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Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment

Alastair Neil Craik

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1. Introduction

As the duty to consult Aboriginal peoples becomes operationalized within the frameworks of government decision-making, the agencies responsible for these decisions are increasingly turning to environmental assessment (EA) processes as one of the principal vehicles for carrying out those consultations. There is a pragmatic attractiveness to using EA processes to implement the duty to consult where the activity in question is subject to EA, since much of the information and analysis of the environmental effects of a proposed activity will be required to assess the impacts of that same activity on Aboriginal rights and interests. Integrating these processes is efficient since it minimizes the need for multiple consultations. As well, since consultations in one sphere may impact the scope of the activity under consideration in the other sphere - for example, consultations within the EA may result in project modifications that would have implications for the duty to consult Aboriginal people - the processes of consultation under the duty to consult and in EA are to some degree inseparable.

The inextricability of these obligations does not however mean that the duty to consult and EA fit together with ease or without important implications for one another. Integrating the duty to consult with environment assessment requires

careful consideration of the unique obligations owed to Aboriginal people and the constitutional nature of those obligations. This article explores the practical and theoretical dimensions of using EA processes to implement the duty to consult. On the practical side, while EA has been identified by governments as the preferred avenue by which the duty to consult ought to be implemented, there remain questions about the limits of EA to satisfy the duty to consult across its many variations. Since the Supreme Court of Canada's trilogy of decisions in *Haida Nation, Taku River* and *Mikisew Cree,*[1] the relationship between EA and the duty to consult has arisen in a number of cases and a clear picture is emerging of the steps that agencies conducting EAs must carry out in order to discharge their constitutional obligations to Aboriginal peoples.

The relationship between EA and the duty to consult goes beyond a functional connection. Both are processes of reconciliation. EA has as its central purpose the generation of harmony between the natural environment and development activities; a process that requires balancing competing social goals and contested values.[2] With the duty to consult, the goal of reconciliation seeks to achieve "the reconciliation of the pre-existence of aboriginal societies with the

[1] *Haida Nation v. British Columbia (Minister of Forests),* 2004, SCC 73, [*Haida*]; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004, SCC 74, [*Taku River*]; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005, SCC 69, [*Mikisew*].
[2] See for example, *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52(4), [*CEAA*]; *The National Environmental Policy Act*, U.S.C. 1970, t. 42 c. 55 s. 4321(101a), [*NEPA*].

sovereignty of the Crown".[3] In practice, reconciliation in the Aboriginal law context requires balancing the rights and interests of Aboriginal groups with those of non-Aboriginals.[4]

The common purpose of reconciliation leads to both processes sharing a similar structural form. Both are primarily procedural obligations, and can be discharged through careful attention to process considerations, such as notice, meaningful participation, and reasoned justification of decisions. The assumption that underlies both EA and the duty to consult is that by requiring decision-makers to consider the impacts of an activity on the natural environment or on the rights and interests of Aboriginal peoples, those interests will be accounted for and reflected in the outcome of the decision, notwithstanding the absence of formal substantive obligations to arrive at a particular result within either process.

However, EA obligations and the duty to consult go beyond process. Neither is ambivalent about the outcomes its produces. The substantive aspect of EA is captured by the commitment to avoid "significant adverse environmental effects" caused by projects and activities subject to EA and to promote sustainable

[3] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [Behn], at para. 28.
[4] *Taku River, supra* note 1 at para. 42 ("…the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims.");*Beckman et al. v. Little Salmon/Carmacks First Nation,* 2010 SCC 53, para 10, [*Beckman*]; see also Deschamps J. at para 103.

development.[5] The substantive aspect of Aboriginal consultation is expressed through the duty to accommodate, which is similarly defined as "taking steps to avoid irreparable harm or to minimize the effects of infringement".[6] The substantive goals of EA are achieved indirectly by requiring that significant impacts be identified and disclosed. Mitigation is encouraged, but the structure of EA is such that the government may ultimately decide that the benefits of a project outweigh its environmental risks.[7] Accommodation, on the other hand, has, formally at least, a different structure owing to its constitutional nature. The Crown's discretion to subordinate Aboriginal interests to competing public goals is more constrained, and in cases of infringement of established rights, is subject to a high threshold of justification.[8]

The principal aim of this article is to examine both the promise and limitations of using EA to implement the duties to consult and accommodate. At the heart of this inquiry is the extent to which careful attention to procedural requirements can bring about substantive ends.[9] In particular, I consider the prospects of EA contributing to a "generative" process of constitutional

[5] *CEAA*, *supra* note 2, s.4.
[6] *Haida*, *supra* note 1 at para 47.
[7] *CEAA*, *supra* note 2 at s.(4)(a).
[8] Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R.(2d) 233 [*Slattery*], at 436.
[9] For a seminal exploration of the relationship between process and substance in environmental law, see A. Dan Tarlock, "Is there a There There in Environmental Law?" (2004) 19 J. of Land Use and Envtl. L. 213.

redefinition;[10] which is to ask, to what extent can EA help build shared understandings among Aboriginal peoples and the Crown with respect to the evolving constitutional "compact" between the non-Aboriginal population and Aboriginal peoples?[11]

The approach is principally descriptive in nature, and is intended to provide legal guidance to those persons engaged in EA processes that are being called upon to satisfy the duty to consult. I also put forward a normative argument. Here the central claim is that if EA is to successfully meet the underlying goal of reconciliation, then those engaged in EA processes must adopt an understanding of EA that recognizes that it is not simply a technical process of impact identification and assessment, but is also a process that has transformative potential. In effect, EA processes ought to be understood as having the potential for genuine deliberation. While the EA process does not dictate particular substantive outcomes, EA requirements do necessitate that the procedural conditions give rise to "meaningful" consultation and good faith, which I argue requires that the parties must be open to reconsidering their interests in light of the factual and normative information that emerges within the EA process, an objective that has to date been underappreciated by administrative officials and courts, but one that it integral to the duty to consult and accommodate. In effect,

[10] *Supra* n.8 at 440, noting that the Supreme Court of Canada has attributed a generative role to s.35; the SCC references this function in *Rio Tinto* at para 38.
[11] *Beckman, supra* n.4, Deschamps J.

participation in and justification of decisions in light of mutually acceptable reasons provides greater opportunities for Aboriginal co-authorship of the policy decisions that effect their rights and interests, which in turn has the potential for both the Crown and Aboriginal groups to generate a set of shared normative expectations that lies at the heart of the notion of reconciliation.

The paper proceeds in three parts. Part One considers the proceduralized nature of EA and the duty to consult. I examine the parallel structure of the two processes, but also how EA and the duty to consult diverge from one another. In Part Two, which forms the central focus of the paper, I look more specifically at stages of the EA process and how the duty to consult is being implemented through EA, and how Canadian courts understand the interaction between these processes. The focus here is on identifying the EA practices that are best able to satisfy the legal requirements and the aspirations of the duty to consult, as well as to identify areas that are likely to present challenges moving forward. Finally, in Part Three, I return to the theme of process and reconciliation, and more specifically to the prospects of process obligations to contribute to a renewed constitutional order.

Part 1 The Duty to Consult and EA: The Turn to Process

a. The Duty to Consult and Accommodate

The duty to consult as a distinct constitutional requirement was established in its present form by the Supreme Court of Canada in the *Haida Nation* and *Taku River Tlingit First Nation* cases and has been elaborated upon in three subsequent Supreme Court of Canada decisions; *Mikisew Cree First Nation, Rio Tinto v. Carrier Sekani Tribal Council, and Beckman et al. v. Little Salmon/Carmacks First Nation*.[12] The duty to consult arises out of the broader principle of the honour of Crown,[13] which places a general duty on the Crown in their dealings with Aboriginal people to determine, recognize and respect the rights of Aboriginal peoples.[14] In the context of treaty negotiation and interpretation, the honour of Crown requires the avoidance of 'sharp dealing' and imposes an overarching obligation of fairness on the Crown in their dealings with Aboriginal peoples. The honour of the Crown has been invoked in support of the obligation of the Crown to consult Aboriginal peoples in the face of infringements of established Aboriginal rights, with consultation becoming a critical consideration in determining whether a government action that infringes an established Aboriginal right is justified.[15]

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[12] *Haida, Taku River, supra* note 1, *Mikisew, supra* note 1; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council,* 2010 SCC 43, [*Rio Tinto*]; *Beckman, supra* note 4.
[13] See *Slattery, supra* note 8; see also Isaac and Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41:1 Alta. Law Rev. 49.
[14] *Haida Nation, supra* note 1 at para 25.
[15] *R. v. Sparrow*, 1990, SCC 104, [*Sparrow*], at 1114.

In *Haida Nation,* the Supreme Court of Canada recognized that the honour of the Crown extends the duty to consult to circumstances where Aboriginal rights are claimed, but are as yet unproven. Allowing the Crown to undertake activities in an unfettered manner where those activities may affect asserted, but unproven claims, would allow the Crown to potentially adversely affect the subject matter of ongoing negotiation.[16] In these circumstances, the honour of the Crown serves to protect these contingent rights.[17]

In *Mikisew Cree,* the question before the court was whether a Crown activity that was contemplated under a historic treaty, in this case, the taking up of surrendered land for road purposes, was nevertheless subject to the duty to consult. In holding that a duty to consult existed in these circumstances, the court maintains that the honour of the Crown does not come to an end once treaties are negotiated, as such the Crown in this case remained obligated to consult since its activities had potential adverse effects on the rights secured under the treaty. To hold otherwise would undermine the goal of reconciliation, which is understood by the court as a continual process, not as a destination that is reached upon

[16] *Haida Nation, supra* note 1 at para 27.
[17] *Rio Tinto, supra* note 12 at para. 33: "The duty to consult…derives from the need to protect Aboriginal interests while land and resources and resource claims are ongoing or when the proposed action may impinge on a Aboriginal right. Absent this duty, Aboriginal groups seeking to protect their interests pending a final settlement would need to commence litigation and seek interlocutory injunctions to halt the threatening activity."

concluding a treaty. A point made clear by the Supreme Court of Canada in *Haida Nation,* where it noted: "Reconciliation is not a final legal remedy in the usual sense. Rather it is a *process* flowing from rights guaranteed by s.35(1) of the *Constitution Act, 1982*."[18]

Because the nature and strength of the Aboriginal claim will vary and the degree of impact from the government action will be dependent on the particular context of the activity in question, these requirements give rise to a duty that varies in its content. The Supreme Court has evoked the concept of a spectrum to illustrate how the content of the duty to consult varies:

> At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential infringement minor. In such cases the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice.
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk on non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with

[18] *Haida Nation, supra* note 1 at para 32.

> the circumstances, the consultation required at this stage 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.[19]

The honour of the Crown not only demands adherence to procedural requirements, but it also imposes a duty to accommodate. This duty is triggered where the *prima facie* case for the Aboriginal claim is strong and the activity is likely to have "significant" adverse effects.[20] While the trigger looks very much like the requirement for deep consultation, noted above, the duty to accommodate is best understood as a distinct obligation in the sense that a duty to consult at the lower end of the spectrum may still yield a obligation to accommodate, and an obligation for deep consultation will not necessarily require accommodation.[21] The duty to accommodate reveals itself through consultation,[22] as a result any consultation to be meaningful must entertain the possibility of accommodation.[23] In *Wii'litswx v. British Columbia (Minister of Forests),* the court found that "An

[19] *Ibid* at para 43 & 44.
[20] *Ibid* at para 47.
[21] See *Ka'A'Gee Tu First Nation v. Canada (Attorney General)*, 2012 FC 297, [*KTFN*], para 122: "The duty to accommodate is not a free-standing legal right".
[22] *Haida Nation, supra* note 1 at para 47; *KTFN supra* note 21 at para 38: "the extent and nature of accommodation, if any, can only be ascertained after meaningful consultation."
[23] *Mikisew, supra* note 1, para 54.

assessment of whether consultation was meaningful inevitably leads to an examination of what accommodations were reached".[24]

The precise content of the duty to accommodate remains ill-defined.[25] The Supreme Court describes the duty as "taking steps to avoid irreparable harm or to minimize the effects of infringement".[26] In its guidelines, *Aboriginal Consultation and Accommodation* (2011), the Federal government notes, "The primary goal of accommodation is to avoid, eliminate, or minimize the adverse impacts on potential or established Aboriginal or Treaty rights, and when this is not possible, to compensate the Aboriginal community for those adverse impacts".[27] While the duty to accommodate is structured as a substantive right, the judicial treatment of the duty has severely curtailed its substantive effect by characterizing the duty as being satisfied through negotiation and compromise, as opposed to through the determination of formal legal rights:

> [A]ccommodation requires that Aboriginal concerns be balanced reasonably with the potential impact of the particular decision on those concerns and with

[24] *Wii'litswx v. British Columbia (Minister of Forests),* 2008 BCSC 1139 [*Wii'litswx*] at para 179.
[25] Lorne Sossin, "The Duty to Consult and Accommodate" (2010) 23 C.J.A.L.P. 93 at 107 *et seq.* [*Sossin*]; Dwight Newman, *Revisiting The Duty to Consult Aboriginal Peoples* (Saskatoon: Purich Publishing, 2014) at 59-63, [*Newman*].
[26] *Haida, supra* note 1, para 47.
[27] *Aboriginal Consultation and Accommodation* (2011) Minister of the Department of Aboriginal Affairs and Northern Development Canada, Online <http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675>, at p.54"consultation that excludes from the outset any form of accommodation would be meaningless".

