



Osgoode Hall Law School of York University
Osgoode Digital Commons

Articles & Book Chapters

Faculty Scholarship

2000

From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult

Sonia Lawrence

Osgoode Hall Law School of York University, slawrence@osgoode.yorku.ca

Patrick Macklem

Source Publication:

Canadian Bar Review 79:1 (2000) pp. 252-279

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



Part of the [Indian and Aboriginal Law Commons](#)

Repository Citation

Lawrence, Sonia and Macklem, Patrick, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000). *Articles & Book Chapters*. 2131.

https://digitalcommons.osgoode.yorku.ca/scholarly_works/2131

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

FROM CONSULTATION TO RECONCILIATION: ABORIGINAL RIGHTS AND THE CROWN'S DUTY TO CONSULT

Sonia Lawrence* and Patrick Macklem**
Toronto

The judiciary has repeatedly called on First Nations and the Crown not to tax the institutional competence of the judiciary by excessive litigation of disputes, and instead to attempt to reach negotiated settlements. It has also held that the Crown is under a duty to consult with a First Nation when it proposes to engage in an action that threatens to interfere with existing Aboriginal or treaty rights recognized and affirmed by s. 35(1) of the Constitution Act, 1982. In this Article, the authors argue that the duty to consult requires the Crown, in most cases, to make good faith efforts to negotiate an agreement specifying the rights of the parties when it seeks to engage in an action that adversely affects Aboriginal interests.

De façon répétée, la magistrature a fait appel aux Premières Nations et à la Couronne pour ne pas la surcharger par des litiges sur leurs différends, mais pour essayer plutôt d'arriver à des règlements négociés. Les tribunaux ont aussi décidé que la Couronne a le devoir de consulter une Première Nation quand elle projette de s'engager dans une action qui menace d'entrer en conflit avec des droits des Autochtones ou des droits résultant de traités reconnus par l'article 35, par. 1 de l'Acte constitutionnel de 1982. Dans cet article les auteurs soutiennent que le devoir de consultation implique que la Couronne, dans la plupart des cas, doit de bonne foi faire des efforts pour négocier une entente spécifiant les droits des parties, quand elle cherche à s'engager dans une action qui peut affecter les intérêts des Autochtones.

I.	Introduction	253
II.	Consultation in the Courts	255
	A. The Parameters of the Duty	255
	B. The Practicalities of the Duty	258
	1. Attaching the Duty	259
	2. Triggering the Duty	261
	3. Fulfilling the Duty	263
III.	Toward a Jurisprudence of Reconciliation	267
	A. Calibrating Consultation Requirements	267
	B. Funding Requirements	272

* Sonia Lawrence, LL.B., M.S.W., University of Toronto, Toronto, Ontario.

** Patrick Macklem, of the Faculty of Law, University of Toronto, Toronto, Ontario.

C. Remedial Options	274
D. Consultation as a Two-Way Street	276
IV. Conclusion	278

I. Introduction

In northern British Columbia, about 50 kilometres south of Prince Rupert, lies Kumealon Lake, a pristine body of water which, together with its surroundings, abounds with fish, other marine life and wildlife. Prior to European contact, ancestors of the Kitkatla First Nation known as the Gitkaxaala people, along with other Aboriginal peoples, used Kumealon Lake and its surrounding lands for activities and practices necessary for its sustenance and survival. To this day, the Kumealon Lake region continues to provide important economic, cultural and spiritual resources to the Kitkatla First Nation in its efforts to maintain its distinctive indigenous identity.

In 1994, International Forest Products Ltd. (Interfor) began to log the Kumealon Lake region under a forest license and several permits conferred by the Government of British Columbia pursuant to the provincial *Forestry Act*. In 1997, after the Supreme Court of Canada decision in *Delgamuukw v. British Columbia*,¹ the Kitkatla commenced litigation seeking to enjoin Interfor from logging the area. Since commencing its legal action, the Kitkatla have received no less than eleven judgments from the British Columbia Supreme Court and the British Columbia Court of Appeal. Most recently, the Kitkatla was ordered to pay Interfor's costs after they appealed the dissolution of an *ex parte* injunction and the refusal of the British Columbia Supreme Court to issue another injunction against Interfor's logging in the Kumealon watershed. As of August, 1999, although the Kitkatla have an appeal pending, they do not have an injunction protecting the Kumealon.¹

¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

¹ *Kitkatla Band v. British Columbia (Minister of Forests)*, [1998] B.C.J. No. 2667 (B.C.S.C.) (June 18, 1998); *Kitkatla Band v. British Columbia (Minister of Forests)*, [1998] B.C.J. No. 1652 (B.C.C.A.) (June 24, 1998); *Kitkatla Band v. British Columbia (Minister of Forests)*, [1998] B.C.J. No. 1598 (B.C.C.A.) (June 25, 1998); *Kitkatla Band v. British Columbia (Minister of Forests)*, [1998] B.C.J. No. 1616 (B.C.S.C.) (June 25, 1998); *Kitkatla Band v. British Columbia (Minister of Forests)*, [1998] B.C.J. No. 1599 (B.C.C.A.) (July 3, 1998); *Kitkatla Band v. British Columbia (Minister of Forests)*, [1998] B.C.J. No. 1600 (B.C.C.A.) (July 6, 1998); *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [1998] B.C.J. No. 2440 (B.C.S.C.) (October 21, 1998); *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [1998] B.C.J. No. 3041 (B.C.S.C.) (December 15, 1998); *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [1999] B.C.J. No. 177 (February 2, 1999); *Kitkatla Band v. British Columbia (Minister of Forests)*, [1999] B.C.J. No. 1074 (B.C.C.A.) (May 7, 1999); *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [1999] B.C.J. No. 1684 (B.C.C.A.) (June 15, 1999).

The Supreme Court of Canada's landmark decision in *Delgamuukw v. British Columbia* appeared to many observers to establish new constitutional benchmarks in the relationship between the Crown and First Nations. It held that Aboriginal title is protected as a matter of constitutional right, and affirmed that the Crown is under a duty to consult with a First Nation before undertaking action that might interfere with a First Nation's Aboriginal title. The Court's affirmation of the Crown's duty to consult is especially significant in light of repeated judicial calls for First Nations and the Crown not to tax the institutional competence of the judiciary by excessive litigation of disputes, and instead to attempt to reach negotiated settlements. Perhaps the most well-known expression of this sentiment is Lamer C.J.'s statement in *Delgamuukw* that "[u]ltimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... the basic purpose of s. 35(1)-'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.'"³

But *Delgamuukw's* call for negotiated settlements and its affirmation of the Crown's duty to consult appear to have had little impact on disputes like the one involving the Kitkatla First Nation and Interfor. In fact, the Kitkatla litigation suggests that the duty to consult has produced the very effect that it was designed to minimize, namely excessive reliance on the judiciary to reconcile competing interests of the parties. Consultation processes, by and large, have not led to lasting settlements. Instead, consultations increasingly serve as a kind of pre-trial discovery process, closely resembling the litigation they were intended to forestall, and constituting the first step in protracted legal disputes.⁴

Our premise in this Article is that the reason why the duty to consult is failing to accomplish its purpose is because it has been widely misunderstood by parties, by counsel, and by courts. This misunderstanding arises from a tendency to regard the duty as a legal requirement that assists in determining whether the Crown is constitutionally justified in engaging in a particular action that infringes on an existing Aboriginal or treaty right of a First Nation. That is this one of its functions is no doubt true, but characterizing

³ *Delgamuukw*, *supra* at 1123-24 (quoting *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at 539). See also *R. v. Marshall* (unreported decision of the Supreme Court of Canada rendered November 17, 1999), at para. 22 ("the process of ... accommodation ... may best be resolved by consultation and negotiation of a modern agreement for participation in shared resources ... rather than by litigation").

⁴ See J. Woodward and R.J.M. Janes *Fulfilling the Promise of Consultation: Strategies and Tactics in First Nations, The Environment and Development: The Emerging Duty to Consult* (Canadian Bar Association - Ontario, 1999 Institute of Continuing Legal Education Conference, January 28-30, 1999). See also J. Woodward, *First Nation Empowerment Over Traditional Territories: An End to False Consultation*, in Pacific Business & Law Institute, *Environmental Law and Canada's First Nations* (Conference Proceedings, November 18-19, 1999).

the Crown's duty in this manner obscures the extent to which it also operates *ex ante* to minimize reliance on litigation as a means of recognizing and affirming Aboriginal and treaty rights. Properly understood, the duty to consult also acts as a prelude to a potential infringement of an Aboriginal or treaty right. Consultation requirements ought to be calibrated according to the nature and extent of Aboriginal interests and the severity of the proposed Crown action in order to provide incentives to the parties to reach negotiated agreements. In most cases, the duty requires the Crown to make good faith efforts to negotiate an agreement with the First Nation in question that translates Aboriginal interests adversely affected by the proposed Crown action into binding Aboriginal or treaty rights. By realizing the duty's *ex ante* possibilities, the judiciary will have more success in its efforts to promote reconciliation between First Nations and the Crown.

