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Re-imagining the Duty to Consult: Requiring a Substantive Outcome to Further Reconciliation

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RE-IMAGINING THE DUTY TO CONSULT: REQUIRING A SUBSTANTIVE OUTCOME TO FURTHER RECONCILIATION

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ABSTRACT

The Crown has a duty to consult with Indigenous peoples on actions that may adversely affect claimed Indigenous interests that have not yet been established as recognized rights. Currently, the duty to consult remains a procedural obligation that does not require the consent of the Indigenous claimants to move forward. The crux of the duty to consult is to reconcile Crown and Indigenous interests. This paper explores how the duty to consult can better promote reconciliation by requiring a substantive outcome. Requiring a substantive outcome enhances the ability of Indigenous claimants to protect their own interests in the face of impactful state action.

This paper illuminates the ongoing limitations of the duty to consult in achieving reconciliation, including, amongst other issues, its inherently procedural nature and the limited negotiating power of Indigenous claimants in the consultation process. Next, alternative conceptions of the duty are discussed. This paper concludes by advocating for an altered framework whereby Indigenous claimants negotiate with the Crown and project proponents through a constitutionally entrenched head of power, rather than relying on the courts to substantiate Indigenous interests within the broader authority of the Crown.

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INTRODUCTION

The duty to consult and accommodate ("duty to consult") is the Crown's obligation to consult with Indigenous[1] peoples in order to avoid undermining claimed, but not yet recognized, rights that have yet to be litigated or negotiated.[2] The duty to consult is rooted in the honour of the Crown and aims to reconcile Indigenous interests with those of the Crown.[3] However, the effectiveness of the duty to consult in achieving practical reconciliation has been criticized. This paper will explore how the duty to consult can be extended to require a substantive outcome in Crown-Indigenous dealings, and address how the duty to consult can be re-imagined to achieve practical reconciliation.

Ultimately, this paper takes the position that the current conception of the duty to consult is insufficient in achieving reconciliation and must be reformulated to require a substantive outcome and greater agency for Indigenous claimants. In furtherance of this argument, Part I of the paper will briefly outline the current conception of the duty to consult. Part II will highlight the doctrine's limitations in furthering reconciliation. Part III will engage with alternative conceptions of the duty to consult, and Part IV will review whether they offer a more feasible and practical approach to fulfilling reconciliation.

I: DOCTRINAL DEVELOPMENT AND CURRENT APPLICATION

1. Doctrinal Development

Aboriginal rights protected under subsection 35(1) of the *Constitution Act, 1982* include those that existed prior to 1982 and those proven under the *Sparrow-Van der Peet* test.[4] Prior to the development of the doctrine, this meant that unproven rights were vulnerable to Crown infringement whilst in the litigation or negotiation process.[5]

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[1] I will use the term "Indigenous" instead of the term "Aboriginal" throughout this paper to refer in general to the Indigenous peoples of Canada. "Aboriginal" will be used in reference to a quotation or in reference to a legal term.

[2] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20 [*Haida*].

[3] *Ibid.*

[4] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1) [*Constitution Act, 1982*]; *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385 [*Sparrow*]; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*].

[5] *Haida*, *supra* note 2 at paras 26–27.

Following European colonization, some Indigenous interests were not reconciled with Crown sovereignty. The Supreme Court of Canada ("SCC") confirmed in *Haida Nation v British Columbia* that potential rights claimed by Indigenous groups are protected under subsection 35(1) and require a special consultation process.[6] The honour of the Crown asserts that in the context of a potential right, the Crown must act honourably and consult with Indigenous peoples in order to reconcile those interests with the sovereignty of the Crown.[7] Where unproven rights are concerned, the Crown's obligation stems from their control over lands and resources that were previously held by Indigenous peoples prior to colonization, and therefore the Crown must preserve those interests.[8] As the SCC articulated in *Haida,* the Crown cannot "cavalierly run roughshod over Aboriginal interests" where claims are contemporaneously undergoing litigation or negotiation.[9]