> competing societal concerns. Compromise is inherent to the reconciliation process.[28]

It follows that the duty to accommodate in the context of unproven or undefined Aboriginal rights does not include a veto.[29] The result is to conflate the substantive content of the duty to accommodate with a form of process obligation, a point alluded to by the Supreme Court: "Where consultation is meaningful, there is no ultimate duty to reach agreement".[30] The Court's deference to government discretion in connection with this duty – the standard of review for determination of whether the duty to consult and accommodate has been fulfilled is reasonableness – is consonant with an understanding that these duties require political, as opposed to judicial, competencies.[31]

b. Environmental Assessment

Environmental assessment has become a central pillar of the environmental regulatory system in Canada and, indeed, globally.[32] The logic of environment assessment is straightforward. Prior to making decisions that may have adverse impacts on the natural environment, decision makers should inform themselves of

[28] *Taku River, supra* note 1 at para 2.
[29] *Haida, supra* note 1 at para 48.
[30] *Taku River, supra* note 1 at para 2.
[31] *Haida, supra* note 1 at para 62.
[32] Richard Morgan, "Environmental impact assessment: the state of the art", (2012) 30 Impact Assessment and Project Appraisal 5 at 5-6 (noting globalized nature of EIA processes).

the potential environmental consequences of their decision, and should inform and consult other government agencies and the public.[33] In order to bring this examination about, environmental assessment legislation prescribes a set of procedural requirements that determine the level of scrutiny to which a project will be subject, the scope and content of the assessment itself, and the degree of public engagement.[34] The procedural orientation of environmental assessment is captured by the Supreme Court of Canada in the *Friends of Oldman River* case, in which the Court describes EA in the following terms:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making.
>
> As a planning tool it has both an information-gathering and decision-making component which provide the decision-makers with an objective basis for granting or denying approval for a proposed development. In short,

[33] It is difficult to essentialize EA, and different decision-makers may seek to impose a more rigorous and sustainably-oriented approach, emphasizing not only bio-physical harm mitigation, but also seeking positive contributions to environmental, social and economic sustainability, see for example, Robert Gibson, "Favouring the Higher Test: Contribution to sustainability as the central criterion for reviews and decisions under the *Canadian Environmental Assessment Act*" (2000) 10 *JELP* 39 [Gibson]. The discussion that follows focuses on the legislative and judicial approaches to EA processes in Canada, which have tended to emphasize harm mitigation. I return to the issue of a more expansive understanding of EA in Part 3.

[34] Christopher Wood, *Environmental Impact Assessment: A Comparative Review, 2d.* (New York, Routlege, 2003); Jane Holder, *Environmental Assessment: The Regulation of Decision Making* (Oxford, Oxford University Press, 2006) [*Holder*]; Bram Noble, *Introduction to Environmental Impact Assessment: A Guide to Principles and Practice,* 2d ed. (Don Mills, Oxford University Press, 2009).

environmental impact assessment is simply descriptive of a process of decision-making.[35]

The precise procedural requirements of EA are variable and responsive to the potential level of environmental harm, and can range from cursory reports prepared by proponents or authorizing agencies with little or no opportunities for direct consultation to hearings before independent tribunals who prepare recommendations for statutory decision-makers. The underlying logic is to match the procedural requirements with the degree of environment risk posed.

As suggested by the Supreme Court, EA is not a regulatory instrument in the sense that EA legislation does not require adherence to pre-determined environmental outcomes in the manner that traditional command-and-control regulations, such as emission standards, do.[36] That said, EA processes are very clearly intended to influence outcomes, and in this regard, EA legislation identifies substantive goals, such as the avoidance of significant environmental affects and the promotion of sustainable development.[37] However, the environmental goals to which EA is directed are only identified in such broad terms, that, on their own, they can fairly be said to constrain government activity

[35] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 SCC 110 at para 95; see also *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para 14.
[36] Richard Stewart, "A New Generation of Environmental Regulation" (2001) 29 Capital University L. Rev. 21 at 140-41 (describing EIA processes as a form of reflexive law).
[37] *CEAA, supra* note 2 at s.4.

very little. Ultimately, even where an EA discloses significant environmental impacts, it remains open for the government to proceed with the activity in question. The U.S. Supreme Court captured the procedural dynamic of EA where it noted that the *National Environmental Policy* Act, which contains the U.S. federal EA obligations, "merely prohibits uninformed – rather than unwise – agency action".[38]

It would be an oversimplification of EA, however, to view it in purely procedural terms. The premise behind EA is that informed and open attention to adverse environmental effects will result in environmentally benign decision-making, as public officials will seek to adhere to the identified public purposes of EA legislation. Public participation, which is an essential part of EA, serves as both an informational tool, insofar as members of the public can identify environmental and social impacts, and an accountability tool. Decision-makers are required to justify their decisions in light of the environmental impacts and in light of the specific concerns raised by members of the public. Despite the SCC's characterization of EA as supplying an "objective basis" for decisions, which suggests a purely technical role, EA is understood by many commentators as having political and normative dimensions.[39] The consultative nature of EA

[38] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989)
[39] Serge Taylor, *Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform* (Stanford: Stanford University Press, 1985) [*Taylor*]; Robert Bartlett & Priya Kurian, "The Theory of Environmental Impact Assessment: Implicit Models of Policy Making" (1999)

provides opportunity for agencies and the public to bring power and influence to bear on decisions, while the justificatory nature of EA requires that decisions be justified in light of substantive normative criteria.

c. Understanding the Turn to Process

The key point of connection between the duty to consult and EA is the turn to process as the primary approach to addressing substantive goals, with parallels in both the structure of the process and the underlying justification for preferring procedural obligations. First, both the duty to consult and EA are primarily concerned with government decision-making and involve public duties. For the duty to consult, the focus on government arises from the special relationship between the Crown and Aboriginal peoples. In some instances, the courts have characterized this relationship as a fiduciary duty, but more generally, the relationship is captured by the more flexible concept of the honour of the Crown.[40] The government's relationship to the public in relation to the environment arises not from a special relationship, but from the status of the natural environment as a public good. As such, the courts have recognized that safeguarding the public interest in the environment is the responsibility of the

27:4 Policy and Politics 415 [*Bartlett & Kurian*]; Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (New York: Cambridge University Press, 2008) [*Craik*].

[40] See *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para 81.

Crown, giving rise, for example, to the right of the Crown to recover damages for pure environmental loss.[41] While the Crown's obligation regarding the environment does not formally constitute a trust, there is a trust-like dimension that draws parallels with the duty to consult.[42] In both cases, the Crown is understood as the steward of resources, the benefit of which accrues to others. This in turn requires, as a minimum, that the Crown discharge its stewardship obligations in good faith. In both cases, because the responsibility resides with the Crown, and not on a private party, such as a resource developer, the obligations relate to the Crown's conduct and are triggered by the actions of the Crown.[43]

Since both EA and the duty to consult engage administrative discretion, the Crown is required to exercise that discretion with reference to public values.[44] In relation to EA, these values are expressed in EA legislation, and relate to public goals of sustainability, environmental protection and meaningful public engagement.[45] The public goals of the duty to consult are the recognition and accommodation of Aboriginal rights, which is framed as a public value through the honour of the Crown. In both cases, however, these underlying substantive goals are open-textured and only cognizable with reference to specific contexts.

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[41] *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38 [*Canfor*] at para 72-83.
[42] *Ibid*, but note that the Court in *Canfor* does not go so far as to hold that the Crown can be held legally responsible for breach of trust in the event of government failure to protect the environment, see para 81-82.
[43] *CEAA, supra* note 2, s.5 – triggers.
[44] *Roncarelli v. Duplessis*, 1959 SCC 50.
[45] *CEAA, supra* note 2, s.4.

One might suppose that EA processes would become redundant in the face of specific standards governing air and water pollution, toxic substances, waste management, biological diversity and endangered species protection, as well as land use controls.[46] However, in Canada, and elsewhere, EA laws persist in the face of substantive environmental law. One reason why EAs have not become superfluous in the face of growing substantive environmental rules is that the avoidance of significant environmental harm, particularly from large and complex undertakings, is difficult to determine in the abstract. For example, most EA legislation recognizes the importance of cumulative impacts from multiple sources, something for which it is harder to develop standards.[47] Ecosystem and related social impacts are often the result of the interaction of environmental and social components, which again requires a more holistic approach. Adherence to standards also does not adequately inform decision-makers whether the social and economic trade-offs associated with an activity are justifiable – a determination that is again highly context specific.

The need for contextual decision-making is also integral to government decisions affecting Aboriginal interests. The particular circumstances relating to

[46] Michael Herz, "Parallel Universes: NEPA Lessons for the New Property" (1993) 93 Columbia L.Rev. 1668 at 1682-83 (noting that under NEPA there is an important separation between the presence of substantive standards and EIA commitments).
[47] Since standards tend to be facility specific.

the strength of the claim and the potential for infringement will vary on a case-by-case basis. So too will the government's interests in the potentially harmful activity.[48] A set of clear substantive rules respecting accommodation is not possible as the duties to consult and accommodate necessarily respond to the particular facts at hand. The relationship between the duties to consult and accommodate is further complicated by the fact that the presence of a substantive duty cannot be determined *ex ante*, since part of the purpose of the duty to consult is explore whether there is a duty to accommodate. As currently described by the courts, the duty to accommodate has a kind of twilight existence. It does not give rise, at least in a formal sense, to a right of consent.[49] But adherence to procedural duties alone will not satisfy the duty to accommodate, which requires by definition efforts to address Aboriginal concerns.[50] Like the decision that must be made in EA, the duty to accommodate requires a balancing of competing interests.[51]

Proceduralization is a product of the need for contextual decision-making, but it is also recognition of the political content of the underlying goals.[52] Since the decisions being undertaken involve the balancing of different interests that are

[48] *Mikisew, supra* note 2 at para 63.
[49] But in the case of proven claims, see Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, discussing obligation of the Crown where Aboriginal title is demonstrated.
[50] *Haida, supra* note 2 at para 49.
[51] *Ibid* at para 50: "the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests."
[52] See Gunther Teubner, "How The Law Thinks: Toward A Constructivist Epistemology Of Law" (1989) 23:5 Law and Soc'y Rev. 727.

traditionally left to the political branches of government, the recourse to procedure structures the nature of these interactions but not the content of the outcome.[53] Accommodation is a process of "balance and compromise" between Aboriginal groups and the Crown. Reconciliation, which is the underlying goal of the duty to consult and accommodate, ought to be a product of negotiation not litigation. [54] The turn to procedure respects the primacy of the political branches in the reconciliation process.