II. Consultation in the Courts

A. The Parameters of the Duty

The Supreme Court of Canada has provided general guidance in a number of cases on the circumstances in which the Crown owes a duty to consult with a First Nation. It is clear that the Crown must consult with a First Nation when it seeks to interfere with rights associated with Aboriginal cultural interests. In *R. v. Sparrow*, at issue was the constitutionality of federal fishing regulations imposing a permit requirement and prohibiting certain methods of fishing. The Musqueam First Nation, located in British Columbia, had fished since ancient times in an area of the Fraser River estuary known as Canoe Passage. According to anthropological evidence at trial, salmon is not only an important source of food for the Musqueam but also plays a central role in Musqueam cultural identity. The Musqueam argued that the federal fishing requirements interfered with their Aboriginal fishing rights and were invalid in light of s. 35(1).

In its landmark decision, the Supreme Court of Canada found for the Musqueam First Nation, and held that Aboriginal rights recognized and affirmed by s. 35(1) include practices that form an "integral part" of an Aboriginal community's "distinctive culture."⁵ If such rights "existed" as of 1982, that is, if such rights had not been "extinguished" by state action prior to 1982, then any law that unduly interferes with their exercise must meet relatively strict justificatory requirements.⁶ One such requirement, according to the Court, is that the Crown consult with Aboriginal people prior to introducing natural resource conservation measures that interfere

⁵ [1990] 1 S.C.R. 1075, at 1099.

⁶ *Ibid.* at 1111-19.

with the exercise of an Aboriginal right to fish. Specifically, the Court held that the constitutionality of fish conservation regulations that interfere with the exercise of an Aboriginal right to fish would depend in part “on whether the Aboriginal group in question has been consulted with respect to the conservation measures being implemented.”⁷

The Court has also made it clear that the Crown must consult with Aboriginal people when it seeks to interfere with rights associated with Aboriginal territorial interests. In *Delgamuukw v. British Columbia*, hereditary chiefs of the Gitksan and Wet’suwet’en nations claimed Aboriginal title to 58,000 square kilometres of the interior of British Columbia. The Gitksan sought to prove historical use and occupation of part of the territory in question by entering as evidence their “adaawk”, which is a collection of sacred oral traditions about their ancestors, histories and territories. The Wet’suwet’en entered as evidence their “kungax”, which is a spiritual song or dance or performance which ties them to their territory. Both the Gitksan and Wet’suwet’en also introduced evidence of their feast hall, in which they tell and re-tell their stories and identify their territories to maintain over time their connection with their lands.

The trial judge admitted the above evidence but accorded it little independent weight, stating that, because of its oral nature, it could not serve as evidence of detailed history, or land ownership, use of occupation.⁸ He concluded that ancestors of the Gitksan and Wet’suwet’en peoples lived within the territory in question prior to the assertion of British sovereignty, but predominantly at village sites, which had already been identified as reserve lands, and, as a result, he declared they did not own or possess Aboriginal title to the broader territory.⁹ On appeal, the Supreme Court of Canada ordered a new trial for procedural reasons, but ruled that Aboriginal title is protected in its full form by s. 35. In the event of an interference with rights associated with Aboriginal title, according to the Court, “[t]here is always a duty of consultation” that forms part of the Court’s inquiry into “whether the infringement of Aboriginal title is justified.”¹⁰

Finally, the Court has indicated that the Crown is under a duty to consult with Aboriginal people in the event of an infringement of a treaty right recognized and affirmed by s. 35. In *R. v. Badger*, at issue was whether the Treaty 8 right to hunt provided a defence to a charge under Alberta’s *Wildlife Act*, which prohibited hunting out-of-season and hunting without a license. The Court held that Treaty 8 protected hunting for food on private property that was not put to a visible, incompatible use, and that the right

⁷ *Ibid.* at 1119.

⁸ *Uukw v. R.*, [1987] 6 W.W.R. 155, at 181 (B.C.S.C.).

⁹ [1991] 3 W.W.R. 97, at 383 (B.C.S.C.).

¹⁰ *Supra* at 1113.

to hunt was a treaty right within the meaning of s. 35(1) of the *Constitution Act*. The Court stated that "a treaty represents an exchange of solemn promises [and] an agreement whose nature is sacred."¹¹ It noted that "aboriginal and treaty rights differ in both origin and structure."¹² It reiterated that treaties ought to be interpreted in "a manner which maintains the integrity of the Crown" and that ambiguities or doubtful expressions in the wording of the treaty or document must be resolved in favour of the Indians."¹³ The Court further held that treaty rights can be unilaterally abridged by the Crown so long as the law in question meets justificatory standards similar to those that operate in relation to laws that interfere with the exercise of Aboriginal rights, but it suggested that given the fact that a treaty constitutes "a solemn agreement, ... it is equally if not more important to justify *prima facie* infringements of treaty rights."¹⁴ Accordingly, the Crown likely is under a duty to consult in the event of an infringement of a treaty right recognized and affirmed by s. 35.

The Court has also addressed at some length the nature and scope of the Crown's duty to consult. In *Delgamuukw v. British Columbia*, Lamer C.J. stated that:

[t]he nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.¹⁵

As stated, the Court in *Delgamuukw* also reiterated a call for negotiation, rather than litigation, as a means of achieving reconciliation between First Nations and the Crown, adding that:

s.35(1) "provides a solid constitutional base upon which subsequent negotiations can take place." Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not legal, duty to enter into and conduct those negotiations in good faith.¹⁶

The Court's call for negotiated settlements is especially significant given the detailed and complex political, economic, jurisdictional, and remedial judgments

¹¹ [1996] 1 S.C.R. 771, at 793.

¹² *Ibid.* at 812.

¹³ *Ibid.* at 794.

¹⁴ *Ibid.* at 814.

¹⁵ *Supra* at 1113.

¹⁶ *Supra* at 1123 (quoting *Sparrow*, *supra* at 1105).

necessary to resolve competing claims to territory and authority.¹⁷ Even if the judiciary could tailor rules and remedies to address these issues in a detailed manner, negotiations are clearly preferable to court-imposed solutions. Litigation is expensive and time-consuming. Negotiation permits parties to address each other's real needs and reach complex and mutually agreeable trade-offs.¹⁸ A negotiated agreement is more likely to achieve legitimacy than a court-ordered solution, if only because the parties participated more directly and constructively in its creation. And negotiation mirrors the nation-to-nation relationship that underpins the law of Aboriginal title and structures relations between First Nations and the Crown. Instead of attempting to exhaustively define the respective rights of the parties at first instance, the judiciary ought to first endeavour to enforce the Crown's duty to consult in a manner that creates incentives on the parties to reach negotiated agreements.

B. *The Practicalities of the Duty*

Within the broad parameters established by the Supreme Court of Canada, lower courts have been left with the unenviable task of determining many of the practicalities of the duty to consult, including questions relating to the *who*, *when* and *how* of consultation. With respect to the issue of who bears the duty to consult, the emerging case law attaches the duty to the Crown and third parties in a manner consistent with the objective of creating incentives on the parties to reach negotiated settlements. With respect to the question of when the duty arises, however, most decisions treat the duty simply as an element of an *ex post* justification of an infringement of an Aboriginal or treaty right, thereby frustrating the duty's *ex ante* possibilities. With respect to how consultations are to occur, most decisions also fail to vest the duty with any meaningful content. The result is a duty to consult that is essentially procedural in nature, stripped of its ability to foster negotiated settlements. However, countering this trend are several decisions that regard the duty as a prelude to a potential infringement of an Aboriginal or treaty right, and suggest that the duty requires more of the Crown than mere procedural fairness. Coupled with a richer understanding of the duty's potential to create incentives for parties to

¹⁷ See Royal Commission on Aboriginal Peoples, *Final Report*, vol. 2, *Restructuring the Relationship* (Ottawa: Minister of Supply and Services Canada, 1996), at 561-62. See also *Pacific Fishermen's Defence Alliance v. Canada*, [1987] 3 F.C. 272 (T.D.), at 284 ("[b]ecause of their socio-economic and political nature, it is indeed much preferable to settle aboriginal rights by way of negotiation than through the Courts").

¹⁸ See M.A. Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 Harv. L. Rev. 637 (1976).

avoid litigation, these decisions ought to serve as the starting point for a jurisprudence that seeks to foster reconciliation through negotiation.