Indigenous claimants must meet the "threshold" test for triggering the duty to consult. The duty to consult is triggered when the Crown has real or constructive knowledge of a potential right and contemplates conduct that may adversely affect that right.[10] What is required from the Crown in discharging the duty to consult varies depending on the strength of the claim and the severity of the adverse impact on the right.[11] Where there is a strong *prima facie* claim and the Crown contemplates conduct that would severely infringe on the claimed right, the content of the consultation will be significant.[12] In *Coldwater First Nation v Canada,* the Federal Court of Appeal ("FCA") outlined indicia of a reasonable discharge of consultation where the duty falls on the deep end of the spectrum. These reasonableness factors may afford the opportunity for claimants to make submissions, formally participate in the decision-making process, require the Crown to provide written reasons showing that claimants' concerns were adequately considered in the final decision, dispute-resolution procedures like mediation or arbitration, and potential accommodation of proposed Crown actions.[13] However, there is no obligation on the Crown to accommodate to the degree of undue hardship for non-Indigenous Canadians.[14] On the other end of the spectrum, where a claim is weak and Crown conduct will not pose a significant

[6] *Ibid* at para 25.
[7] *Ibid.*
[8] *Ibid* at para 32.
[9] *Ibid* at para 27.
[10] *Ibid* at para 35.
[11] *Ibid* at para 39.
[12] *Ibid* at para 44.
[13] *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 41 [*Coldwater*].
[14] *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 81.

impact on the interest, consultation may only require the Crown to give notice or engage in discussion with the claimants.[15]

2. Meaningful Discharge of the Duty to Consult

Importantly, the duty to consult is not a commitment to agree but rather requires the Crown to engage in consultation with a view to meaningfully address the concerns raised by the Indigenous claimants.[16] This means that the current conception of the duty to consult does not require consent or agreement from claimants, nor does it give claimants a veto power.[17] It may require the Crown to accommodate Indigenous concerns and alter their action plan but Indigenous concerns must be balanced against broader societal interests.[18] As an example of the far end of the spectrum, a consent standard should be applied in consultations whereby Crown conduct would preclude any meaningful right to hunt.[19] Where there is fundamental disagreement between the Crown and the Indigenous claimants, and where the Crown has made a meaningful commitment to consultation efforts, the duty will have been discharged.[20] Although the duty to consult may be aimed at a commitment to promote reconciliation and balance Indigenous and Crown interests, the current conception of the doctrine does not require any substantive outcome[21] and the duty itself is largely procedural.

3. Defining "Crown Conduct"

The duty to consult is limited to actions contemplated by the Crown. This includes conduct undertaken by both the federal and provincial governments. The duty to consult applies to the federal government because of their fiduciary duties owed under subsection 35(1).[22] Provincial governments must also discharge the duty to consult pursuant to section 109 of the *Constitution Act, 1867*,[23] which provides that

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[15] *Haida*, *supra* note 2 at para 43.
[16] *Ibid* at para 42.
[17] *Ibid.*
[18] *Ibid* at para 46; *Coldwater*, *supra* note 13 at para 57.
[19] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168, 153 DLR (4th) 193 [*Delgamuukw*].
[20] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 22 [*Taku River*].
[21] *Coldwater*, *supra* note 13 at para 44, citing *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC at para 22 [*Mikisew*].
[22] *Constitution Act, 1982*, *supra* note 4, s 35(1).
[23] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5, s109 [*Constitution Act, 1867*].

when the provinces took up Crown lands, they did so subject to the existing duties they owed to Indigenous peoples.[24]

In this context, the Crown refers to the executive branch of government as well as administrative bodies carrying out Crown policies.[25] Notably, the duty to consult does not apply to the legislative branch. In *Mikisew*,[26] the SCC held that the duty to consult is not triggered in the development, passage, or enactment of legislation as this would contravene the separation of powers between the judicial and legislative branches. Lastly, the duty to consult does not apply to third parties because the duty to consult stems from the honor of the Crown and the Crown's sovereignty over resources and lands previously owned by Indigenous peoples.[27]

II: LIMITATIONS IN FURTHERING RECONCILAITION

This section will review some of the limitations of the duty to consult in furthering reconciliation. Many of the gaps in the doctrine stem from its procedural nature and failure to require a substantive outcome. These limitations include the unilateral imposition of consultation structures, reciprocal duties imposed on claimants, the "adversely affect" threshold, inapplicability to the legislative process, questions raised by international law, the allocation of benefits flowing from a Crown project, as well as the doctrine's lack of certainty and failure to distribute equal negotiating power.