Acknowledgement of the political nature of the decision-making process is also evident within EA processes. The decision to proceed with an activity is left to the discretion of the responsible agency, which must account for the results of the EA, but is not bound by it. While substantive norms shape the political process by creating burdens of justification on government decision-makers, agencies retain control over the exercise of this discretion.[55] Process does not serve to take politics out of the decision-making process, but rather requires that the

[53] David Dyzenhaus & Evan Fox-Decent, "Rethinking the process/substance distinction: Baker v. Canada" (2001) 51:3 U.T.L.J. 193 [*Dyzenhaus & Fox-Decent*].
[54] *Haida*, *supra* note 2 at para 14; *Rio Tinto, supra* note 12 at para 38, consultation "seeks to further an ongoing process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations"; see also *Beckman*, *supra* note 4 at para 103, Deschamps J. makes this point noting: the "objective of reconciliation of course presupposes active participation by Aboriginal peoples in the negotiation of treaties, as opposed to a necessarily more passive role and an antagonistic attitude in the context of constitutional litigation."
[55] The identity of decision-makers varies from system to system, ranging from individual administrative delegates to cabinet level decision-makers.

government engage in a form of decision-making that is transparent, participatory and justificatory.[56]

Both sets of obligations blur the distinction between process and substance by imposing an informal substantive legal rationality on the decision-making process. The principles that guide the exercise of authority are substantive in the sense that they are intended to influence the outcome of the decisions. EA processes are, for example, meant to result in the avoidance of adverse environmental impacts. Decisions that engage the duty to consult are intended to lead to the avoidance of adverse impacts to those interests. The substantive obligations, owing to their inchoate and contextual nature, find expression in the commitment to principled decision-making through the requirement for justification in light of shared substantive values. The standard of review of the adequacy of this justification is reasonableness, which recognizes the superior position of the original decision-maker to assess the application of principles to the often-complex factual context.[57] While not subject to strict judicial supervision, normative justification is nonetheless constraining in that it reduces the available courses of action open to the government. The public nature of the

[56] *Craik, supra* note 39 at 280.
[57] *Haida, supra* note 1; see also *Sossin, supra* note 25.

justification contributes to the substantive constraints because the acceptance or non-acceptance of the reasons put forward can contribute to political authority.[58]

There is a strong emphasis on good faith within both processes. Good faith does not require that the government abandon its own interests in favour of those potentially affected by its decisions, but it does require a demonstration that the government make a genuine attempt to understand the interests of other parties and to assure those parties that their views have been accounted for. While good faith is largely determined with reference to how decisions were undertaken, there is also a substantive element that requires that the reasons given in order to demonstrate that the decision taken accords with the objectives of the respective obligations.

The turn to process also reflects a more sociological understanding of how process obligations may influence substantive outcomes. Both EA and the duty to consult would appear to embrace the possibility that adherence to procedural requirements will result in social learning by the participants with the potential to internalize shared norms.[59] By creating conditions that make genuine deliberation possible, participants may reconsider their interests in light of factual and

[58] *Dyzenhaus & Fox-Decent, supra* note 53.
[59] See, for example, John Sinclair and Alan Diduck, "Public Involvement in EA in Canada: A Transformative Learning Perspective" (2001) 21 Environmental Impact Assessment Rev. 113; see also Robert Bartlett, Rationality and the Logic of the National Environmental Policy Act" (1986) 8 Envt'l Professional 105.

normative information. EA was developed in part as a response to the failure of public agencies to consider environmental matters in the exercise of their discretion.[60] EA underscored the idea that environmental considerations ought to form a part of all good public decision-making. Similarly, the duty to consult responded to the failure of the Crown and the courts (in injunction proceedings) to properly account for Aboriginal interests in government decisions. [61] Internalization of norms is not guaranteed, and the supposed transformational effects of process are the subject of criticism in both EA and the duty to consult.[62] Nonetheless, the stated goal of both processes remains one of integrating competing sets of values into a shared vision, best captured in the concept of sustainable development that underlies EA and Justice Binnie's description of reconciliation as leading to "a mutually respectful long-term relationship.[63]

Despite these similarities, there are also important differences in the nature of these obligations. The environmental interests that EA addresses are the interests that all citizens share in relation to the natural environment. EA originated in part as an acknowledgement that all citizens have an interest in

[60] Lynton Caldwell, "Beyond NEPA: Future Significance of the National Environmental Policy Act" (1998) 22 Harvard Envt'l L. Rev. 203.
[61] *Haida, supra* note 1 para 14.
[62] Joseph Sax, "The (Unhappy) Truth about NEPA" 26 Oklahoma LR (1973) 239 [*Sax*]; *Newman, supra* note 25 at 105.
[63] Binnie J. in *Beckman*, *supra* note 4 at para 10; *NEPA, supra* note 2 s. 101: "goal of sustainability".

maintaining environmental resources.[64] Because these interests are shared, they are what I would classify as "stakeholder" interests. Individuals derive benefit from environmental resources, but they have no specific common law rights, beyond private property interests.[65] The environmental interests protected through EA are subsumed as part of the broader public interest. As a consequence, the interests protected are not superior to other elements of public interest, and may be traded-off against other public priorities, including development interests. In recognition of the government's superior position in determining the public interest, courts have granted agencies implementing EA rules broad discretion to determine how best to balance competing interests.

The interests protected by the duty to consult are of a different character. The difficulty is that the character is variable depending upon the strength of claim. At the high end, where the interests are either proven rights or rights that possess high *prima facie* strength, the rights cannot be easily traded off. Given their constitutional nature they are in effect superior to other public interests. This does not make those rights absolute, but it does require compelling and substantive reasons to justify infringement.[66] Even in cases where the strength of claim is lower, the interests remain underlain by the potential existence of a future, proven right. The potential and underlying substantive content that attaches

[64] *NEPA, supra* note 2.
[65] *Canfor, supra* note 41.
[66] *Sparrow, supra* note 15 at 1113.

to Aboriginal interests is significant across the entire spectrum of the duty to consult because it is through the duty to consult that the nature of the interests reveals itself, as a result, the process always operates in the shadow of substantive Aboriginal rights.

Unlike environmental interests, Aboriginal rights, which are held collectively by an identifiable group, are defined oppositionally to the "broader community as a whole".[67] Whereas environmental interest can be entirely subordinated to other public interests, such as economic development, Aboriginal rights, which are constitutionally protected and independent of Crown authority, cannot be so easily subordinated. Since the duty to consult is oriented towards the reconciliation of "prior Aboriginal occupation of the land with the reality of Canadian sovereignty",[68] the Crown must temper the exercise of its sovereignty with the rights of self-determination and cultural self-expression that inhere in the fact of prior occupation.

Part 2 – Implementing the Duty to Consult through Environmental Assessment

a. Defining the Relationship between EA and the Duty to Consult

[67] R. v. Gladstone, 1996 SCC 160, [*Gladstone*], para 73.
[68] *Haida*, *supra* note 1 at para 26.

The question of whether the Crown could implement the duty to consult through its existing EA processes arose in the *Taku River Tlingit First Nation* case that was decided by the Supreme Court of Canada with *Haida Nation* in 2004.[69] In that case, which concerned a proposal to build a road through the Taku River Tlingit First Nation's (TRTFN) traditional lands, TRTFN had participated in an environmental assessment process for the road under British Columbia's *Environmental Assessment Act*.[70] The SCC found that TRTFN was entitled to consultation in the middle to high range of the spectrum, allowing "TRTFN was entitled to something significantly deeper than minimum consultation under the circumstances, and to a level of responsiveness to its concerns that can be characterized as accommodation".[71]

Under the B.C. process in place at the time, the EA process is coordinated through a Project Committee, on which TRTFN participated. Through that process, TRTFN had an opportunity to review the many reports and studies produced in support of the project, and it was able to voice its concerns with the project as proposed. Ultimately, the project was recommended for approval, although TRTFN had outstanding concerns. TRTFN appealed the decision on the basis that the EA process was an inadequate form of consultation. The SCC found

[69] *Taku River, Haida, supra* note 1 at para.
[70] *Environmental Assessment Act,* SBC 2002, ch. 43, s. 29.1.
[71] *Taku River, supra* note 1 at para 32.

that the EA process fulfilled the requirements of the duty to consult in this instance.[72]

The principal legal finding of the court was that the duty to consult does not require the development of special consultation measures, but rather can be satisfied through existing schemes, such as the EA process.[73] In coming to this conclusion, the Court was careful to review in considerable detail the specific elements of the scheme. Given the variability the duty to consult and EA processes, courts will be required to look behind the particular scheme to ensure that its application meets the requirements of the level of consultation that must be afforded in the circumstances. In this case, while the duty was determined to be near the high end of the spectrum, the particulars of the EA scheme satisfied that onus. Of salience in this regard were the following features of the EA scheme:

- That TRTFN participated directly as a member of the Project Committee (a statutory requirement);
- TRTFN was provided with financial assistance to facilitate its participation;
- Numerous meetings with officials and the consultants preparing the EA were held with the TRTFN to discuss TRTFN's concern;

[72] *Ibid* at paras 22, 40.
[73] *Ibid* at para 40.

- On several occasions time extensions were granted to allow TRTFN more time to respond to information;
- TRTFN's concerns were set out in the Project Report and "meaningfully discussed";
- The Report included mitigation strategies to address TRTFN's concerns, which were adopted into the project approval conditions;
- There were further opportunities for TKFN's concerns to be addressed through the permitting process for the project.[74]

Matching the requirements of the duty to consult with the EA process, the key elements of the EA process were that TRTFN were provided with notice, full disclosure of the project details and impacts, TRTFN were given ample opportunity to understand how their interests were affected, and to voice their concerns and have those concerns responded to meaningfully. The presence of mitigation measures that sought to address TRTFN's concerns was understood by the court as a form of accommodation.[75] The Court notes that the EA process itself was adapted to meet the concerns of TRTFN.[76] The *Taku River* case should be understood to stand for the proposition that the duty to consult may be implemented through EA in principle, but each case will be determined on its own merits in light of the particulars of the actual process carried out and the level of

[74] *Ibid* at paras 3, 37, 38, 11, 41, 44, 46.
[75] *Ibid* at para 44.
[76] *Ibid* at para. 2.

consultation and accommodation demanded in the circumstances. It should also be noted that the British Columbia EA process in place at the time the *Taku River* case was decided provided for a high level of engagement that is not present in other jurisdictions, and has since been amended in British Columbia.[77]

The issue of EAs was also raised incidentally in the *Haida Nation* case, where the SCC in its discussion of the duty on third parties (particularly project proponents) indicated that while the duty to consult *in toto* cannot be delegated, the "Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments".[78] The distinction that the Court is making between "procedural" and other non-procedural aspects of consultation is not entirely clear, particularly in light of the process-oriented nature of the duty as a whole. However, if viewed in light of the *Taku River* case, the EA process provides for a delegation to industry proponents of the conduct of the study, subject to defined terms of reference. It is not uncommon through this process for the proponent (typically through a consultant) to engage the public and other agencies in defining the scope of the study, understanding the concerns of the public and, where appropriate, recommending mitigation measures to address those concerns. At the end of this process, the findings are communicated (usually in a report) to

[77] *Environmental Assessment Act,* SBC 2002, c.43. (The *Taku River* case considered the process under the prior *Environmental Assessment Act,* RSBC 1996, c.119.)
[78] *Haida*, *supra* note 1 at para 53.

the statutory decision maker. In the *Taku River* case, the recommendations were made to the Executive Director of the EA division, who then makes a recommendation to the Minister. As a result, the Crown, through the Minister, was ultimately responsible for the approval, and the Minister had before him or her a full record of the concerns of TRTFN and the measures of how they were addressed.

The issue of the adequacy of EA has arisen in subsequent cases. In *Ka'A'Gee Tu First Nation v. Canada*, the adequacy of regulatory processes, including the EA process was contested by the KTFN.[79] In its decision, the Federal Court confirmed that EA processes could satisfy the duty to consult, but that process must provide meaningful consultation throughout the approvals process. At issue in the case was a modification to the project that occurred after the consultation with the KTFN. While the process on the original proposal was the subject of adequate consultation, the Crown could not unilaterally modify the project without providing KTFN with a further opportunity to have input on the modified activity.[80] The process undertaken was in accordance with the statutory requirements, which did not require further consultation on modifications, but the Federal Court found the process failed to satisfy the duty to consult, noting that it is not enough to rely on a statutory process. The Crown's constitutional duty must

[79] *KTFN, supra* note 21 at para 30.
[80] *Ibid* at para 120, 124.

take precedence. In the Court's words, "the Crown's duty to consult cannot be boxed in by legislation".[81]

The judicial consensus that is emerging is that statutory processes designed to satisfy other regulatory requirements, such as EA, may satisfy the duty to consult, so long as "in substance an appropriate level of consultation is provided".[82] In cases where the statutory process on its own is adequate, Aboriginal groups cannot insist on a separate and discrete consultation process with the Crown.[83] In one case, the Court goes so far as to say that where statutory process are accessible and adequate, Aboriginal groups have a "responsibility to use them".[84] This is more likely to occur at the low end of the consultation spectrum. Where consultation requirements are more onerous, as in the *Taku River* and *Ka'A'Gee Tu First Nation* cases, the statutory processes may need to be adjusted, or supplemented, in order to meet the constitutional requirements.[85] This is not an insignificant challenge, as there are high degrees of variability in what the duty to consult will require in each instance, and in the manner by which the EA is structured along side other regulatory approval processes.