1. *Attaching the Duty*

A number of lower court decisions addressing the Crown's duty to consult hold that the Crown cannot cabin its obligations according to its internal administrative structures or delegate such obligations to third parties. Both developments lend themselves to a jurisprudence that fosters negotiated settlements. With respect to the former, in light of the fiduciary relationship that exists between the Crown and Aboriginal people, the duty to consult attaches to the Crown. However, the duty attaches to the Crown in general, and not to any particular decision-maker. Various ministries can, as it were, share the duty to consult. In *Kelly Lake First Nation*, for example, at issue was a decision by British Columbia to authorize the development of an exploratory gas well on land possessing historical and spiritual significance to the Kelly Lake First Nation. The ultimate decision was to be made by the Ministry of Energy and Mines, but part of the consultation was undertaken by the Ministry of Employment and Investment. Taylor J. accordingly treated "MEI ... as an adjunct to MEM in this process." ¹⁹

Similarly, in *Labrador Metis Association v. Canada (Minister of Fisheries and Oceans)*, a case involving a refusal by the Department of Fisheries and Oceans to grant a communal fishing license to the Association, the court regarded the DFO to be still part of the consultation process when it sent a letter to the Association urging it to continue providing information to the Department of Justice, stating that "DFO will continue to consult with these agencies on this issue over the winter." ²⁰ And in *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, the petitioners challenged the decision of the Minister under the *Heritage Conservation Act* permitting Interfor to harvest culturally modified trees in the Kumealon Lake region. Wilson J. held that the letter sent by the Ministry of Small Business, Tourism and Culture was "not informative" and that "notification and opportunity to consult were both inadequate in this case." ²¹ Wilson J. stated further that the faulty procedure could not be

¹⁹ *Kelly Lake Cree First Nation v. Canada (Minister of Energy and Mines)*, [1998] B.C.J. No. 2471 (October 23, 1998) (B.C.S.C.) at para. 241 ("no authority ... requires the decision-maker to personally inquire and receive the information upon which the decision is made or to personally engage in consultation").

²⁰ [1997] F.C.J. No. 132 (F.C.T.D.), at para. 5.

²¹ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [1998] B.C.J. No. 2440, Victoria Registry No. 982223 (October 21, 1998) (B.C.S.C.), at paras. 45, 47.

answered by the fact that the petitioners were in consultation with the Ministry of Forests, since the *Heritage Conservation Act* prevails over other statutes in this regard. According to Wilson J., “[t]he petitioners are entitled to an informed decision by the responsible Minister.”²²

The foregoing cases suggest that, at least in certain circumstances, the Crown cannot unilaterally decide which internal administrative departments are responsible for fulfilling the duty, and that the duty may require coordinated efforts across departmental lines. Constraining Crown discretion in this manner furthers the duty’s broader objective of minimizing litigation. So long as there exists clear lines of communication between the parties, departmental coordination fosters transparent consultation processes that take into account the range of Crown and Aboriginal interests at stake in possible negotiated settlements. It also creates an incentive on the Crown to establish processes for inter-departmental scrutiny of the adequacy of consultation initiatives of particular officials and departments, and to develop a coordinated strategy to seek to avoid litigated outcomes.

With respect to Crown action that authorizes a private entity, such as a corporation, to engage in activity that may interfere with the exercise of Aboriginal or treaty rights, Crown policy often requires the private company to consult with adversely affected First Nations. Courts have been relatively strict in requiring a continuing Crown presence in consultations assumed by third parties. In *Halfway River First Nation v. British Columbia*, for example, at issue was a Crown decision to approve the application of a forestry company for a timber cutting permit in an area alleged to be integral to the traditional culture of the Halfway River First Nation. Meetings between the First Nation and the forestry company which did not involve the District Manager were not considered consultation “for the purposes of determining whether [the District Manager] met his fiduciary obligations.”²³

Similarly, in *Tsilhqot’ in National Government v. British Columbia*, a case involving the granting of a pesticide use permit, the British Columbia Environmental Appeal Board noted that ministerial consultation policy “requires the proponent for pesticide use permits to take the lead role in identifying aboriginal rights associated with a proposed pesticide use program and to consult with First Nations as required to determine those rights.”²⁴ Although the Board, citing *Halfway River*, regarded the delegating of the duty to be “problematic,” it held that “[t]he delegation of the responsibility to implement consultation may satisfy the government’s fiduciary obligation in some cases, but not in others,” noting the potential

²² *Ibid.* at para. 49.

²³ *Halfway River First Nation v. B.C. (Minister of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at 71.

²⁴ [1998] B.C.E.A. No. 23, Appeal No. 97-PES-08, at para 51.

for mistrust and conflict of interest.²⁵ Nevertheless, it concluded that there was sufficient involvement by the Ministry of Environment, Lands and Parks and the Ministry of Forests to meet the Crown's fiduciary obligation to consult with the Tsilhqot'in. It noted that MELP was informed of the progress of consultation efforts, corresponded directly with the Tsilhqot'in regarding its concerns, and became directly involved when it deemed it necessary, while MOF oversaw some of the consultation processes.²⁶

A requirement that the Crown maintain a continuing presence in consultations assumed by a third party is consistent with the objective of fostering negotiated settlements. Inclusion of a third party in a consultation process enhances the likelihood that the parties will be able to identify and attempt to reconcile all of the relevant competing interests. Authorizing Crown delegation of the duty to a third party only insofar as the Crown maintains supervisory responsibility over the third party's actions promotes accountability. But while the emerging case law attaches the duty in a manner consistent with the objective of creating incentives on the parties to reach negotiated settlements, it tends to trigger the duty only on the showing of a violation of an existing Aboriginal or treaty right and, once triggered, regards the duty's content in purely procedural terms. As discussed below, both developments frustrate the duty's ability to foster negotiated settlements.

2. *Triggering the Duty*

Lower courts have held that the duty to consult is triggered upon the showing of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. Given that the Crown must fulfil its duty to consult with a First Nation if it seeks to justify any action that constitutes a *prima facie* violation of s. 35(1), this proposition is consistent with the broad parameters of the duty as established by the Supreme Court of Canada. But a number of cases suggest that the duty is triggered only when the Aboriginal or treaty right in question has been established as an existing right within the meaning of s. 35(1) either by treaty or litigation.²⁷ In *Kelly Lake*, for example, Taylor J. stated that the Crown must "consult with First Nation people before making decisions that will affect rights either established through litigation or recognized by government as existing."²⁸

²⁵ *Ibid.* at para. 56.

²⁶ *Ibid.* at para. 59.

²⁷ See generally, Woodward and Janes, *Fulfilling the Promise of Consultation*, *supra*, and cases cited therein. See also J.J.L. Hunter, Q.C., *Consultation With First Nations Prior to Natural Resource Development*, in Pacific Business & Law Institute, *Environmental Law and Canada's First Nations* (Conference Proceedings, November 18-19, 1999).

²⁸ *Supra* at para. 154.

What this proposition overlooks is that in most cases involving the assertion of Aboriginal or treaty rights, the First Nation in question is simultaneously attempting to establish the existence of its rights and prevent interference with those rights by the Crown or a third party. If the duty to consult is triggered only in cases where the law already recognizes that the First Nation possesses the right in question, the duty to consult will not apply where an injunction is sought pending determination of the plaintiff's rights. This approach may make sense if the duty to consult only operates as one element of a justification of a Crown or third party action that interferes with an existing right. But the Court's treatment of the duty in *Delgamuukw* as part of a justification of an infringement of an existing right illuminates only one consequence of breach of the duty, namely, that breach will affect the constitutionality of a Crown or third party action that amounts to an infringement. If the duty also operates to minimize reliance on litigation, as a means of determining the nature and scope of Aboriginal and treaty rights, it must also apply in cases where a First Nation asserts rights that have yet to be formally recognized by a court of law or treaty. Breach in this context might well affect the ultimate constitutionality of the proposed Crown or third party action, but it should also result in remedies that facilitate outcomes determined by the parties themselves without the need for subsequent litigation.

A number of cases hint at this richer understanding of the duty.²⁹ In *Halfway River*, Dorgan J. rejected the proposition that the duty to consult does not arise until the First Nation has established a *prima facie* infringement of s. 35(1), stating that such a holding would be "inappropriate given the relationship between the Crown and Native people."³⁰ Instead, Dorgan J. held that the duty governs decisions that may affect the exercise of Aboriginal or treaty rights. And, on appeal, Huddart J.A. in a concurring decision stated that the Crown is "required to initiate a process of adequate and meaningful consultation ... to ascertain the nature and scope of the treaty right at issue."³¹ These holdings come close to realizing the duty's potential to minimize litigation, but, as discussed at greater length in Part II, the duty can only achieve its purpose if it requires the Crown to make good faith efforts to first jointly define the nature and scope of Aboriginal or treaty rights before it seeks to determine the extent to which its proposed actions might infringe such rights.

