbia and Saskatchewan is underpinned by the same Aboriginal rights discourse. Although Aboriginal title may still exist in British Columbia, the legal significance of the historical numbered treaties and recent pronouncements on the duty to consult doctrine provide similar catalysts for negotiations in Saskatchewan. Crown unilateralism or a lack of meaningful consultation has been shown to lead to failure in negotiations and economic dead-ends for the provincial government in British Columbia; Saskatchewan need not head down this path. The current Saskatchewan party is a very new government in comparison to the British Columbia government, and this adds to the necessity of deferring to a jurisdiction with considerably more experience. It is clear that both provinces are heading in the same direction, it is just a matter of which one will reach its destination first. Filling the present policy vacuum in Saskatchewan is a definite challenge, but by taking more time at the outset to formulate a workable process, Saskatchewan has the

opportunity to avoid the litigation and uncertainty that has plagued First Nation-provincial relations on lands and resources in most other provinces in Canada.

A treaty federalism consultation framework must not only identify principles of shared decision-making, it must articulate such principles in the form of practical policy mechanisms and action. High-level commitments to mutual cooperation, respect and trust are meaningless if they are not being implemented 'on the ground' with institutional safeguards. At the level of vision, the relationship must be on a government-to-government basis that recognizes the inherent right of Aboriginal self-government consistent with distinctive traditions and practices of self-determination; and agrees that the stewardship of the land and its resources should be shared by First Nations and the provincial Crown. Such recognition entails the Province of Saskatchewan move past its current position on treaty interpretation to embrace the more complete picture of the historical treaties as based on mutual stewardship of the land. It must begin to realize that the treaties can and should be the basis of all political negotiations in the province, particularly the most pressing issue of the duty to consult. The parties must negotiate goals, a strategic vision, principles, action plans and a management committee and working groups to foster implementation of its vision of a new relationship. Some intergovernmental mechanisms to foster cooperation on facilitating First Nations governance have already been established, and these can be built upon. British Columbia offers some practical ideas for mechanisms of shared decision-making, all of which facilitate intercultural dialogue. The Province of Saskatchewan and First Nations must decide what mechanisms will work best for them. A dispute resolution process involving an independent, third party, perhaps the OTC, is absolutely necessary to maintain shared decision-making that truly balances the concerns and interests of the parties.

### **Future Research**

The duty to consult is a constantly evolving topic in legal jurisprudence. At present, hundreds of duty to consult cases are winding their way through the various court systems across Canada. With each new court decision, the duty to consult is re-articulated, sometimes with major implications. Legal scholars have been doing an admirable job keeping up with the latest pronouncements of the courts. However, as I hope I have demonstrated to a small degree, the concept of the duty to consult is also very much a political question. To date, not much attention

seems to have been given to the political dimensions and implications of the duty. For instance, what role has duty to consult played in recent political developments in British Columbia? Specifically, Aboriginal title has been recognized as a major driver of political change in this province, but what has been the significance of the duty to consult here? This is just an example of one jurisdiction, similar questions could be asked in other provinces. The concept raises many noteworthy questions about important linkages between legal jurisprudence and Aboriginal governance, and their implications for policy. Overall, more research needs to be done on the political dimensions and implications of the duty to consult.

The various mechanisms and options for shared decision-making is an area of research that also warrants further study. In Saskatchewan alone, there are additional examples of where the provincial and First Nation governments have managed to share jurisdiction in pursuit of a common goal. The Saskatchewan Indian Gaming Agreement and framework is such an example. Granted, in this case, the province and First Nations appeared to be proceeding towards a common goal. Perhaps further study of that particular case and others like it may shed some light on how commonalities can be identified within the duty to consult.

To reiterate, a marked limitation of this research is that it pertains only to First Nations, while the duty to consult is applicable to all Aboriginal peoples. A possible avenue for further research may lie in studying how the duty impacts the political position of other Aboriginal groups. In Northern Saskatchewan in particular, the duty to consult and accommodate regarding Métis and non-status people may be especially significant, given the sizeable population of such residents who have occupied and the used the land for generations. Their rights and interests should not be ignored. The roles of industry and the federal government in the duty to consult process are also areas that warrant further research. Lastly, government actions in jurisdictions beyond lands and resources may be infringing upon Aboriginal and treaty rights, proven and unproven, and additional research needs to be conducted in this regard.

One area that does *not* require more research is the historical treaties of Saskatchewan. Instead, the existing research and publications, most notably those of the Office of the Treaty Commissioner, must instead be *acted upon* so that they inform policy considerations in the province of Saskatchewan.

The implementation of a forward-looking treaty relationship will require much more than the establishment of a more accurate and comprehensive historical record. The people of Saskatchewan need to see actions taken to renew the treaty relationship as solemn commitments based upon a rededication of the parties to a relationship based upon fair

dealing, trust, and respect. People need to understand the nature of the rights and responsibilities of both treaty partners and the enduring nature of these commitments.”<sup>315</sup>

The process of treaty federalism holds the promise of bringing people together in a strong, harmonious and sustainable union. That which unites us can be stronger than that which divides us. However, at this juncture in Saskatchewan’s history, the province’s motto is merely words, with no real action behind them, just like the articulation of the new relationship between First Nations and the Province.

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<sup>315</sup> OTC, *Treaties as a Bridge*, 74.