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[81] *Ka'a'Gee Tu First Nation v. Canada (Attorney General),* 2007 FC 763 at para 121.
[82] *Beckman*, *supra* note 4 at para 39; see also *Conseil des innus de Ekuanitshit c. Canada (Procureur général)*, 2013 FC 418 [*Innu*] at 113 ("...it is now a well accepted practice that Crown consultation can take place through CEAA's EA process.").
[83] *Brokenhead Ojibway First Nation v. Canada (Attorney General),* 2009 FC 484 [*Brokenhead*] at para 42.
[84] *Ibid.*
[85] *Taku River, supra* note 1; *KTFN, supra* note 81; see also *Ka'a'Gee Tu First Nation v. Canada (Attorney General), supra* note 21 at para 112 (describing and finding that the process prescribed in the 2007 KTFN case was meaningful).

One further aspect of the relationship between the duty to consult and EA is that even where an alternative consultation process is contemplated, the Crown may nevertheless have an obligation to ensure that there is adequate consultation within the EA. In *Nlaka'pamex Nation Tribal Council v. British Columbia*, the statutory process for determining the terms of reference for an EA process, including which groups had to be consulted as part of the EA process, excluded the NNTC.[86] The Environmental Assessment Office did propose consultations outside of the EA process, but the BCCA held that "denying the NNTC a role within the assessment process is denying it access to an important part of the high-level planning process", and as such consultation outside the EA process could not be a "substitute for consultations within the assessment process itself".[87] The Crown had argued that in the circumstances, the proposed form of consultation was most efficient and that it was simply seeking to "balance its obligation to consult with its obligation to carry out its statutory duty in an effective manner".[88] As in other cases, however, the Court recognized that the constitutional duty took priority and that efficiency rationales could not be used to compromise the duty to consult.

[86] *Nlaka'pamex Nation Tribal Council v. British Columbia,* 2011 BCCA 78 [*NNTC*].
[87] *Ibid* at para 97.
[88] *Ibid* at para 68.

This decision points to the inseparability of EA from the duty to consult. What the court recognized here was that key aspects of the project would be determined through the EA process, and by separating consultation from that process, the consultations could not be meaningful, as they where disengaged from the broader decision-making process that could affect Aboriginal rights. The practical implication of the NNTC case is that even where the Crown is engaged in parallel consultations, it must consider whether other regulatory processes may influence Aboriginal rights, in which case the Crown is likely obligated to provide appropriate levels of consultation within those regulatory processes.

This connection may work both ways in that where Aboriginal consultations result in major project changes, the revised project may need to be the object of additional public participation through the EA process. Because the Crown must balance its obligations to Aboriginal peoples with other public interest concerns, it may face restrictions in its ability to consult with Aboriginal groups to the exclusion of other interested parties. These latter interests may trigger administrative law protections, but in the EA context, are most likely addressed through statutory public participation requirements.

b. Current Government Practices

The federal and provincial governments have indicated a clear preference to use environmental assessment processes where they apply to fulfill the duty to consult, and have increasingly institutionalized their approach in government policy. For example, the federal government's guide to *Aboriginal Consultation and Accommodations: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult,* states that "The Government of Canada will use and rely on, where appropriate, existing consultation mechanisms, processes and expertise, such as environmental assessment and regulatory approval processes in which Aboriginal consultation will be integrated, to coordinate decision making and will assess if additional consultation activities may be necessary".[89] The approach seeks, as far as practical, to integrate the duty to consult with the EA process, and with regulatory processes. In order to coordinate this process across the various departments of the federal government, the Guidelines identify the Canadian Environmental Assessment Agency as the Crown consultation coordinator, and clarifies the roles of other participants, such as other responsible authorities, proponents, and other regulatory agencies in the EA process.[90]

[89] Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011) <http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675> [*Federal Guidelines*] at 14.
[90] *Ibid.*

Provincial governments have likewise sought to integrate consultation within their EA processes.[91] In a number of cases, the provincial guidelines explicitly incorporate directions to project proponents to carry out the "procedural aspects of consultation".[92] For example, the BC *Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process* explicitly identify those areas which are "procedural aspects" of consultation, and those which cannot be delegated. The areas subject to delegation include:

- Providing information about the proposed project to First Nations early in planning process;
- Obtaining and discussing information about specific Aboriginal Interests that may be impacted with First Nations;
- Considering modifications to plans to avoid or mitigate impacts to Aboriginal Interests; and
- Documenting engagement, specific Aboriginal Interests that may be impacted and any modifications to address concerns and providing this record to EAO.

While the following decisions remain the responsibility of the Crown:

- The strength of a First Nation's claimed Aboriginal Rights or Title

[91] Province of British Columbia, *Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process* (2014) <http://www2.gov.bc.ca/gov/DownloadAsset?assetId=E7440CDF3C864AA8B63D48EA79D37BA1> [*BC Guide*]; Province of Saskatchewan, *Guidelines for Engaging and Consulting with First Nations and Métis Communities in Relation to Environmental Assessment in Saskatchewan* (June 2014) <http://www.environment.gov.sk.ca/EAProponentConsultationGuidelines> [*Saskatchewan Guide*].
[92] *Ibid*.

- Whether Crown decisions regarding a proposed project represents potential infringements of Treaty rights; and
- The adequacy of the Crown's duty to consult and accommodate.[93]

In addition to general guidelines, governments have developed consultation frameworks on a case-by-case basis. For example, the federal government has developed Aboriginal Consultation Frameworks setting out how the federal government will conduct consultation in the context of complex regulatory proceedings involving administrative tribunals, such as review panels under the Canadian Environmental Assessment Act.[94] The role of tribunals in satisfying the duty to consult was considered in *Beckman*, and some of the complications as they relate to EA proceedings are discussed below. The practice that is emerging is to distribute consultation activities across different phases of the approvals process and use the hearing process as the central vehicle for consultation, although inserting opportunities for direct consultation with the Crown.[95] The result in

[93] *BC Guide, supra* note 91 at 3; see also the *Responsible Energy Development Act,* SA 2012, c.R-17.3, s.21, (preventing regulator from assessing adequacy of Crown consultation).
[94] Government of Canada, *Aboriginal Consultation Framework for the Northern Gateway Pipeline Project* (n.d.) <http://www.ceaa-acee.gc.ca/050/documents/44761/44761E.pdf> [*Northern Gateway*]; Government of Canada, *Federal Aboriginal Consultation Framework for the Lower Churchill Hydroelectric Generation Project* (August, 2010) < http://www.ceaa-acee.gc.ca/050/documents/44761/44761E.pdf>.
[95] For example, in the approvals process for the Northern Gateway pipeline, which required both an EA and approval of the National Energy Board, the Consultation Framework identified five distinct phases: Phase I - involving initial engagement of potentially affected Aboriginal groups and consulting on the development of the Joint Review Panel process; Phase II – involving the lead to the JRP, where information is exchanged among the parties; Phase Three – the hearing itself, including the preparation by the JRP of its reports and recommendations, which may include recommendations aimed at accommodation, but may not

these cases is a separation between the "procedural aspects" of the duty from the decision itself. This has lead governments to restrict the mandates of some consultation bodies by preventing those bodies from making determinations of the strength of claim and from assessing the adequacy of the Crown's fulfillment of the duty to consult.[96]

c. Specific Implementation Issues

i. Application and Screening

Picking up on the point above, the Crown will need to make a determination as to whether a regulatory process engages the duty to consult and at which point within that process consultation ought to be commenced. Within EA processes, the initial determinations of whether an EA shall be conducted and, if so, what form the EA shall take, are referred to as screening processes. Under current federal rules, the determination of whether an EA should be conducted is a decision that involves nearly unconstrained discretion,[97] but under prior

include determinations as the strength of Aboriginal claims or the adequacy of consultation; Phase IV – consultation with the Crown Consultation Coordinator on the JRP EA report, which is reported to the Cabinet, who makes a determination on the government's response to the JRP report; and Phase 5 – involving additional consultation on further regulatory approvals. Northern Gateway Framework

[96] *Northern Gateway, supra* note 94.

[97] *CEAA, supra* note 2, s.10.

legislation a full EA was triggered where a project was determined to have a likelihood of having a significant environmental impact.[98]

The basic rule respecting when the duty to consult arises was stated in *Haida Nation* as occurring "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".[99] The obligation, which relates to Crown "conduct", is much broader than the application of EA, which is typically restricted to physical projects.[100] The different scope of application has led to some difficult practical questions about when consultation needs to be engaged. One source of difficulty is that project planning processes are not necessarily discrete activities, but rather occur in the context of other enabling decisions on policies and programs.

This issue first arose in the *Haida Nation* case, which involved the granting of a tree farm licence. The tree farm licence did not authorize the harvesting of trees, which required further permits. The B.C. government argued that while it

[98] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [*CEAA 1992*], s.20, (under *CEAA 1992* a comprehensive EA was required for projects identified by regulation, but where not specifically included in regulation a screening EA was conducted, which if indicated a likelihood of significant effect (or if uncertain about impacts or public concerns warranted) would require the responsible authority to refer the project to mediation or a review panel). Pursuant to s.5, Federal EAs apply only to activities that involve identified federal "triggers".
[99] *Haida*, *supra* note 1 at para 35.
[100] See, for example, definition of "project" in *CEAA, supra* note 2 at s. 2(1)

did not consult at the stage of granting the tree farm licence, it intended to consult prior to the issuance of cutting permits. In holding that the duty to consult applies to the tree farm licence, the Court recognized that the strategic level decision strongly influenced the subsequent outcomes, and leaving consultation to a later stage would prevent meaningful consultation.[101] The extension of the duty to consult to "strategic, higher level decisions" was confirmed by the Supreme Court in the *Rio Tinto* case, which noted that the duty ought include decisions respecting higher-level or structural changes to resource management schemes as those changes may "set the stage for further decisions that will have a direct adverse impact on land and resources".[102]

A form of strategic planning is often associated with large scale, complex development processes, such as pipelines or large facilities that engage multiple regulatory processes, often across jurisdictions. For example, the Mackenzie gas pipeline spans multiple jurisdictions and engages EA and other environmental regulatory requirements at territorial, provincial and federal levels, as well as National Energy Board approvals. In order to manage and streamline these multiple processes a Cooperation Plan was developed among the regulators. Other interested parties in the proceedings, including the project proponents, were consulted as part of the development of this process. The Dene Tha' First Nation

[101] *Haida*, *supra* note 1 at para 76.
[102] *Rio Tinto, supra* note 12 at 47

was not consulted and challenged the proceedings on the basis of the Crown's failure to consult. In holding that the Dene Tha's rights to consultation were breached, the Court characterized the Cooperation Plan as "strategic", in the sense that the issues determined through the Cooperation Plan had the potential to adversely affect the rights of the Dene Tha'. As a consequence, the Crown's duty extended to the creation of the Cooperation Plan, but the Dene Tha' were not even given notice of the Cooperation Plan, let alone meaningfully consulted about the process, resulting in the breach.[103]

While the court uses the term "strategic", they remain project oriented. EA practice also includes processes for the assessment of higher-level policy, planning and programming decisions, often referred to as strategic environmental assessment (SEA) [104] While these processes are well developed in other jurisdictions, they remain largely ad hoc and informal in the Canadian context.[105] Nevertheless, the underlying justification for early consultation suggests that the duty to consult will extend to upstream policy decisions.

[103] *Dene Tha' First Nation v. Canada (Minister of Environment)*, 2006 FC 1354 [*Dene Tha'*] at para 3.
[104] R. Gibson, H. Benevides, M. Doelle, & D. Kirchhoff. "Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options" (2010) 20.3 *J.E.LP.* 175 [*Gibson, et. al.*]
[105] There is a federal Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals, but it is non-binding and does has not found much purchase in the development process. See also *Gibson, et al., supra* note **Error! Bookmark not defined.**

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Whether a preliminary proceeding will trigger the duty to consult depends on the extent to which those earlier proceedings are likely to prejudice future decisions. One of the benefits of integrating the duty to consult with EA is that the EA process provides a mechanism for gathering a great deal of project specific information on potential impacts. The context specific nature of EA allows interested parties to understand how a proposal impacts their interests. However, as decisions become more abstracted from the project and more diffuse and indirect in their impact, determining whether a policy decision has an adverse impact will become more difficult. For example, the Federal Court of Appeal in Hupacasath First Nation v. Canada held that the conclusion of a trade agreement that may constrain government resources policy was too speculative to give rise to the duty to consult.[106] It should also be realized that the connection between higher-level decisions and subsequent project-level decisions may be more apparent in hindsight.