²⁹ See *Halfway River First Nation v. British Columbia (Minister of Forests)* [1997] 4 C.N.L.R. 45 (B.C.S.C.); *R. v. Jack* (1995) 16 B.C.L.R. (3d) 201, [1996] 2 C.N.L.R. 113 (C.A.); *R. v. Noel*, [1995] 4 C.N.L.R. 78 (N.W.T. Terr. Ct.). See also *Cheslatta Carrier Nation v. British Columbia*, [1998] 3 C.N.L.R. 1 (B.C.S.C.) ("the Crown always bears a common law duty to consult where Aboriginal land issues arise").

³⁰ *Halfway River First Nation*, *ibid.* at 71.

³¹ *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] B.C.J. No. 1880 (B.C.C.A.), at para. 191, per Huddart J.A., concurring.

3. Fulfilling the Duty

As stated, the Supreme Court of Canada in *Delgamuukw* indicated that the content of the duty of consultation will vary with the circumstances. Specifically, it held that:

In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to Aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the Aboriginal peoples whose lands are at issue. In most cases it will be significantly deeper than mere consultation. Some cases may even require the full consent of an Aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to Aboriginal lands.³²

Lower courts have studiously ignored the significance of the sliding scale of consultation proposed in *Delgamuukw*. In so doing, they seriously impair the capacity of the duty to consult to serve as an instrument to minimize litigation.

Specifically, lower courts have not attempted to calibrate the content of the duty to the nature of the decision. They typically do not require of the Crown anything more than the duty's "minimal acceptable standard" of meaningful consultation, let alone require the Crown to obtain the «full consent» of the First Nation in question.³³ In *R. v. Jack*, a case involving the constitutionality of a provision of the *Fisheries Act*, for example, the court stated:

we do not agree... that the consultation between the DFO and the band required that the DFO reach agreement with the band on all conservation measures. To so interpret the consultation ... would be to conclude that the band was entitled to veto any conservation measure which the DFO wished to implement between the DFO and the band.³⁴

³² *Supra* at 1113.

³³ *Ibid.* See *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] B.C.J. No. 1880 (B.C.C.A.), per Finch J.A. (no reference to *Delgamuukw* or sliding scale), and per Huddart J.A., concurring (citing *Delgamuukw* but omitting mention of sliding scale); *Cheslatta Carrier Nation*, *supra* at 14 (citing *Delgamuukw* but omitting mention of sliding scale); *Alberta Wilderness Association v. Canada*, [1998] F.C.J. No. 540 (F.C.T.D.); at para 16 (citing *Delgamuukw* but omitting mention of sliding scale); *Kelly Lake Cree First Nation*, *supra* (citing *Delgamuukw* but not applying sliding scale); *Tsilhqot'in National Government*, *supra* (citing *Delgamuukw* but not applying sliding scale); *Sushwap Thompson Organic Producers Ass'n*, [1998] B.C.E.A. No. 24 (no reference to *Delgamuukw* or sliding scale). We are aware of only one case requiring the Crown to obtain the consent of a First Nation: *Mushkegowuk Council et al. v. Ontario*, [1999] O.J. No. 3170 (Ont. S.C.J.) (province must obtain consent of First Nation before requiring it to administer "workfare" program).

³⁴ (1995) 131 D.L.R. (4th) 165 at 189 (B.C.C.A.), at 189. See also *R. v. Sampson* (1995), 131 D.L.R. (4th) 192 (B.C.C.A.), at 220 ("we do not interpret 'consultation' to mean 'agreement' ... [or] accede ... to the submission ... [that] the Crown must establish 'informed consent' by an Indian band" to a proposed regulation of an Indian food fishery).

Instead, lower courts have relied heavily on a test first developed by Dorgan J. in *Halfway River* prior to the Supreme Court of Canada's decision in *Delgamuukw*, which requires that the Crown (a) provide a First Nation that may be affected by government legislation or a decision with "full information" on the proposed legislation or decision; (b) fully inform itself of the practices and views of the First Nation; and (c) undertake meaningful and reasonable consultation with the First Nation.³⁵ As discussed below, these three requirements require little more than the sharing of information and procedural fairness. While both information sharing and procedural fairness are critical to any consultation process that fosters negotiated outcomes, the duty to consult must require more of the Crown if it is to create incentives on the parties to jointly determine the nature and scope of Aboriginal rights without resort to litigation.

With respect to the first requirement, full information includes notice to affected First Nations of the fact that the Crown intends to engage in activity that might affect the exercise of Aboriginal and treaty rights. In *Kitkatla Band*, for example, Wilson J. stated that "there is a duty on the Crown to provide an opportunity for consultation to First Nations; and a correlative right on First Nations to be extended the opportunity to consult," adding that "the crown must take the initiative in the consultative process."³⁶ In *R. v. Jack*, the British Columbia Court of Appeal held that the Crown's duty to consult includes an obligation to inform the First Nation of the proposed Crown action prior to its implementation.³⁷

Full information includes not only information about the proposed project but also its expected impact on the environment. In *Cheslatta Carrier Nation v. British Columbia*, a case that implicated a statutorily mandated environmental assessment of an energy project, Williams C.J.S.C. held that the constitutional requirement on the Crown to consult with affected First Nations entailed that the mining company, when requested, should have provided wildlife information maps of the area in dispute:

Those maps plus the information which they should have brought forth would at least have given the petitioners and opportunity to consider the impact on their lives and

³⁵ *Tsilhqot' in National Government*, *supra* at 71 (summarizing the trial decision of *Halfway River*, *supra*, although *Halfway River* does not speak of "meaningful" consultations). On appeal, Finch J.A. in *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] B.C.J. No. 1880, at para. 160, defined the duty in similar terms (the duty to consult obligates the Crown "to reasonably ensure that aboriginal people are provided with all necessary information in a timely way so that they will have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action").

³⁶ *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, *supra* at para. 46.

³⁷ *Supra* at 189 ("it was the duty of the DFO to inform the band of the conservation being implemented before they were implemented").

their land, and to consider what measures or compensation would be required. If they had possessed adequate and requisite wildlife information, the Petitioners could have carefully considered their response and brought any concerns they might have had to the attention of the Project Committee.³⁸

With respect to the second requirement, in determining whether the Crown has fulfilled the duty to inform itself of the practices and views of the First Nation, courts have looked to the materials produced by the consultation process, as well as to the final decision rendered by the government, for evidence that the Crown understood the concerns of the First Nation. In *R. v. Bones*, for example, at issue was the constitutionality of fishing regulations. In holding the regulations to be unconstitutional, Barnett J. regarded the evidence of consultation as “not convincing”, noting that while the Department of Fisheries and Oceans employed a biologist to design and manage the fishery, “[h]e says he knows nothing about Indian cultures or fishing practices This seems to me a strange way of doing things.”³⁹ Referring to testimony by this official to the effect that he did not know why “as the fall period begins [the Aboriginal fishers] go out less and less,” the judge stated that “[i]f DFO officials really listened to Indian people they might learn why [they] fish when they do.”⁴⁰

The third requirement, namely, that consultations be both meaningful and reasonable, obligates the Crown to be prepared to make changes to its proposed action based on information obtained through consultations.⁴¹ This requirement is capable of incorporating the sliding scale proposed in *Delgamuukw*, but most lower court decisions appear to regard fulfillment of the first two requirements as constituting sufficiently meaningful and reasonable consultations. Some cases even waive this requirement, allowing the Crown to proceed with its

³⁸ *Supra* at 18.

³⁹ *R. v. Bones*, [1990] 4 C.N.L.R. 37 (B.C.Prov. Ct.), at 42.

⁴⁰ *Ibid.* at 45. See also *Heiltsuk Tribal Council v. Deputy Minister, Pesticide Control Act*, [1997] B.C.E.A. No. 20, Appeal No.95-33(b), at para 55 (lack of clarity about the aboriginal rights in the area of proposed activity seen as evidence that the consultation was inadequate); *Halfway River*, *supra* at 73-74 (the Crown should have informed itself further “with respect to potential infringement of treaty and Aboriginal rights” when a Cultural Heritage Overview Assessment held by the District Manager stated that “[this report fails] to adequately address the concerns and management needs of forest managers and First Nations”).