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## Appendix A

<b>Comparison of Concepts</b>	
<b>Treaty Federalism Principle</b>	<b>Duty to Consult Principle*</b>
<i>The Purpose</i>	
The purpose of treaty federalism is to mutually balance the autonomy/freedom and interdependence /belonging of the parties. (Balances civic dignity with civic participation.)	The purpose of consultation is to reconcile Aboriginal and settler societies.
<i>The Starting point:</i>	
<p>Mutual and equal recognition of nationhood with separate spheres of autonomous jurisdiction.</p> <p>Mutual consent to the process.</p> <p>Concurrent areas of jurisdiction are set out whereby the autonomy of both nations is redefined in relation to the other to create an innovative transnational covenant or unity.</p>	<p>The obligation arises when the Crown has knowledge of the potential existence of the Aboriginal interest and is contemplating action that may adversely affect it.</p> <p>Consultation with Aboriginal groups should take place as early as possible in the project's planning stages.</p>
<i>Nature of the concept</i>	
Intercultural dialogue or rational thinking, constructive dialogue and true exchange of ideas is both the process and outcome.	The duty is both procedural and substantive in its process and outcome.
<i>The 'Who' of the Concepts</i>	
The 'who' is identified by the signatories to the treaties, namely the Crown and First Nations in Canada.	The obligation to consult and, where indicated, to accommodate Aboriginal interests lies with the Crown alone; there is no independent obligation on third parties.

	However, the Crown may delegate procedural aspects of consultation to industry.
Mutual and equal recognition of nationhood with separate spheres of autonomous jurisdiction.  Trust in honouring the commitments made.	The obligation is owed by both the provincial and federal Crown.
<i>The substance of the obligation</i>	
Trust in honouring the commitments made.  Responsive to the popular will rather than dictated by an absolute sovereign.	The extent of the obligation will be proportionate to: the strength of the case supporting an asserted interest (if a proven right is not at issue); and the seriousness of the potentially adverse effect on the applicable interest.
<i>Consent to the process and outcome.</i>	
Mutual consent to the process.  Responsive to the popular will rather than dictated by an absolute sovereign.	Neither an Aboriginal group asserting an as-yet unproven right, nor a First Nation signatory to a historical treaty claiming treaty rights, will hold a veto over the uses to which Crown land may be put.
<i>Substance of negotiation</i>	
Intercultural dialogue or rational thinking, constructive dialogue and true exchange of ideas is both the process and outcome.	The Crown has a positive obligation to “pro-actively address” any potential infringement concerning land and resources.  This includes the Crown researching both the nature and scope of the right at stake as well as the impact of the regulated activity in question and to provide the First Nation with all the necessary information in a timely way so that they have an opportunity to express their interests and concerns during the consultation process.
Intercultural dialogue or rational thinking, constructive dialogue and true exchange of ideas is both the process	The Aboriginal group in question must also consult in good faith and must not frustrate the Crown’s good faith

and outcome.	efforts to consult.
<p>Concurrent areas of jurisdiction are set out whereby the autonomy of both nations is redefined in relation to the other to create an innovative transnational covenant or unity.</p> <p>Intercultural dialogue or rational thinking, constructive dialogue and true exchange of ideas is both the process and outcome.</p> <p>Trust in honouring the commitments made.</p>	<p>Good faith consultation reveals a duty to accommodate when modifications need to be made to proposed government action or policy. The duty to accommodate involves a process of minimizing adverse impacts, substantively addressing Aboriginal interests, and in the absence of agreement, balancing interests.</p>
<p>Intercultural dialogue or rational thinking, constructive dialogue and true exchange of ideas is both the process and outcome.</p> <p>Concurrent areas of jurisdiction are set out whereby the autonomy of both nations is redefined in relation to the other to create an innovative transnational covenant or unity.</p> <p>Trust in honouring the commitments made.</p>	<p>Crown obligations to consult, and, where indicated, to accommodate Aboriginal interests may be satisfied through an effective administration of an applicable regulatory process. However, a determination of whether the obligations have been successfully discharged in any particular case will involve a subjective analysis, looking at the nature of the right, the nature of the infringement, and the extent of the consultation undertaken in the particular circumstances. Mere adherence to regulatory guidelines will not necessarily suffice.</p>
<i>Implementing change to the process</i>	
<p>Terms of the relationship may only be renewed or renegotiated through the same process.</p> <p>Responsive to the popular will rather than dictated by an absolute sovereign.</p> <p>Mutual consent to the process.</p>	<p>Reliance on the courts.</p>
<i>Where a prior agreement exists</i>	

<p>Trust in honouring the commitments made.</p>	<p>First Nations that are signatories to historical treaties hold procedural treaty rights (e.g. the right to be honourably consulted), in addition to any specific substantive rights (e.g. the right to hunt and trap).</p> <p>The Crown itself has a historical treaty right (that exists in some form in all of the numbered treaties) to “take up” surrendered lands for a variety of purposes with the effect that certain treaty First Nations will be precluded from exercising their rights to hunt, trap or fish on those lands. However, the exercise of this treaty right by the Crown must be honourable and must involve a process of consultation and, where indicated, accommodation of Aboriginal interests that may be adversely impacted.</p>
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\*Legal Principles

A recent publication authored by three legal practitioners in the field, which succinctly sets out the legal principles<sup>316</sup> of the duty to consult is used as a basis for this summary of the case law. In addition, a brief description of the principles’ source in the case law is provided, with amendments and additions to the principles as determined by additional texts by other legal scholars and practitioners.

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<sup>316</sup> Treacy, Heather L, Campbell Tara L., and Dickson, Jamie D. “The Current State of the Law in Canada on Crown Obligations to Consult and Accommodate Aboriginal Interests in Resource Development,” *Alberta Law Review*, 44, (2006-2007), 593-595.