In a case involving the Northern Gateway Pipeline process, the Gitxaala First Nation argued that their non-involvement in a marine safety review process that formed the background to the larger EA process on the pipeline was a breach of their right to be consulted. The court, however, in denying the claim, found that the marine safety report did not determine any rights in the broader approvals

[106] *Hupacasath First Nation v. Canada,* 2015 FCA 4

process and its findings could be challenged within the EA process itself.[107] The Court also held that given that there was a further public consultation established under the EA and or other processes, the Gitxaala Nation's objections were premature.[108] The question that the Courts must turn their attention to in these instances is the extent to which the prior process creates "clear momentum" that forecloses or narrows the subsequent proceedings.[109] Whether the prior process in binding is not determinative of the matter, but rather the courts appear to look at the practical effect of the prior process. The degree to which a subsequent process can remedy an earlier failure to consult also appears to be a factor.[110]

Where the screening assessment discloses adverse impacts on Aboriginal interests, the Crown under EA legislation, maintains broad discretion to not conduct an EA and to address the duty to consult in a process outside an EA. However, such a decision, particularly where the Aboriginal group seeks an EA as the preferred mode of consultation, may defeat the purposes of CEAA, which include the promotion of "communication and cooperation with aboriginal peoples with respect to environmental assessment".[111] Conducting an EA may be understood as a form of accommodation itself, since systematic identification and

[107] *Gitxaala Nation v. Canada (Transport, Infrastructure and Communities),* 2012 FC 1336 [*Gitxaala*] at para 51.
[108] *Ibid* at para 54.
[109] *Ibid* at para 40, citing Sambaa k'e Dene Band.
[110] *Ibid* at para 34.
[111] *CEAA, supra* note 2 at s.4(1)(d).

assessment of impacts through EA can be understood as an appropriate and proportionate means to address those impacts. It remains an open question whether the Crown is obligated to exercise its discretion in relation to determining whether or not to conduct an EA in a manner that most fully accords with its constitutional duty. At a minimum, the screening process should be conducted in a manner consistent with the duty to consult, including providing appropriate levels of participation and justification. Adherence to the 45-day time limit, as required under CEAA, to the detriment of the duty to consult, is likely to be unconstitutional.[112]

One further issue that is likely to arise in the screening stage is how the assessment of the strength of claim is integrated into the EA screening process. Properly assessing the strength of claim is critical to determining the proper level of consultation and the choice of procedures, a central element to screening. However, the assessment of the strength of claim often requires complex evidence, which may be difficult to gather at the initial stages of the EA and which the Crown and First Nations may be reluctant to fully disclose where the claim is being contested and is subject to a broader set of negotiations. The BCCA suggested that a failure to conduct a strength of claim assessment is not in itself a breach of the duty to consult, but may require that the default position be deep

[112] This follows from the dicta that the "Crown's duty to consult cannot be boxed in by legislation", *KTFN, supra* note 81 at para 121.

consultation.[113] In a recent federal EA process on the Roberts Bank Terminal, the Aboriginal consultation guidelines state the review panel is to "take assertions of Aboriginals rights at face value during the EA process",[114] also suggesting that the strength of claim will be assumed, rather than assessed at this stage of consultation.

While this approach appears to benefit Aboriginals groups by defaulting to a deeper level of consultation, it raises questions about the meaningfulness of the consultations that follow since those engaging in consultation on behalf of the Crown are making recommendation on the acceptability of impacts and mitigation measures, a form of accommodation. Meaningful consultation on these matters would seem to require some understanding of the nature of the interests and the strength of claim being asserted. The ultimate decision-makers can turn their attention to the adequacy of accommodation,[115] but conducting the EA without a clear strength of claim analysis leaves the Aboriginal group conducting consultations with Crown agents that may only be partially aware of what is at stake.

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[113] *First Nation v. British Columbia*, 2012 BCCA 472 [*Halalt*] at para 118; see also *NNTC*, *supra* note 86 at para 72.
[114] Canadian Environmental Assessment Agency, *Aboriginal Consultation and Environmental Assessment Handout,* Roberts Bank Terminal 2 Project, online at CEAA < http://www.ceaa.gc.ca/050/documents/p80054/100180E.pdf >.
[115] *Brokenhead, supra* note 83 at para. 25.

ii. Scoping

Once a decision has been made to conduct an EA, the next stage in the EA process is the determination of which issues ought to be addressed through the EA process, referred to as scoping. The range of issues addressed by EA is potentially broad enough to include most of the issues that will arise in the context of the duty to consult.[116] In the case of CEAA, the definition of "environmental effects" explicitly includes broad range of effects on Aboriginal peoples, including impacts on "health and socio-economic conditions, physical and cultural heritage, the *current* use of lands and resources for traditional purposes, or any structure, site or thing that is of historical [or] archeological… significance".[117] The effects must arise from changes to the environment that relate to the project. The restriction to "current" use of lands and resources for traditional purposes may be overly restrictive to fully account for the interests that are protected by the duty to consult. The scope of effects considered here should be interpreted to be consistent with scope of the constitutional rights being asserted, an approach that

[116] Again there is some variation across federal, provincial and territorial EA systems in relation to the scope of assessments. Generally the scope focuses on bio-physical impacts, but includes health, socio-economic and cultural impacts that arise from environmental change, see *CEAA, supra* note 2, s.5(2)(b).

[117] *CEAA, supra* note 2 at s.5(c), numbering omitted, emphasis added.

is consistent with the broader purposes of the Act.[118] What are clearly excluded from the process are broader questions of unresolved land claims.[119]

An area of growing importance in relation to the scope of assessment is the degree to which cumulative effects are assessed. Assessing cumulative environmental effects requires consideration of the impact of the activity under consideration, while taking into account the combined effect from other activities that have been or will be carried out.[120] The significance of cumulative effects in the context of the duty to consult was acknowledged by the SCC in the *Beckman* case, where Binnie noted that "the severity of the impact of land grants, whether taken individually or cumulatively, properly constituted an important element of consultation".[121] The Federal Court in the *Brokenhead Ojibway* case similarly commented that: "While the environmental footprint of any one project might appear quite modest, the eventual cumulative impact of development on the rights and traditional interests of Aboriginal peoples can be quite profound".[122] This sentiment is repeated by the BC Supreme Court in *Taseko Mines Limited v. Phillips*, an injunction case, where in holding the balance of convenience favoured the Aboriginal group, the Court notes:

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[118] *Ibid* at s.4.
[119] *Brokenhead, supra* note 83 at para 27.
[120] *Brokenhead, supra* note 83 at s.19(1)(a).
[121] *Beckman, supra* note 4 at para 21.
[122] *Brokenhead, supra* note 83 at para 28.

> Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.[123]

Cumulative effects could influence the determination of the strength of claim insofar as the *Haida* test requires courts to consider the impact of the development on the exercise of the asserted rights. A project, when considered in isolation, may have only a minor impact (such as early stage mineral exploration), giving rise to a duty at the low end of the duty to consult spectrum. However, when considered in combination with other activities, the impact may be more profound, leading to a more extensive duty to consult and accommodate. Addressing cumulative effects poses a significant challenge to the efficient management of EA in Aboriginal contexts and may increasingly push regulators towards planning and licensing models that can account for multiple projects.[124]

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[123] *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675 [*Taseko*] at para 65; see also *Lameman v. Alberta*, 2012 ABCA 159; *Lameman v. Alberta* ABQB 195.

[124] See, for example, *Fort McKay First Nation v Alberta (Minister of Environment and Sustainable Resource Development)*, 2014 ABQB 393 [*Fort McKay*]; and *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977 [*Dene Tha' 2013*]; see also E. R. Tzimas "To What End the Dialogue?" (2011) 54:2 S.C.L.R. 493 at 517.

Strategic EA may provide some basis to assess cumulative effects where the upstream policy or plan considers impacts on a regional scale. But to date the available tools to perform these kinds of assessments are poorly developed, and continue to lead to disputes respecting the assessment of cumulative impacts over time.[125]

There has been some controversy surrounding whether consideration of impacts from existing and approved projects contravenes the holding in *Rio Tinto* that the duty to consult does not extent to consultation on the impacts of past projects.[126] This issue was raised squarely in *West Moberly First Nation v. B.C.* In this case, the central issue was the impacts of a coalmine exploration and sampling project on caribou herds that had already been significantly depleted. The decision to approve, which did not fully consider the cumulative impacts of the past activities or the future development of the mine was stayed pending further consultation. In upholding the judges decision, the BCCA, distinguished *Rio Tinto*, noting that the WMFN was not seeking consultation on past decisions, but rather was seeking consultation of the impacts from the proposal in light of the severely degraded ecological conditions that prevailed:

[125] See, for example, *Yahey v. British Columbia*, 2015 BCSC 1302.
[126] *Rio Tinto*, *supra* note 12 at para 45 "The claimant must show a causal relationship….".

> I do not understand Rio Tinto to be authority for saying that when the "current decision under consideration" will have an adverse impact on a First Nations right, as in this case, that what has gone before is irrelevant. Here, the exploration and sampling projects will have an adverse impact on the petitioners' treaty right, and the historical context is essential to a proper understanding of the seriousness of the potential impacts on the petitioners' treaty right to hunt.[127]

Additionally, the Court went to hold that the chambers judge did not err in considering future impacts, "beyond the immediate consequences of the exploration permits", and further held that "to the extent that MEMPR [the approving regulator] failed to consider the impact of a full mining operation in the area of concern, it failed to provide meaningful consultation".[128] This holding is best understood in light of the prevailing practice in relation to scoping cumulative effects, which maintains that only "likely" cumulative effects need be considered.[129]

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[127] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 [*WMFN*] at para 117; see also *Upper Nicola Indian Band v. British Columbia (Environment)*, 2011 BCSC 388.

[128] *WMFN*, supra note 127 at para 125; see *also Adam v. Canada (Environment), 2014 FC 1185* at para 85; *White River First Nation v. Yukon Government*, 2013 YKSC 66 at para 136 [*WRFN*]; *Fort MacKay, supra* note 124 at para 15.

[129] *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)*, 1999 FC 8735 at para 41; see also CEEA, Operational Policy Statement: Assessing Cumulative Environmental Effects under the CEAA, 2012 (March 2015) < https://www.ceaa-acee.gc.ca/default.asp?lang=En&n=1DA9E048-1> (noting "A cumulative environmental effects assessment of a designated project must include future physical activities that are certain and should generally include physical activities that are reasonably foreseeable.").

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A second issue that has yet to receive significance judicial consideration is the requirement within EA processes to consider alternatives to the proposal and the environmental effects of those alternatives.[130] Alternatives have been described in the U.S. National Environmental Policy Act (which contains the federal EA requirements) regulations as "the heart of the environmental impact statement… providing a clear choice of options by the decision-maker and the public".[131] Alternatives analysis plays a particularly important role in light of the absence of clear quantitative standards to assess the acceptability of impacts, as alternatives provide an evaluative substitute in the sense that the impacts from the proposed activity can be measured against the impacts of a proposed alternative. In relation to the duty to consult, alternatives provide a basis to assess forms of accommodation. If a First Nation identifies a reasonable alternative that is less adversely impactful on Aboriginal rights and interests, then there is, at a minimum, a burden of justification on the Crown to demonstrate why that alternative was not preferred.

The issue of alternatives arose in the *West Moberly* case, where the WMFN put forward what was effectively a "no action" alternative, asking that the exploration permits be refused. This alternative was not seriously considered and

[130] *CEAA, supra* note 2, s. 19(1)(g).
[131] Council on Environmental Quality (CEQ) Regulations, 40 CFR § 1502.14.

no indication was given as to why this position was impractical or unreasonable. In upholding that this failure was a reviewable error, the BCCA noted that the lack of engagement of the WMFN's preferred position effectively meant that the consultation was limited to mitigation of effects and thus did not recognize the full range of possible outcomes. This, in the Courts view, amounted "to nothing more than an opportunity for the First Nations "to blow off steam". [132] The Crown was not required to accept the WMFN's alternative, which would amount to a veto, but was required to "provide a satisfactory, reasoned explanation as to why their position was not accepted".[133] Alternatives analysis is not an established approach to the duty to consult, nevertheless it furthers the underlying purpose of meaningful consultation. In particular, the notion of a preferred alternative aligns with the idea articulated in the *Sparrow* test that Aboriginal groups ought to be able to exercise their rights with minimal impairment and in their preferred manner.[134]

As with other scoping decisions the challenge will be determining the potential range of reasonable alternatives. In some cases, such as CEAA, the range of alternatives to be considered may be qualified by legislative. CEAA limits the requirement to consider alternatives to "alternatives means of carrying out the designated project that are "technically and economically feasible". This is a fairly

[132] *WMFN, supra* note 127 at para 149.
[133] *Ibid* at para 148.
[134] *Sparrow, supra* note 15.