⁴¹ See *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] B.C.J. No. 1880, at para. 160, per Finch J.A. (the duty obligates the Crown “to ensure that [Aboriginal] representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action”); see also *R. v. Bones*, *supra* at 42 (suggesting that the Crown under an obligation to enter the process prepared to change policies, and criticizing Crown’s approach as “leading to nothing more than minor amendments ... and such in-season changes as are necessary”); *Treaty 8 Tribal Association v. British Columbia (Minister of Forests)* [1994] B.C.E.A. No. 11 Appeal No. 92/27 (criticizing Minister’s actions as “get permission to spray, then talk”).

action in the absence of any consultations at all. For instance, in *R. v. Pine*, the judge stated

I infer from the language used in the *Sparrow*, *Badger* and *Nikal* cases that although consultation is desirable and expected, direct consultation is not in every case mandatory, so long as an analyses demonstrates that the justificatory standard imposed by *Sparrow* is met in the specific factual context of each case.⁴²

Similarly, in *R. v. Coullonneur*, s. 38(1)(d) of the Saskatchewan Fishery Regulation under the federal *Fisheries Act* was challenged as infringing the rights under Treaty 10 of a member of the Canoe Lake First Nation. Nightingale J. found “no evidence to show that the Aboriginal peoples of the Canoe Lake area were consulted before the regulation was enacted.”⁴³ Nonetheless, he held that “in all of the circumstances I do not find that the regulation was enacted in a high-handed or paternalistic fashion, or one which ignored the needs and preferences of the peoples affected,” and upheld the constitutionality of the regulation in question.⁴⁴

In *Heiltsuk Tribal Council v. Deputy Administrator, Pesticide Control Act*, however, a case involving a challenge of a pesticide permit, the British Columbia Environmental Appeal Board held that the Crown was obligated to consult with First Nations adversely affected by the decision to grant the permit. It held further that consultation is meaningful when it involves a process that is not “adversarial” but one that is “well thought out” and attempts to determine the nature and scope of Aboriginal rights in the area, the extent to which those rights would be infringed by the proposed activity, and how an infringement may be avoided.⁴⁵ It also regarded meaningful consultation to include a process that shows sensitivity to Aboriginal values, that “recognizes different communication styles than letters and telephone calls,” and that includes building a relationship of trust with aboriginal people, and not merely “filling a bureaucratic requirement.”⁴⁶

⁴² [1997] O.J. No. 1004, Court File 97-09504 (January 29, 1997) (Gen.Div.), at para 55.

⁴³ [1997] 1 C.N.L.R. 130, at 138 (Sask. P.C.) (emphasis deleted).

⁴⁴ *Ibid.* *Coullonneur* was cited and followed in *R. v. Crowe and Ironchild*, [1997] 3 C.N.L.R. 155 (Sask. Prov. Ct.). After noting the general features of the 1980 consultation process when the claimed infringement (the Woody Lake Road Corridor Game Preserve) was created, Bobowski P.C.J. stated that “[t]here was no evidence as to how SERM [Saskatchewan Department of Environment and Resource Management] would determine whether or not subsistence hunting needs were met, although the evidence suggested that no complaints were received by SERM from First Nations people and from this apparently the conclusion was drawn that there is no problem.” He concluded, citing *Coullonneur*, that “although there is no specific evidence as to who was consulted, the Federation of Saskatchewan Indian Nations was afforded an opportunity to be involved in the decision making process of setting up the Road Corridor. They chose not to do so....the setting up of the Road Corridor was not done so in a high-handed or paternalistic fashion or one which ignored the needs and preferences of the affected Aboriginal people.”

⁴⁵ *Supra* at para. 37.

⁴⁶ *Ibid.* at para. 36.

Together, these three requirements obligate the Crown, when contemplating an action that might adversely affect a First Nation's interests, to provide notice, gather and share relevant information, and act in a procedurally fair manner to the First Nation. But these requirements do not exhaust the content of the duty; as discussed in the following Part, most disputes require the Crown to make good faith efforts to negotiate an agreement specifying the rights of the respective parties to the territory in question.

III. *Toward a Jurisprudence of Reconciliation*

If the duty to consult is to serve as an instrument that fosters reconciliation between First Nations and the Crown, the judiciary must begin to fashion a jurisprudence that creates incentives on the parties to reach negotiated settlements without resort to litigation. As discussed in the previous Part, critical to this task is a recognition of the fact that the duty to consult is not simply one element of a justification test governing infringements of existing Aboriginal or treaty rights. The duty to consult also operates *ex ante* on the parties, requiring the Crown to initiate discussions with any First Nation whose interests appear to adversely affected by a proposed Crown action to attempt to jointly determine the rights of the respective parties.

In the following section, we argue that implementing the duty's *ex ante* purpose also requires an acknowledgement that the content of the duty varies from context to context, depending on the nature and extent of the First Nation's interests and the severity of the Crown action in question. In some circumstances, where the adverse effect of the action in question appears to be minimal, the duty requires the Crown to do little more than what lower courts already require of the Crown, namely, that it provide notice, gather and share relevant information, and act in a procedurally fair manner to the First Nation. In most cases, however, the duty imposes heightened consultation requirements on the Crown, including a requirement that the Crown attempt in good faith to negotiate an agreement that identifies the respective rights of the parties to the territory in question. Subsequent sections address what the duty entails in terms of funding obligations, remedial options, and negotiating behaviour of the parties.

A. *Calibrating Consultation Requirements*

The Supreme Court of Canada was explicit in *Delgamuukw* that the content of the duty to consult varies from context to context. In "rare" circumstances, it will require the Crown only to engage in «meaningful consultation»; in most cases, the duty's content "will be significantly deeper than consultation."⁴⁷ In

⁴⁷ *Supra* at 1113.

some cases, the duty will require the Crown to obtain the consent of the First Nation in question. In *R. v. Marshall*, the Court added that “[t]his variation may reflect such factors as the seriousness and duration of the proposed restriction, and whether or not the Minister is required to act in response to unforeseen or urgent circumstances.”⁴⁸ In other words, the content of the duty is to be calibrated according to the circumstances at hand, the severity of the proposed Crown action, and the nature and extent of the Aboriginal interests at stake. Several cases involving consultation processes mandated by prior agreement between the parties illustrate that such calibration is both possible and desirable.

In *Cree School Board v. Canada (Attorney General)*, for example, the Cree challenged the creation of an agreement between Quebec and Canada that allowed for budgetary approval of funding for the Cree School Board. The Cree claimed that this agreement violated s.16 of the James Bay and Northern Quebec Agreement, specifically s.16.0.23, which provides that

[t]he funding by Quebec and Canada ... shall be provided to the Cree School Board in accordance with a formula to be determined by the Quebec Department of Education, the Department of Indian Affairs and Northern Development and the Crees.

Quebec and Canada argued that “the Cree School Board does not have to be present when funding formulas are determined, and that it need only be consulted, as is the case for other school boards.”⁴⁹ In support of this position, the government asserted that if anything more than consultation was provided for, “the Crees could abuse the situation and block any process.”⁵⁰

In rejecting the government’s position, the Court described the James Bay Agreement as a “treaty” within the meaning of s.35 of the *Constitution Act, 1982*, and stated that it did “not agree with [the argument] ... that the fiduciary obligation of both governments was transformed into a contractual obligation.”⁵¹ The Court characterized the Cree School Board as a method of exercising an Aboriginal right, enabling the Cree to “control their own future in their own language and culture, thereby preserving their distinctiveness.”⁵² Since the Agreement is a treaty, the Court concluded that the paragraphs in question “provide for an exceptional regime which is outside the law governing the management of the Canadian and Quebec governments.”⁵³ The case was decided, however, mainly on the basis of the wording of the Agreement. The word “determine” in s.16.0.23 was held to mean that “the obligation is for the

⁴⁸ *R. v. Marshall*, *supra* at 43.

⁴⁹ [1998] 3 C.N.L.R. 24 (Que. Sup. Ct.), at 44.

⁵⁰ *Ibid.* at 57.

⁵¹ *Ibid.* at 56.

⁵² *Ibid.* at 49.

⁵³ *Ibid.* at 57.

three parties to determine the budgetary rules together, not for Quebec and Canada to determine them alone and impose their own modalities by administrative agreement.”⁵⁴

Even where a prior agreement is not regarded as a treaty within the meaning of s.35(1) of the *Constitution Act, 1982*, its existence may authorize heightened consultation requirements on the Crown. In *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans)*, for example, the applicants challenged the determination of fishing quotas for 1997 based on the provisions of an agreement between the Inuit of the Nunavut Settlement Area and Canada. Specifically, the Inuit used Article 5 of the agreement, which set out principles of the relationship between Canada and the Nunavut Inuit, and Article 15, which set out substantive expectations of the relationship between the government and the Nunavut Wildlife Management Board, including the following:

15.3.4 Government shall seek the advice of the NWMB... The NWMB shall provide relevant information to the government.

15.3.7 Government recognizes the importance of the principles of adjacency and economic dependence of communities in the Nunavut Settlement Area [NSA] on marine resources and shall give special consideration to these factors...

... Government shall consider such advice [from various Nunavut agencies] and recommendations in making decisions which affect marine areas.

The Government's 1997 allocation of fish, which increased the total allowable catch in a region that included the settlement area, was held to infringe the Board's authority under s. 5.6.16, which grants sole authority to establish levels of total allowable harvest in the settlement area. Campbell J. noted that:

there was no meaningful prior consultation with the [Board] on the apparently strongly held view of the Minister that the Canadian share of the [total allowable catch] should increase, and as a result, the [Board] really had no opportunity to express a precise position on this view.⁵⁵

Most importantly, the Court interpreted the agreement to “require the sharing of decision-making,” and found that the evidence showed that Fisheries and Oceans was “prepared to go only so far in meeting their obligations to the [Board] under the Agreement.”⁵⁶ Rejecting the government's argument that “consider” means “simply receive and examine,” the Court held that in light of the provisions of the agreement, “there must be activities and results which reflect the intent of the Agreement,” including:

meaningful inclusion... in the... decision making process before any decisions are made; ... full, careful and conscientious consideration of any advice or recommendation made ... [and] allowance must be made for the advice or recommendations... [I]f a given position is not accepted+at the very least, out of respect, an explanation for doing so should be provided; ... [and] priority consideration

⁵⁴ *Ibid.* at 56 (emphasis deleted).

⁵⁵ (1997) 134 F.T.R. 246 (F.C.T.D.), at 257.

⁵⁶ *Ibid.* at 258.

to ... the position of... the Nunavut Inuit ... [C]onsultation and consideration must mean more than simply hearing. It must include listening as well.⁵⁷

Moreover, two recent decisions regard the existence of a prior agreement as giving rise to a duty to negotiate in good faith an agreement that identifies the rights and obligations of the respective parties. The first, *Nunavik Inuit v. Canada (Minister of Canadian Heritage)*, involved a challenge by the Nunavik Inuit to the planning of Torngat National Park in Labrador. The territory in question was governed by a framework agreement under the federal comprehensive land claims process, and the framework agreement required the parties to negotiate in good faith an agreement in principle. The decision to create the park was announced while Canada was in the midst of negotiating the agreement in principle with Nunavik Inuit. Richard A.C.J. held that the Crown is under a duty to negotiate in good faith when it agrees to negotiate an agreement specifying the rights and responsibilities of the parties with respect to a particular territory. In noting that different land uses may affect the content of the duty, the court stated:

Where a national park reserve is established, there is a minimal impact on the rights and the use of land. There is... a duty to consult in such circumstances. Any consultation must be meaningful. Where a national park itself is established, the impact will occur on the title, the rights and the use of land. There is, therefore, a duty to consult and negotiate in good faith in such circumstances.⁵⁸

Richard A.C.J. concluded that the federal government owed a duty to consult with Nunavik Inuit, including a duty to inform and listen, prior to establishing a park reserve in the area, and a duty to negotiate in good faith with Nunavik Inuit over its claim of Aboriginal title to certain parts of the territory prior to the establishment of a national park in the area.

Similarly, in *Gitanyow v. British Columbia*, the Gitanyow First Nation applied for a declaration that the Crown is obliged to negotiate in good faith an agreement defining its Aboriginal rights. At the time of its application, the First Nation had entered into a framework agreement and was in the process of negotiating an agreement in principle with Canada and British Columbia, in accordance with the terms of the British Columbia Treaty Commission Agreement. Unlike *Nunavik Inuit*, the Gitanyow framework agreement did not expressly require the parties to negotiate in good faith. Williamson J. held that although they were not obligated to conclude an agreement, both levels of government were obliged to negotiate in good faith and make every reasonable effort to conclude an agreement with the Gitanyow.⁵⁹

⁵⁷ *Ibid.* at 260 (emphasis deleted).

⁵⁸ [1998] F.C.J. No. 1114 (F.C.T.D.) at paras. 121-22.

⁵⁹ *Gitanyow First Nation v. Canada*, 1999 B.C.D. Civ. J. 610 (March 23, 1999) (B.C.S.C.); see also *Chemainus First Nation v. British Columbia Assets and Lands Corporation* (7 January, 1999), Victoria 983940 (B.C.S.C.) (if a nexus has been established between the First Nation and the land in question, a duty to negotiate in good faith flows from the fiduciary relationship between the Crown and the First Nation).

All of the above cases appear to regard the Crown's heightened consultation requirements as flowing from the intersection of the Crown's fiduciary duty and the existence of a prior agreement between the parties. In both *Nunavik Inuit* and *Gitanyow*, for example, the requirement that the Crown act in good faith was viewed as an incident of the Crown's fiduciary duty, whereas the requirement that the Crown negotiate an agreement identifying the rights of the respective parties was treated as a function of the fact that the Crown was already participating in negotiations under the rubric of a framework agreement. But it is not at all clear why the presence of a prior agreement, as opposed to the Crown's duty to consult, should give rise to heightened consultation requirements. The above decisions, on their face, suggest that the written text of the agreement supports heightened consultation requirements. But, with the possible exception of *Nunavik Inuit*, these requirements do not flow inexorably from the text at issue. Perhaps comfort is found in the fact of an ongoing, already formalized relationship. But Aboriginal peoples and the Crown already are in an ongoing, formalized relationship - one that is fiduciary in nature. If the duty to consult is to operate in a manner that fosters the creation of a constructive, ongoing relationship between Aboriginal peoples and the Crown, then consultation requirements ought to be calibrated not only to the existence or non-existence of a prior agreement, but also to the nature of the Aboriginal interests at stake and the severity of the proposed Crown action in question.

As noted, *Delgamuukw* offers a sliding scale that provides guidance on how and when such calibration is to occur. At one end of the scale are the "rare cases" where the Crown's proposed action likely will have a minimal impact on Aboriginal interests in the area. In such cases, the duty requires good faith consultation and an effort to substantially address the concerns of the First Nation in question.⁶⁰ At the other end of the scale are proposed Crown actions that likely will cause extensive interference with existing Aboriginal or treaty rights. In such cases, the duty effectively vests a veto in the First Nation, as it requires the Crown to obtain the First Nation's "full consent" to the proposed action.⁶¹ Most cases fall in between these two extremes, requiring of the Crown more than good faith consultation but not requiring the parties to reach agreement: What lower courts have failed to grasp is that the duty to consult in these cases requires the Crown to negotiate in good faith and make every reasonable effort to reach an agreement that delineates the rights of the parties to the territory in question.

In *Perry v. Ontario*, for example, the Ardoch Algonquin First Nation challenged Ontario's decision to repeal an interim enforcement policy calling for the non-enforcement of certain game and fish laws against status Indians in certain circumstances. The First Nation argued that s. 35(1) imposed an

⁶⁰ *Delgamuukw v. British Columbia*, *supra* at 1113.

⁶¹ *Ibid.*

affirmative obligation upon Ontario to negotiate with First Nations to “determine and identify the extent of their aboriginal rights.”⁶² Rendering judgment prior to the Supreme Court of Canada decision in *Delgamuukw*, the Ontario Court of Appeal declared the issue moot but when on to state that “while practicality may dictate that the parties negotiate, the Constitution does not.”⁶³

To the extent that it stands for the proposition that the Constitution never mandates negotiations between a First Nation and the Crown, *Perry* no longer is valid law. As a result of *Delgamuukw*, the Constitution requires the Crown not only to negotiate but to reach an agreement with a First Nation in those cases where the duty requires “the full consent of an Aboriginal nation.”⁶⁴ In most cases, the Constitution does not require the parties to actually reach an agreement, but in such cases, the Crown is at least under a duty to negotiate in good faith. Regardless of its precedential value, *Perry* is an indication that the judiciary is reluctant to enforce heightened consultation requirements in cases where the parties do not have an ongoing relationship formalized by agreement. But heightened consultation requirements in the presence of a prior agreement serve the same purpose as heightened consultation requirements in the absence of a prior agreement; they create incentives on the parties to determine their respective rights without resorting to litigation. Holding the Crown to a duty to negotiate in good faith in both cases increases the likelihood that the parties themselves, and not the judiciary, will determine their respective rights and obligations with respect to the territory in question. No doubt judicial caution on this issue is fuelled by a desire not to handcuff the Crown in the exercise of its legislative and executive authority, but a duty to negotiate does not mean a duty to agree. It means instead a commitment to reconciliation over litigation.

B. Funding Requirements

In order to fully participate in consultation processes as well as comply with information requests, such as traditional use studies, First Nations often seek funding from the Crown. Lower courts have been generally unsympathetic to arguments about lack of resources, occasionally suggesting that the First Nations were overstating the amount of funds and expertise

⁶² *Re Perry et al. and the Queen in Right of Ontario* (1997), 148 D.L.R. (4th) 96 (Ont. C.A.), at 116.