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narrow range of alternatives, which excludes consideration of "no action" alternatives or alternatives to the project itself, both of which where included in the pre-2012 version of CEAA.[135] However, the range of preferred alternatives sought by Aboriginal groups may be much broader and a statutory requirement that limits alternatives to those that are economically feasible may subordinate Aboriginal rights to economic considerations without clear justification on the facts.[136] In these circumstances, an overly restrictive approach to consideration of alternatives in EA is out of step with the duty to consult.

iii. Participation

There are several important differences in relation to the participation requirements under EA and the duty to consult. First, Aboriginals are entitled to be consulted as First Nations, and not simply as members of the general public. Thus, in the *Mikisew Creee* case, it was held that a public forum was not a substitute for formal consultation.[137] Even at the lower end of the spectrum (as was the case in *Mikisew Cree*), "engagement ought to have included the provisions of information about the project addressing what the Crown knew to be

[135] See *CEAA 1992*, *supra* note 98, s.16 (included as permissive factors to consider "alternatives to" the project and to consider the "need" for the project, effectively raising the "no action" alternative); see also Meinhard Doelle, "CEAA 2012: The End of Federal EA As We Know It? (2013) 24 *J.E.L.P.* 1 at 13.
[136] Note, nothing prevents the Crown from considering a broader range of factors if it chooses, see *CEAA*, *supra* note 2, s.19(1)(j).
[137] *Mikisew*, *supra* note 1 at para 64.

Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests".[138] Public notice and comment processes in relation to EA activities, including consultation on the structure of the process and scoping, without something more, are not likely to be sufficient.[139]

Second, the courts have generally held that the right to consultation falls to the Aboriginal group itself, and not individual members within the group.[140] Thus, in a case involving a request for an injunction enjoining a blockade, the blockading individuals maintained that they had not been consulted. The court, in granting the injunction, noted such rights were held by the First Nation itself, and on the facts, the First Nations affected had been adequately consulted.[141] Nevertheless, individuals who belong to First Nations will have rights as members of the public under the EA process that are not detracted from by virtue of their membership in a First Nation, but those rights will be of the same nature as those held by non-Aboriginals.

The more difficult question relates to who must carry out the consultations on behalf of the Crown during the EA process. As noted, the Court in *Haida*

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[138] *Ibid.*
[139] *Dene Tha', supra* note 103 at para 104.
[140] Newman, *supra* note 25 at 65, (citing *R. v. Lefthand,* 2007 ABCA 206, but noting issue not fully closed as arguments that some Aboriginal rights might be individually held made in *Behn v. Moulton Contracting,* 2013 SCC 26).
[141] *Red Chris Development v. Quock et al.,* 2006 BCSC 1472.

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Nation draws a distinction between the procedural and non-procedural aspects of the duty to consult, indicating the former may be delegated. The practical problem that needs to addressed is that decision-making processes for large-scale projects are often very complicated, involving multiple agencies, review panels and federal and provincial governments. The trend in EA procedure has been to seek to reduce overlap through joint panels and substituted decision-making. Mapping the duty to consult on to these procedures is likely to present legal uncertainty. For example, the issue of substitution, whereby one level of government agrees to substitute its EA process for the process of another level, has been challenged in the Northern Gateway pipeline process on the basis that the provincial government cannot delegate its duty to consult to federal agencies.[142]

One result of the use of panels in EA processes is the parceling out of the duty to consult among different actors with different mandates. The emerging federal practice is to use the panel reviews as the primary mechanism for informing Aboriginal groups of the project and receiving information from those groups on their interests and how those interests might be affected. The panel may make recommendations, but has a restricted mandate that excludes determinations

[142] See for example, the proceedings in *Gitxaala Nation v. Canada,* (FC docket Nos. A-56-14*),* (factums in proceedings available online at West Coast Environmental Law: http://wcel.org/category/publications/aboriginal-law. See also, G. Hoekstra, "Legal challenges mount involving Northern Gateway pipeline" *The Vancouver Sun (13 January 2015),* online <http://www.edmontonjournal.com/technology/Legal+challenges+mount+involving+Northern+Gateway+pipeline/10726698/story.html#__federated=1>.

on questions of strength of claim and on the adequacy of the consultation process itself. Further consultation over the panel's recommendations, particularly around mitigation measures is undertaken with the Crown Consultation Coordinator, who in turns reports on the adequacy of consultation to Cabinet.[143] On that basis Cabinet can make an independent determination on the adequacy of the consultation and accommodation.

The extent to which EA processes merely facilitate Aboriginal understanding of the project, but leave consultation to a parallel process is likely to remain a source of tension. As noted, where consultation arises outside of the EA process, it must nonetheless offer the possibility of modification of the project to address impacts on Aboriginal rights in order to be meaningful. However, where the modifications give rise to substantially different environmental consequences, further environmental assessment and consultation with non-Aboriginal stakeholders may be warranted.

The courts have not questioned the overall ability of these staged processes to implement the duty to consult.[144] Nonetheless, the adequacy of consultation in these types of EA proceedings may turn on whether the resulting consultation meets the qualitative requirement for "meaningful" consultation. The *White River*

[143] *Northern Gateway, supra* note 94.
[144] *Innu, supra* note 82 at para 113.

First Nation v. Yukon case is illustrative. Here an EA evaluation report of a mine was carried out and recommended against the granting of approvals on the basis of the mine's potential impact on a caribou herd that had significance for the exercise of the WRFN's Aboriginal rights. The Report was provided to the Director of Mineral Resources, who rejected the Report's finding and granted the approval. Consultation was carried out by the Director with the WRFN, but did not involve a clear disclosure of the Director's basis for rejecting the report, which was supported by the WRFN. The court held that the duty to consult was not met in these circumstances because the consultation did not amount to an "exchange of views"[145] In particular, because the WRFN was not provided with any basis for the Director's rejection of the report they had no opportunity to present their views or challenge the decision: "Fairness and the honour of the Crown require that the First Nation be given an opportunity and time to put forward their view when the Decision Body, as here, is contemplating a decision completely at odds with the one that was rendered after an in-depth consultation process."[146]

One final point in relation to consultation under the EA process picks up on a point made by Sossin that in order for consultation to be meaningful, the Crown may be required to take positive steps to facilitate Aboriginal participation.[147] Given the technical nature of EA processes and the often highly specialized

[145] *WRFN*, *supra* note 128 at para 112.
[146] *Ibid* at para 123.
[147] *Sossin*, *supra* note 25 at 107.

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information and expertise requirements EA processes involve, adequate funding is likely to be a potential source of contention. The potential for financial assistance is acknowledged in relation to EA in federal and provincial consultation guidelines,[148] and in cases where the courts have upheld EA processes as satisfying the duty to consult, such as *Taku River,* the Crown has provided financial assistance.[149] Aboriginal groups who seek to challenge the EA on the basis of that funding was necessary to facilitate meaningful consultation will need to clearly demonstrate the need for the funding, and cannot simply insist upon their preferred method (and its associated costs) of participation.[150]

iv. The Decision

Since both the duty to consult and EA are underlain by good faith, the provision of reasons are of central importance, as it is only through the provision of reasons by which the Aboriginal group, in the case of the duty to consult, and the public, in the case of EA, can assess whether the concerns raised were given serious consideration. The challenge for reviewing courts is to separate good faith

[148] *Federal Guidelines*, *supra* note 89 at 30; *BC Guide*, supra note 91 at 3.
[149] *Taku River*, *supra* note 1 at para 37; see also *KTFN*, *supra* note 21 at para 112; *Katlodeeche First Nation v. Canada (Attorney General),* 2013 FC 458 at para 167; see also *Halalt, supra* note 113.
[150] *Innu, supra* note 82 at para 129.

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consultations from processes that are merely intended to allow Aboriginal groups to "blow off steam".[151]

The obligation to provide reasons arises at the higher end of the consultation spectrum,[152] and will be required not only in relation to the final decision, but also in relation to interim decisions, respecting screening and scoping, for example, that impact asserted Aboriginal rights.[153] The relationship between a reasoned justification and the duty was set out forcefully in the *West Moberly* decision, where the court found that the failure to provide reasons for the rejection of the WMFN's preferred alternative contravened the duty to consult:

> To be considered reasonable, I think the consultation process, and hence the "Rationale", would have to provide an explanation to the petitioners that, not only had their position been fully considered, but that there were persuasive reasons why the course of action the petitioners proposed was either not necessary, was impractical, or was otherwise unreasonable. Without a reasoned basis for rejecting the petitioners' position, there cannot be said to have been a meaningful consultation.[154]

[151] *Mikisew*, *supra* note 1 at para 54.
[152] *Haida*, *supra* note 1 at para 44
[153] *Ibid.*
[154] *WMFN*, *supra* note 127 at 144.

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The practice under EA in relation to the provision of reasons is uneven. In some cases, the courts have held that assessment reports cannot simply come to bald conclusions respecting the significance of impacts, but rather must provide some reasoned basis for the conclusions reached.[155] However, high-level decisions respecting projects often take a more declaratory form.[156] In *Adam v. Canada*, the Athabasca Chipewyan First Nation challenged a decision taken under s.52 of CEAA that determined that the impacts from the Jackpine oil sands expansion project while significant, were justified in the circumstances. The cabinet decision and accompanying Decision Statement provided no justification for the decision.[157] The Federal Court, in dismissing the appeal, rather opaquely stated that the Crown was not required to justify the Cabinet's decision, so long as it provided a justification of its rejection of ACFN's position within the broader process.[158] The thrust of the Court's decision in *Adam* is that so long as the Crown meets its procedural requirements, in this case the ACFN participated in a lengthy and extensive panel process and was further invited to make representations on whether the report captured its concerns, and shows that it gave the Aboriginal group's concerns serious consideration, the duty will be satisfied.

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[155] *Pembina Institute for Appropriate Development v. Canada (Attorney General),* 2008 FC 302 [*Pembina*] at para 73: ("I recognize that placing an administrative burden on the Panel to provide an in-depth explanation of the scientific data for all of its conclusions and recommendations would be disproportionately high. However, given that the Report is to serve as an objective basis for a final decision, the Panel must, in my opinion, explain in a general way why the potential environmental effects, either with or without the implementation of mitigation measures, will be insignificant").

[156] Again using CEAA 2012, as an example, the revised EA rules removed a required found in s.53(2)c) of CEAA, 1992 to provide reasons for not following a review panel's recommendation.

[157] *Adam v. Canada (Environment),* 2014 FC 1185.

[158] *Ibid* at para. 81.

Sossin argues that the underlying substantive nature of accommodation imposes a greater constraint on the Crown, requiring the Crown "to show that governments' substantive position has been modified as a result" of consultation. If Sossin is right, then a critical element of any consultation will be assessing mitigation measures and the acceptability of impacts in light of the strength of claim. As the strength of claim approaches the very high end, one would expect that the justification would also approach that which is required to justify the infringement of an established right; namely a substantial and compelling objective.