⁶³ *Ibid.* at 166-7. See also *Delgamuukw v. The Queen*, *supra*, per McEachern C.J. (“the Supreme Court has no jurisdiction to declare that the defendants are obliged to negotiate... [s]till less has the Supreme Court the power to direct the defendants to meet with the plaintiffs and negotiate in good faith”); *Delgamuukw v. the Queen* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), per Macfarlane J.A. (“negotiations are not the province of the court”).

⁶⁴ *Delgamuukw v. British Columbia*, *supra* at 1113.

needed to carry out the necessary investigations. In *Kelly Lake Cree First Nation*, for example, the Saulteaux First Nation argued that they were “without the resources to provide information,” but the judge responded that while it was established “that this community ... is of limited means, [it] does not establish a community incapable of providing the information sought.”⁶⁵ The judge referred to a document prepared by the First Nation, prepared with the assistance of the Treaty 8 Tribal Association, and stated that it “illustrates the ability of the ... [First Nation] to respond to the kind of request for information made of it ... , and more importantly to participate in the process of consultation.”⁶⁶ And in *Tsilhqot’ in National Government*, denial of funding was one of the grounds for the Tsilhqot’in’s claim that no consultation has taken place, but the Board did not address the issue except to comment that lack of funding “does not explain why the Appellant did not attempt to supply at least some specific information, to the best of its ability, on its traditional customs and practices relating to the resources and locations in the areas in question.”⁶⁷

First Nations, often located far from urban centres, typically possess limited financial and technical resources, and must address a number of pressing questions relating to the concerns of their membership on a daily basis. Funding to assist participation and the provision of information is critical to the success of the consultation process. If inadequate funding prevents a First Nation from providing the Crown with relevant information, then the ultimate decision whether and how to engage in the activity in question will not have been based on a proper understanding of the Aboriginal interests at stake. More importantly, inadequate funding decreases the likelihood that the Crown would be convinced of the validity of the Aboriginal interests in the territory in question, and increases the likelihood of the Crown proceeding with an action that subsequently forms the basis of litigation.

Properly understood, the duty to consult requires the Crown to provide sufficient funds to a First Nation that may be adversely affected by a proposed Crown action to enable it to participate in consultation processes and gather relevant information in a timely manner. In *Halfway River*, the court intimated that the duty to consult might impose funding obligations on the Crown, stating that it was “arguable ... that ... a court [could] order the Crown to comply with a duty even where compliance necessitates the expenditure of funds.”⁶⁸ Compliance with the duty, however, invariably necessitates the expenditure of funds; the duty to consult, even in its minimal form, is not cost-free. If the duty is to enhance the likelihood of negotiated settlements, one of the costs it ought to impose on the Crown is

⁶⁵ *Supra* at para. 244.

⁶⁶ *Ibid.* at para. 245.

⁶⁷ *Supra* at para. 68.

⁶⁸ *Supra* at 65.

the provision of provide adequate funding to a First Nation to ensure effective participation and the sharing of information in consultation processes.

C. Remedial Options

When the Crown breaches its duty to consult in the context of an allegation that a particular Crown action may constitute a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*, the ultimate remedy available to the aggrieved party is a declaration that the action in question is unconstitutional. Lower courts typically have not required the Crown to fulfil its duty to consult prior to engaging in the action in question.⁶⁹ However, in a number of cases that also involve compliance with statutory requirements, such as environmental assessment requirements, courts occasionally have ordered the Crown to take affirmative steps in this regard. In *Cheslatta Carrier Nation*, the judge ordered that a new consultative committee be set up and empowered, unless all parties were satisfied with the existing committee. The private company involved was also ordered to produce “missing” information.⁷⁰ However, in *Treaty 8 Tribal Association*, the Panel refused to order consultation, stating that this would not “set the type of collaborative climate required to ensure willing participation by the parties,” but it did cancel the pesticide permits at issue. This Panel also refused to make any orders about the consultation process, saying that “in order for the parties to have an effective working arrangement, they themselves must be involved in the design of the consultative process.”⁷¹

If the Crown’s duty to consult is to relate to the judicial call for negotiation over litigation, then remedies ought to be fashioned in a manner that, in the Panel’s words in *Treaty 8 Tribal Association*, “set the type of collaborative climate required to ensure willing participation by the parties.”⁷² In certain cases, the appropriate remedy would be to order negotiations; in other cases, such a remedy might be wholly inappropriate. Generating a collaborative climate may require greater sharing of information; in other cases, it may require prohibiting the Crown from exercising its discretion in a particular way or to achieve a particular

⁶⁹ See *Halfway River*, *supra* at 78 (“since the duty to consult is not imposed by any statute, but rather as a consequence of the requirement of procedural fairness and the fiduciary duty of the Crown, the court may not compel [consultation]... This... would appear to be sound”).

⁷⁰ *Cheslatta Carrier Nation*, *supra* at 23. The judge declined to grant an injunction, citing the late stage of development of the project.

⁷¹ *Treaty 8 Tribal Association v. British Columbia (Minister of Forests)*, [1994] B.C.E.A. No. 11.

⁷² *Ibid.*

outcome. But the overall purpose of a remedy in the context of a breach of a duty to consult ought to be to facilitate outcomes determined by the parties themselves, without the need for subsequent litigation.

Although the duty to consult requires remedial flexibility on the question of whether and to what extent the Crown ought to be ordered to engage in consultations, it requires bright-line rules regarding the availability of interlocutory injunctions. Generally speaking, in order to obtain an interlocutory injunction, an applicant must show that (a) its underlying claim presents a fair question to be tried as to the existence of the right alleged and a breach thereof; (b) without an injunction, irreparable harm will occur; and (c) the balance of convenience favours the application.⁷³ Despite a number of early high profile successes in obtaining interlocutory injunctions,⁷⁴ lower courts have become increasingly reluctant to order this form of interim relief in cases involving an assertion of Aboriginal or treaty rights or an alleged failure of the Crown to fulfil its duty to consult.⁷⁵

Whether interlocutory injunctions ought to be more readily available in cases involving the assertion of an Aboriginal or treaty right is beyond the scope of this Article. With respect to cases involving a breach of the Crown's duty to consult, however, judicial reluctance to grant interlocutory injunctions creates a perverse incentive on the Crown to engage in ineffective consultations with a First Nation. If it is to serve its objective of fostering negotiated settlements, the duty to consult requires a default rule that provides that the Crown cannot proceed with a proposed action that threatens Aboriginal interests unless and until it has fulfilled its duty to consult.

In most cases, this default rule requires the Crown to make good faith efforts to reach an agreement with the First Nation as to the respective rights of the parties to the disputed territory. If the Crown has made good faith efforts in this

⁷³ *RJR MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311.

⁷⁴ *MacMillan Bloedel Limited v. Mullin* (1985), 61 B.C.L.R. 145 (C.A.) («*Mearnes Island*»); *Pasco v. Canadian National Railway Company* (1985), 69 B.C.L.R. 76 (S.C.), aff'd [1986] 1 C.N.L.R. 34 (B.C.C.A.); *Hunt v. Halcan Log Services* (1986), 15 B.C.L.R. (2d) 165 (S.C.).

⁷⁵ *McLeod Lake Indian Band Chief v. B.C.* (1988), 33 B.C.L.R. (2d) 378 (S.C.); *Westar Timber Ltd. v. Ryan et al.*; *Formula Contractors Ltd. v. Herb George et al.* (unreported B.C.S.C. decision dated October 21, 1988); *Wiigyet (Morrison) et al. v. District Manager, Kispiox Forest District et al* (1991) 51 B.C.L.R. (2d) 73 (B.C.); *The Towtisis Nation et al. v. MacMillan Bloedel Ltd.*, [1991] 2 C.N.L.R. 164 (B.C.S.C.); *Ryan v. Fort St. James Forest District*, January 25, 1994, Smithers Reg. No. 7855 (B.C.S.C.); *Wilps Gutginux v. Kispiox Forest (District) Acting Manager* (1995), 127 D.L.R. (4th) 568 (B.C.S.C.); *Council of the Cheslatta Carrier Nation and Chief Marvin Charlie v. Marczyk et al.*, July 12, 1996, File No. A954336, Vancouver Registry (B.C.S.C.); *The Tsay Keh Dene Band v. British Columbia*, June 10, 1997, Court File 97/0723, Victoria Registry (B.C.S.C.); but see *Jules v. Harper Ranch Ltd.* [1989] 3 C.N.L.R. 67 (B.C.S.C.). See generally John J.L. Hunter, Q.C., *The Use of Injunctions to Protect Claims of Aboriginal Rights*, in Pacific Business & Law Institute, *Litigating Aboriginal Claims* (April 15, 1998).

regard but circumstances are such that it is unlikely that an agreement can be reached with the First Nation, then the general principles respecting interlocutory relief ought to govern whether an interlocutory injunction ought to be granted pending judicial determination of the First Nation's underlying case. However, where the Crown proceeds with its proposed action without adequate consultation with an affected First Nation, and where circumstances support an order that the Crown engage in mandatory negotiations, the Crown ought to be enjoined from proceeding with the action in question until such a time that it would be reasonable to expect the parties to determine whether a negotiated settlement is feasible. If circumstances do not support mandatory negotiations, then an interlocutory injunction ought to be granted pending judicial determination of the First Nation's underlying case.

D. *Consultation as a Two-Way Street*

In *R. v. Nikal*, a case involving the constitutionality of a fish licensing scheme, Cory J., for a majority of the Supreme Court of Canada, stated that "in the aspects of information and consultation the concept of reasonableness must come into play."⁷⁶ Lower courts have invoked *Nikal* in support of the proposition that, despite the fact that the duty to consult attaches to the Crown, the way in which a First Nation conducts itself in the consultative process may affect its ability to retain its right to be consulted. As stated by Finch J.A. in *Halfway River*, "[t]here is a reciprocal duty on aboriginal peoples to express their interests and concerns once they have had an opportunity to consider the information provided by the Crown, and to consult in good faith by whatever means are available to them."⁷⁷ Consultation, in other words, is understood to be a "two way street."⁷⁸

In *Ryan v. British Columbia*, for example, Macdonald J. rejected allegations that a cutting permit was issued without consultation with an affected First Nation, stating the First Nation was:

...not content to consult with MOF... Instead, while refusing to engage in any discourse as to the nature of the rights they claim in this area, they insist that nothing should occur without their consent. Furthermore, any such consent is contingent upon the Province agreeing to a Co-Management Agreement on their terms. They delivered an ultimatum to MOF with respect to the area in question They are only interested in a process which will give them such control and, as I read the [material] ... they are using their opposition to this Cutting Block... as a lever in the bargaining process. ...

⁷⁶ *R. v. Nikal*, [1996] 1 S.C.R. 1013, at 1065.

⁷⁷ See *Halfway River First Nation v. British Columbia (Minister of Forests)*, [1999] B.C.J. No. 1880, at para. 161, per Finch J.A.

⁷⁸ *Cheslatta Carrier Nation* at 21, citing *Ryan et al v. Fort St. James Forest District (District Manager)* [1994] B.C.J. No 2642 (Smithers No. 7855 and 7856 (B.C.S.C.) affd (1994) 40 B.C.A.C. 91 (C.A.).

Consultation did not work here because the Gitksan did not want it to work. The process was impeded by their persistent refusal to take part in the process unless their fundamental demands were met ... It was the failure of the Petitioners to avail themselves of the consultation process, except on their own terms, which lies at the heart of this dispute.⁷⁹

Similarly, in *Kelly Lake Cree First Nation*, after describing the process as "less of a process of discussion in which [the Salteaux First Nation] sought to participate and much more of a process in which [they] sought to delay the decision," Taylor J. stated that "[a]ny responsibility for the absence of consultation lies with their own representatives."⁸⁰ He added that:

In order to stall the making of any decision other than rejection of the application, the SFN continued to demand further consultation and complained of a lack of it on the part of the Government... [the Government] saw the SFN as wishing to have the power of a veto as opposed to wishing to participate in consultations as done with the other two First Nations.⁸¹

Cases involving statutory consultation requirements or prior agreements that have imposed heightened consultation requirements are divided on whether reasonableness extends to behaviour which looks like hard bargaining. In *Cree School Board*, the Quebec Superior Court held that the fact that «people [are] sincere and firmly believe in their own truth» is not relevant to determining whether heightened consultation requirements are appropriate, although it may signal the culmination of unsuccessful negotiations.⁸² In *Labrador Metis Ass'n. v. Canada (Minister of Fisheries and Oceans)*, however, the Court held that it was appropriate for the Crown to cease consultations with the Association when it formed the impression that the Association was attempting to "lever an initial attempt at obtaining a communal fishing license into recognition by the Crown of the Association's Aboriginal rights."⁸³

Holding a First Nation to a standard of reasonableness is consistent with the duty's objective of fostering negotiated settlements. If a First Nation acts unreasonably in a consultation process designed to determine the respective rights of the parties, and the Crown has made good faith efforts to negotiate an agreement, the Crown ought to be free to proceed with the proposed action, subject to the general principles governing interlocutory relief pending judicial determination of the First Nation's underlying case. However, the standard of reasonableness required of the First Nation ought to vary with the degree of consultation requirements imposed on the Crown. In most cases, the nature of the Aboriginal interests and the severity of the proposed Crown action are such that the Crown owes

⁷⁹ *Ibid.* at paras 21-26.

⁸⁰ *Supra* at paras. 127, 252.

⁸¹ *Ibid.* at 113.

⁸² *Supra* at 57.

⁸³ [1997] F.C.J. No.132 (F.C.T.D.), at para 4.

a duty to negotiate with a First Nation. In such cases, the First Nation must be allowed more latitude than what would be required in cases where the proposed Crown action likely will have a minimal impact on Aboriginal interests in the area. Negotiations, at least in some circumstances, require parties to engage in hard bargaining in an effort to extract concessions from the other. To the extent the law regards hard bargaining as constituting behaviour that will affect a First Nation's right to be consulted, it discourages real negotiations between the parties, because the First Nation will rightly fear that such conduct will result in the loss of its right to be consulted.

Even in those rare circumstances where consultation requirements fall short of a duty to negotiate, a First Nation must be entitled to seek to ensure that consultations are as extensive and meaningful as possible. In *Halfway River*, for example, the Crown claimed that the First Nation had acted unreasonably, since it had insisted that consultation: be meaningful; be based on a process acceptable to both sides; include the provision of funding; and proceed only with assurances that no activity would take place in the disputed area pending its claim and an assessment of the impact on its rights. Dorgan J. at trial noted that the First Nation did not refuse to meet with the Crown but in fact requested such meetings; did not demand a consultation process on its own terms, but one acceptable to both parties; and was facing a situation in which the Crown had failed to make all reasonable efforts to consult.⁸⁴ Adversarial behaviour, in other words, should not absolve the Crown of its duty to consult.

Holding a First Nation to a standard of reasonableness, however, is not consistent with the other objective of the Crown's duty to consult, namely, to assist in determining whether and to what extent the Crown is constitutionally justified in engaging in a particular action that infringes an existing Aboriginal or treaty right recognized by s. 35(1). Whether a First Nation acts reasonably or unreasonably when consulted by the Crown should be irrelevant to a determination of the ultimate constitutionality of the Crown action in question. To hold otherwise would render the constitutional recognition and affirmation of existing Aboriginal and treaty rights contingent on the behaviour of the First Nation in contexts unrelated to the exercise of its rights.

Conclusion

Eugene Lorne Gordon, a Kitkatla fisherman, in an affidavit introduced in one of the Kitkatla proceedings, described how, when he was a boy, he used to travel throughout the Kumealon Lake region with his paternal

⁸⁴ *Supra* at 75-6.

⁸⁵ *Kitkatla Band v. British Columbia (Minister of Forests)*, [1998] B.C.J. No. 2667 (B.C.S.C.) (June 18, 1998), at para. 8.

grandmother.⁸⁵ He remembered Kitkatla people building dugout canoes from red cedar trees and weaving baskets from red cedar bark, and recounted how he and his family continue to hunt for game in the region. At the end of the day, the judiciary, after a lengthy trial and numerous appeals, likely will determine whether evidence such as that provided by Mr. Gordon is sufficient to establish that the Kitkatla First Nation holds Aboriginal title to the area. Litigation over actions like the logging of the Kumealon Lake region, however, is expensive, time-consuming, and ultimately incapable of resolving competing claims to territory in a manner that addresses the interests of all parties. In contrast, negotiated outcomes enable the parties to participate directly and constructively in fashioning a complex set of mutually agreeable trade-offs.

Given the stakes involved, litigation will never disappear from view in cases involving the assertion of Aboriginal title. But the law ought to create incentives on the parties to first attempt to reach negotiated outcomes that define their respective rights. In most cases, the duty to consult requires the Crown to make good faith efforts to negotiate an agreement that translates Aboriginal interests adversely affected by a proposed Crown action into binding Aboriginal or treaty rights. By promoting negotiation over litigation, the duty will foster one of the key objectives of the constitutional recognition and affirmation of Aboriginal and treaty rights, namely, "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."⁸⁶

⁸⁶ *R. v. Van der Peet*, *supra* at 539.