The prevailing approach identifies mitigation measures that in the Crown's view minimize the adverse effects to Aboriginal interests. The extent to which the proposed activity may still adversely impact Aboriginal interests and the basis upon which those potential impacts are justified is not readily disclosed.[159] As noted, in many instances, the actual assessment is undertaken without a coinciding strength of claim analysis and the acceptable mitigation measures are determined, in the first instance, in the absence of knowledge of the strength of claim.

v. Standard of Review and Remedies for Breach

[159] *Ibid.*

The standard of review for matters involving legal interpretations of EA legislations is correctness, while the standard for application of evidence and exercise of discretion (questions of mixed fact and law) within EA processes is reasonableness.[160] Thus, decisions respecting screening and scoping of EAs will be reviewed on the basis of reasonableness. In relation to the duty to consult, the standard of review was addressed in *Haida Nation*, with the accepted approach being to review questions regarding the existence and content of the duty on a correctness standard and questions respecting the adequacy of consultation and accommodation on a reasonableness standard.[161] Subsequent decisions have noted that the determination of the existence of a duty, which involves assessments of the strength of claim and the serious of the impacts, may involve findings of fact, in which case some deference will be owed to the decision-maker.[162]

Separating out what may constitute the "scope and extent" of the duty from how that duty is discharged in the context of EA will not always be straightforward. For example, a screening decision, which involves a determination of whether there is a likelihood of significant environmental impact, will be treated with deference under EA processes, but insofar as determining the

[160] *Ontario Power Generation Inc. v. Greenpeace Canada,* 2015 FCA 186, paras. 120-121. Seealso *Pembina Institute for Appropriate Development v. Canada (Minister of Fisheries and Oceans)*, 2005 FC 1123.
[161] *Haida, supra* note 1 at para 60-63; *Brokenhead, supra* note 83 at para 17.
[162] *Wii'litswx, supra* note 24; *Dene Tha' 2013, supra* note 124 at para 99.

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significance of impacts on Aboriginal interests goes to the extent of the duty to consult, it may be treated on a correctness standard, as appears to be the approach in the *White River* case.[163] Much will turn on the extent to which the court views the determination driven by factual considerations, in which case greater deference will likely be shown. There is evidence that the approach in relation to the implementation of the duty through EA will be looked at functionally, with the court assessing whether the process that was followed allowed for "meaningful consultation". In *West Moberly*, the BCCA effectively equated a consultation process that was not meaningful with unreasonableness.[164] What the courts recognize here is that the consultation process itself, which often involves consultation on the form of the EA, determines the correctness of the scope.[165]

In assessing the actual outcomes of EA processes, the court will again look to the reasonableness of the decision. In doing so, however, the Courts need to be mindful of the central importance of justification to the consultation process. In other words, there is a need to assess the quality of the reasons, not so much to ensure that the result itself is reasonable, but to ensure that the process that gave rise to the result was meaningful and carried out in good faith. The principal form of accommodation that is provided through EA processes is the identification of mitigation measures that are intended to eliminate or reduce adverse impacts to

[163] *WRFN*, *supra* note 128 at para 95.
[164] *WMFN*, *supra* note 127 at para 154; see also *WRFN*, *supra* note 128 at para 115
[165] *Dene Tha' 2013*, *supra* note 124 at para 105.

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asserted Aboriginal rights. In this context, meaningful consultation suggests that the mitigation measures, at a minimum, ought to be responsive to the preferred alternatives put forward by Aboriginal groups.

Where there has been a breach of the procedural requirements of EA, the courts exercise broad discretion in determining the remedy. In the *Miningwatch* case, where Responsible Authority was found to have misapplied the scoping rules by scoping a mining project in an overly narrow fashion, the SCC restricted its remedy to declaratory relief, overturning a decision of the federal court to require further consultation and assessment in accordance with proper scoping requirements.[166] The basis of the decision is complicated, but included the fact that the complaint was procedural in nature and not in relation to the substance of the decision.[167] The *Miningwatch* decision has been relied upon in at least one duty to consult case involving deficient EA processes to provide support for restricting relief to a declaration.[168]

Both cases may be restricted to their unique facts, but it is important to recognize in the context of remedies that procedural deficiencies take on particular importance in the context of the duty to consult precisely because the substantive

[166] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 [*Miningwatch*].
[167] *Ibid* at para 52.
[168] *NNTC*, *supra* note 86 at para 106.

requirements are so indeterminate. The process here is to a large degree the ends sought. Unlike purely administrative proceedings where the court's discretion to grant a remedy may consider the broader balance of convenience to the parties, (in *Miningwatch*, the SCC felt it was unfair to burden the mining company with the consequences of the government's mishandling of the EA), the constitutional dimensions of the duty to consult militate in favour of a robust approach to remedies.[169]

3. Process and Reconciliation: Matching Theory and Practice

Early in the life of *NEPA*, the environmental law scholar Joseph Sax famously expressed his skepticism about the underlying premise of EA:

> I know of no solid evidence to support the belief that requiring articulation, detailed findings or reasoned opinions enhances the integrity or propriety of administrative decisions. I think the emphasis on the redemptive quality of procedural reform is about nine parts myth and one part coconut oil.[170]

[169] *WRFN*, *supra* note 128 at para 37 ("While Tarsis is a responsible exploration company and its contribution is important, the participation and involvement of First Nations without a Final Agreement has both a statutory and a constitutional dimension that must be respected.")
[170] Joseph Sax, "The (Unhappy) Truth about NEPA" (1973) 26 Oklahoma L.R. 239, 239.

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Since that time, EA scholars have offered a number of different approaches to explain how adherence to procedural requirements brings about desired environmental outcomes.[171] While these approaches offer an explanatory model for how EA effects outcomes, the approaches also tend to diverge in the role they ascribe to EA, and structural features of EA upon which they lay emphasis. One set of approaches, identified by Holder as informational theories, stresses the rationality of EA planning processes, and focuses on the need to develop better technical tools and metrics for assessment, but tends to downplay value disputes.[172] Environmentally sound outcomes arise under this model because decision-makers are assumed to be able to accurately assess the costs of potentially harmful activities and avoid or mitigate unacceptable environmental outcomes in the public interest.[173] Culture or transformatve theories by contrast recognize the normative influence that environmental information has on political processes and tend to understand that interactions involving environmental values can have transformative effects on political interests and institutional structures.[174] The emphasis under transformational approaches is on the deliberative quality of the interactions and the justificatory nature of the decisions.

[171] *Bartlett and Kurian, supra* note 39; James Boggs, "Procedural v. Substantive in NEPA Law: Cutting the Gordian Knot" (1993) 15 Envt'l Professional 25; *Taylor, supra* note 39; *Craik, supra* note 39.
[172] *Holder, supra* note 34 at 23.
[173] C. Jones et al, *Strategic Environmental Assessment and Land Use Planning: An International Evaluation*, (Bath: Earthscan, 2013) 35-36.
[174] *Holder, supra* note 34 at 27; Boggs, *supra* note 171; *Craik, supra* note 39.

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When EA is considered in light of its role as a way to implement the duty to consult, informational approaches offer a limited framework to explain the broader aspirations of reconciliation that underlie the duty. First, informational approaches are premised on a single, monolithic conception of public interest. The problems to which EA addresses itself are technical and solvable with recourse to better technical information. The duty to consult, on the other hand, accepts a much more pluralistic and political understanding of the decision-making processes engaged. At the heart of the duty to accommodate is the notion of compromise and negotiation. Accommodation is not technical issue that can be resolved with improved information. Second, informational approaches tend to view participation in instrumental terms, in the sense that the object of participation is to provide experts with additional information, whereas the duty to consult views participation in much more dialogical terms. The duty to consult requires an "exchange of views" and demands responses to alternatives proposed. Finally, the underlying theory of legitimacy under informational approaches is rooted in the expertise of the agency decision-makers, whereas the legitimacy of decisions arrived at through the duty to consult is premised on the deliberative characteristics of participatory decision-making. In other words, decisions are accepted under informational theories because the process is able to identify optimal solutions. Justification appeals to technical criteria, but is indifferent to the normative dimensions of the decision. There is an ahistorical element to informational approaches that fails to acknowledge the context of government

mistrust that reconciliation seeks to ameliorate: good faith is assumed under informational theories, whereas it is required to be demonstrated under the duty to consult.

It might seem that informational approaches present something of straw man, insofar as Canadian EA processes appear to embrace a more participatory model of EA. While that may be true, the technical focus that informational approaches suggest still has a powerful influence over how EAs are conducted and how courts understand them.[175] Recall, that in the *Oldman River* case, the SCC described EA as providing an "an objective basis for granting or denying approval of a proposed development", suggesting a technical, as opposed to political, orientation. Even where the courts acknowledge that EA involves "a large measure of opinion and judgement", the underlying disputes are described in technical not political terms.[176] The fundamental point I seek to make here is that while EA processes and the courts that consider them acknowledge the important role of participation, it is understood in instrumental terms – it is a means to an end. It is in that regard that the Court in *Miningwatch* felt partially justified in offering no substantive remedy in the face of a procedural breach since in the

[175] *Bartlett and Kurian, supra* note 39 at 417-418.
[176] *Alberta Wilderness Assn. v. Express Pipelines Ltd.* [1996] F.C.J. No. 1016 at para 10 ("people can and do disagree about the adequacy and completeness of evidence which forecasts results and about the significance of such results").

Court's view there was no actual harm to the applicant (a public interest litigant).[177]

One of the outstanding puzzles in relation to the duty to accommodate is the extent to which the Crown has to affirmatively address Aboriginal concerns. The framing of the duty as a balancing test suggests a measure of ambivalence to outcomes, in the sense that the test provides little guidance to how that balance is to be achieved, leaving the determination as a matter of Crown discretion. Potes describes two competing approaches to the duty to accommodate; a "procedural" approach, which views accommodation being satisfied by adherence to the procedural requirements of the duty to consult, and a "purposive" approach that requires adherence to substantive standards.[178] The difficulty, as outlined in Part 1, is that drawing a sharp distinction between process and substance in this context fails to capture the dynamic relationship between the two, and suggests that that they can be independently assessed. Potes is sensitive to this dynamic, but does not offer a theory of how this interaction may function.

Transformational theories better capture the essence of reconciliation, and may even provide a way of understanding reconciliation in the institutionalized

[177] *Miningwatch, supra* note 166 at para 52.
[178] Veronica Potes, "The Duty to Accommodate Aboriginal peoples' Rights" (2006) 17 J.E.L.P. 27 at 33-38 [*Potes*]; see also *Sossin, supra* note 25.

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context of project decision-making. Transformational approaches do not regard the interests and values of the participants in EA processes as fixed, but rather understand that participation in the process itself may impact interests. Interest reformulation is endogenous to the EA process, allowing for the possibility of participants learning through the process and reconsidering their interests in light of new information and shared understandings.[179]

Transformational theories of EA locate the legitimacy of the outcomes within the deliberative qualities of the interactions, as opposed to the expertise of the decision-makers. Looking at the quality of interactions, which is what I would argue is at the centre of the requirement of good faith in the duty to consult, requires that the parties treat each other's position with a minimum level of respect, which in turn requires that decision-makers be open to persuasion based on the arguments provided.[180] The deliberative dimensions of the duty to consult are captured in *Mikisew Cree*, where Binnie links the quality of consultation with the possibility of accommodation, noting that "consultation that excludes from the outset any form of accommodation would be meaningless".[181]

[179] Sinclair and Diduck, *supra* note 59; see also Craik, *supra* note 39.
[180] Simone Chambers, "Deliberative Democratic Theory" (2003) 6 Annual Review of Political Science 307 at 309.
[181] *Mikisew, supra* note 1 at para 54.

Understood through a transformational lens, the institutional deficiencies to which EA legislation was responding were that government decision-making had "not been receptive to an adequate range of facts, had not been able to break away from well-known formulas, and had been insufficiently critical and excessively rigid".[182] The duty to consult responds to these same deficiencies. Justification takes on a heighten importance because it not simply a description of the basis of the outcome as decided by the Crown, but is required to be reciprocal in the sense that the reasons given must respond to the concerns raised and must be appeal to shared norms. In the context of the duty to consult, reciprocal justification requires that decision-makers carefully consider Aboriginal perspectives and seek out justifications that incorporate Aboriginal values. The promise of transformational approaches is that reciprocal justification offers an opportunity for those affected by government decisions to participate in the elaboration of the norms of evaluation. For example, the determination of what constitutes a "significant" impact to the environment and to Aboriginal rights ought to be arrived at jointly with due regard for both Aboriginal and non-Aboriginal perspectives. Reconciliation can be understood as co-authorship of the norms that shape the conditions of Aboriginal lives. The self-governing element of co-authorship captures the need to "reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" [183] and the balancing of interests.

[182] Bartlett, *supra* note 59 at 110.
[183] *Haida, supra* note 1 at para 20.

Reconciliation fully realized suggests the possibility of the development of shared interests, as opposed to trading off Aboriginal and non-Aboriginal interests, and it is in this sense that the process can contribute to s.35's jurisgenerative potential.[184]

Returning to the form of EA commitments that will be required to implement the duty to consult, we can identify certain elements of the EA process that are more consistent with a transformational function. First, the requirement for alternatives should be applied with full rigour. The requirement to assess alternatives will be relevant at both the scoping and decision stages of EA. At the scoping stage, the determination of which issues are to be assessed and the depth of assessment will need to account for preferred Aboriginal alternatives. At the decision stage, where alternatives have been considered, the reasons given will need to respond to the preferred Aboriginal alternatives and provide, where appropriate, a justification for the rejection of those alternatives.

In the absence of standards that address themselves to acceptable levels of interference with Aboriginal interests, requiring the careful examination of preferred Aboriginal alternatives requires the Crown to address itself to the question of whether the same public objective can be achieved in a manner that is

[184] See Robert Cover, "Nomos and Narrative" (1983) 97 Harvard L. Rev. 4 (introducing the concept of jurisgenerativity); For application of concept in indigenous context, see Kristen Carpenter & Angela Riley, "Indigenous Peoples and the Jurisgenerative Moment in Human Rights", (2014) 102:1 Cal. L. Rev. 173.

less likely to infringe Aboriginal interests. This would require in circumstances of deep consultation, not only a consideration of "alternative means of carrying out the designated project"[185] but also "alternatives to the project".[186] The former accepts uncritically the need for the project and that the identified project is the preferred manner by which the underlying public objective is achieved, while the latter gives a more fulsome voice to Aboriginal viewpoints on development visions that impact their interests. From a justificatory standpoint, requiring the Crown to consider alternatives promotes a dialogue over competing development visions, but also requires the Crown to articulate in terms that address themselves to Aboriginal interests why the Crown's development approach is preferred. Examining the need for the project requires justification of the Crown's objective. This is not to suggest that the objective has to meet the "compelling and substantial" requirement in the *Sparrow* test, but where the strength of claim merits deep consultation, the reconciliation goal that underlies the requirement to show that the Crown's objectives are of compelling and substantial importance remains relevant.[187] Alternatives analysis also captures the minimal infringement requirement by raising a burden of justification on the Crown to demonstrate why a less harmful (to Aboriginal interests) alternative is not preferred.[188]

[185] *CEAA, supra* note 2, s.19.
[186] *CEAA 1992*, *supra* note 98, s.16.
[187] *Gladstone, supra* note 67 at para 73.
[188] *R. v. Nikal,* 1996 SCC 245 at para 110.

A second element to which greater attention is required to be paid relates to the question of cumulative effects. The diminishment of Aboriginal rights and interests over time and with each new development proposal is a central source of Aboriginal frustration.[189] As described above, the courts have been sensitive to the issue of cumulative impacts on asserted Aboriginal rights, but project-based assessment presents some limitations in the consideration of cumulative impacts over large areas and time scales.[190] The judicial recognition of the significance of cumulative impacts militates in favour of a more strategic approach to assessment, which would consider cumulative impacts on a regional scale. Picking up on the discussion of alternatives, strategic environmental assessment allows for consultation at early stages of development planning processes providing for greater opportunities for articulation of shared development priorities and expectations in advance of specific project proposals. Other strategic tools beyond the assessment of policies, plans and programmes (the typical domain of SEA), such as regional cumulative impact studies and scenario building, can usefully contribute to properly understanding the long term implications of sustained resource development on Aboriginal interests.

[189] *Yahey v. BC*, *supra* n.125; *Lameman v. Alberta,* [2012] A.J. No. 337 (breach of treaty rights claim based on cumulative impacts of development); Environmental Law Centre, *Environmental Assessment in British Columbia* (Victoria: ELC, 2010) at 72-73.

[190] Gibson et al, "Strengthening Strategic Environmental Assessment in Canada: An Evaluation of Three Basic Options" 20 JELP 175 (2010) at 192.

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There has been broad judicial recognition of the obligation to consult at strategic levels where decision-making processes are engaged, but this right does not obligate the Crown to conduct strategic level environmental assessments where they do not exist.[191] It does, however, require some vigilance on the part of the Crown and the courts to recognize where policy level decisions can lead to adverse Aboriginal impacts. In such cases, the Crown will have to assess the whether a legal obligation to consult exists.[192] In doing so, the Crown needs to be sensitive to the long-term implications on the exercise of Aboriginal rights associated with cumulative impacts. The test articulated in the *Gitxaala* case requiring consultation where a process creates "clear momentum" that forecloses future policy options has some application here, suggesting consultation obligations where strategic policy decision advance development opportunities.[193] Viewed in isolation, the impacts may suggest that the duty to consult be considered at the low end, but understood in a more holistic fashion, the duty may viewed as requiring a more discursive process. Sensitivity to the implications of government policy for future resource impacts and their consequent affect on Aboriginal interests was recognized in the *Ross River* case, involving the granting of exploration rights under the Yukon's *Quartz Mining Act*.[194] In that case, the court acknowledged that the requirements to implement the duty to consult are

[191] *Ibid*.
[192] *Courtoreille v. Canada*, 2014 FC 1244 (finding DTC in relation to federal legislation).
[193] *Gitxaala, supra* note 107 at para 40.
[194] *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14.

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flexible.[195] Critically, the court also notes that where "serious and long-lasting adverse effects" are present, "[t]he Crown must ensure that it maintains the ability to prevent or regulate activities where it is appropriate to do so".[196]

Providing for strategic level environmental assessment advances a more transformative approach to EA in that SEA processes encourage an information rich and participatory decision-making environment at the policy level. Giving Aboriginal groups an opportunity to shape policy and programmatic level decisions that will then shape project level decisions, including shaping the availability or at least feasibility of alternative development tracks, provides an opportunity for the development of a common set of normative arrangements that will govern future decision-making. Such an approach is consistent with the approach by the Courts to require consultation throughout the decision-making process. Insisting on strategic level assessment has both procedural benefits and substantive, norm-creating benefits.

The use of strategic environmental assessment is consistent with federal, and to some degree, provincial, EA policy.[197] The federal government has a

[195] *Ibid* at para 45.
[196] *Ibid* at para 51.
[197] *The Environment Act,* C.C.S.M., c. E125, s. 12.0.1; *First Nation and Métis Consultation Policy Framework* (2010), Government of Saskatchewan, available at: <https://www.saskatchewan.ca/~/media/files/government%20relations/first%20nations/consultation%20policy%20framework.pdf>; Environmental Protection

strategic environmental assessment directive,[198] and the purpose section and sections 73 and 74 of CEAA expressly provides for "the study of cumulative effects of physical activities in a region and the consideration of those study results in environmental assessments".[199]

One of the reasons that cumulative effects arise is that decisions under EA processes accept that projects will result a harm to the environment and to Aboriginal interests, but that these harms are either insignificant or justifiably traded off against other public goals. The central evaluative measure for acceptability of impacts is the minimization of adverse impacts or the avoidance of "irreversible" harm. In these circumstances, small and diffuse, but acceptable harms may contribute to a broader erosion of Aboriginal interests, particularly where those interests are understood, as they properly should be, in intergenerational terms. From a reconciliatory standpoint, mitigation alone may offer little positive benefit to Aboriginal communities. Impact and benefit agreements provide one avenue for ensuring Aboriginal participation in the economic benefits from development, but the IBA process is a private negotiation conducted outside the EIA process. A further option is to require projects to adhere to a more sustainably oriented outcome that requires the project to identify

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And Enhancement Act, Revised Statutes of Alberta, c. E12, s. 39(e).

[198]*Strategic Environmental Assessment: The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals*, (2010) Government of Canada Privy Counsel Office. Online: < http://www.ceaa.gc.ca/default.asp?lang=En&n=b3186435-1>.

[199]*CEAA, supra* note 2, s. 4(1)(i); implemented through s.73 and 74, to date not acted upon.

positive contributions to environmental and social outcomes from the project, referred to as sustainability assessment.[200] Gibson has noted that on occasion Canadian EA processes have sought to incorporate this "higher standard", by requiring the proponent to include in their EA documentation a discussion of the "positive overall contribution towards the attainment of ecological and community sustainability, both at the local and regional levels".[201] Such a reorientation, which is entirely consistent with the objectives of EA legislation,[202] moves away from viewing trade-offs as a balancing of competing interests, towards a more integrative approach, which looks at the long-term sustainable future of the impacted community.[203] While reconciliation itself is often described in oppositional terms (balancing Aboriginal interests with those of non-Aboriginals), the critical opportunity that the integrative orientation of sustainability assessment provides is the opportunity for the Crown and Aboriginal groups to deliberate over a shared development vision.[204]

4. Conclusion

[200] Robert Gibson et al., *Sustainability Assessment: Criteria and Processes* (New York, Earthscan, 2005).
[201] Gibson, *supra* note 33,, quoting from Red Hill Expressway EIS guidelines; noting Voisey's Bay as another example.
[202] *CEAA, supra* note 2, s.4
[203] *Gibson, supra* note 201.
[204] *Potes, supra* note 178 at 38, citing Arthur Pape, indicates that the promotion of sustainability in respect of lands and resources relied on by Aboriginal groups is a central to the purpose of accommodation.

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The promise of transformational approaches is that over time, as actors with diverse interests confront those differences on the basis of reciprocal justifications, the politics engaged in is characterized by a more reasoned and less adversarial discourse.[205] Whether EA has resulted in the internalization of environmental values within systems of government decision-making remains a controverted matter. For his part, Joseph Sax, reconsidered his skepticism regarding NEPA, conceding that he "underestimated the influence of NEPA's 'soft law' elements".[206] Several empirical assessments of the long-term impacts of EA have concluded that EA does contribute to positive environmental outcomes, and to the broader process of norm internalization.[207] There is, to be clear, nothing inevitable about transformational approaches to EA. As Doelle and Gibson have argued in relation to the revised structure of the *Canadian Environmental Assessment Act, 2012*, governments can move to restrict the application of EA and insert more administrative discretion that serves to decouple EA from its substantive environmental objectives.[208] The intertwining of the duty to consult

[205] Richard Devlin and Ronalda Murphy, "Contextualizing the Duty to Consult: Clarification or Transformation?" (2003) 14 N.J.C.L. 167 at 214, noting that the duty to consult "create(s) incentives for the relevant actors to see each other in non-adversarial terms".
[206] Joseph Sax, "More than Just a Passing Fad" (1986) 19 U. Mich. J.L. Ref. 797, at 804.
[207] Barry Sadler, *Environmental Assessment in a Changing World: Final Report of the Study of the Effectiveness of Environmental Assessment* (1996) (Ottawa: Canadian Environmental Assessment Agency); Council on Environmental Quality (US), *The National Environmental Policy Act: A Study of Effectiveness After Twenty-five Years* (1997) (Washington, D.C.: CEQ); see also *Taylor, supra* note 39; and *Craik, supra* note 39.
[208] Doelle, *supra* note 135; Robert Gibson, "In full retreat: the Canadian government's new environmental assessment law undoes decades of progress" (2012) 30:3 *Impact Assessment and Project Appraisal* 179.

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with EA provides an important countervailing force to the retrenchment of the robust environmental aspirations of EA.

In this paper, I have sought to take stock of the implementation of the duty to consult through EA processes. Here I have argued that EA and the duty to consult are to a significant degree bound together. Consequently, my intent was not to demonstrate whether the use of EA to implement the duty to consult is a sound policy choice, but given their necessary inter-relationship, I have sought to show that careful attention needs to be paid to the constitutional dimension of the duty to consult along all stages of the EA process. At the heart of the duty to consult is the stringent demand for "meaningful consultation", a requirement that cannot be neatly separated from the duty to accommodate. This I argue pushes EA towards its more deliberative and justificatory construction.

None of the normative arguments I make regarding the form of EA require a radical departure from its current function and structure. In each instance, the Crown has the discretion to structure EA processes in ways that emphasize its transformative potential. The constitutional nature of the duty to consult ought to influence the exercise of that discretion in ways that are consistent with the goal of reconciliation. A requirement that focuses on the justification of government

decisions in ways that account for Aboriginal interests and perspectives, and provide a substantive basis for Aboriginal acceptance of the decisions made.

The argument presented here does not seek to impose a formally substantive rationality on decisions affecting Aboriginal interests. Rather I view both EA and the duty to consult as forms of proceduralized obligations, whereby the process and substance are themselves deeply intertwined. Proceduralization respects the political content of choices being made, and in this regard, I think the SCC's approach in refraining from giving substantive content to the duty to accommodate is sound, so long as it is accompanied by a robust understanding of the potential of process to transform legal relationships, as well as the stringent requirements that are necessary to realize that potential.