1. The Duty to Consult as a Procedural Right

One of the core deficiencies in the current conception of the duty to consult is its procedural nature. As confirmed in *Haida*, the duty to consult does not provide claimants with a veto power or consent over proposed government action.[28] The Crown is required to engage in consultation that shows a "demonstrably serious consideration of accommodation" but does not require said accommodation.[29] The FCA acknowledged in *Coldwater* that consultation is aimed at forming a Crown-

[24] *Haida*, *supra* note 2 at para 59.
[25] *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 29.
[26] *Mikisew*, *supra* note 21 at para 31–32.
[27] *Haida*, *supra* note 2 at para 53.
[28] *Ibid* at para 48.
[29] *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 501 [*Tsleil-Waututh*].

Indigenous relationship that is pursuant to reconciliation.[30] In the same breath, the FCA makes the contradiction that reconciliation "does not dictate any particular substantive outcome."[31] Rather, achieving reconciliation through the duty to consult is about fostering a relationship of mutual respect, even if that means the Crown makes decisions that conflict with Indigenous interests. This line of reasoning seems to indicate that the Crown can impose project development in the face of Indigenous objection in the name of advancing the rhetoric of reconciliation so long as the Crown follows the proper consultation framework.

Stephen Young articulates that the main issue with conceptualizing the duty to consult as a procedural right is that it allows the court to focus its evaluation on the procedural elements and avoid the substantive concerns of Indigenous claimants.[32] However, the reality is that even in cases that fall on the high-end of the consultation spectrum, the government is not required to alter any of its proposals. Rather, as articulated by the FCA in *Gitxaala Nation v Canada*, what is required is a two-way dialogue between the parties, and the presence of a Crown representative empowered to meaningfully address concerns and "do more than take notes."[33] This two-way dialogue requirement is often conceptualized as a process that would lead parties to "exchange information, learn from the others, work together, and find the best solutions," but as Young points out, "a process does not need to."[34] This is further evidenced by the reality that even on the deep end of the consultation spectrum, the reasonableness factors outlined in *Coldwater*[35] are only indicia, and not requirements, of adequate consultation. Despite the requirement to commit to a meaningful consultation aimed at agreement or accommodation, the decision still ultimately lies with the Crown.

The Trans Mountain Expansion ("TMX") serves as a strong example of how the procedural nature of the duty to consult allows the Crown to undermine substantive concerns.[36] In purchasing the TMX project, the government funnelled any court challenge or substantive issue raised in consultation with Indigenous claimants entirely into a procedural complaint,[37] thereby presupposing the project's green-light

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[30] *Coldwater*, *supra* note 13 at paras 47–51.
[31] *Ibid* at para 53.
[32] Stephen Young, "The Deification Process in Canada's Duty to Consult: Tsleil-Waututh Nation v Canada (Attorney General)" (2019) 52:3 UBC L Rev 1065 at 1067 [Young].
[33] *Gitxaala Nation v Canada*, 2016 FCA 187 at para 279 [*Gitxaala*].
[34] Young, *supra* note 32 at 1075.
[35] *Coldwater*, *supra* note 13 at para 41.
[36] Young, *supra* note 32 at 1080–1081.
[37] *Ibid* at 1070.

while allowing some alterations to conditions to "fulfill" the duty to consult.[38] As Young points out, narrowing substantive concerns from Indigenous claimants does not align with the Crown's commitment to reconciliation.[39] By limiting the duty to consult to a process-based obligation, any hope to achieve a significant alteration in a project of TMX-like magnitude where the Crown has already made financial commitments is effectively diminished before consultation even begins. As long as the duty to consult is solely a procedural obligation, the Crown will not be required to accommodate substantively.

2. Unilateral Imposition of Consultation Frameworks and Reciprocal Duties

The Crown is not required to consult with Indigenous claimants on matters related to the design of the duty to consult consultation framework.[40] Design in this context refers to the procedural step and elements of the consultation framework used by the Crown. As long as the Crown has executed the procedure appropriately, the duty to consult is seen to have been appropriately discharged. As a result, Young posits that courts will often diminish complaints raised by Indigenous claimants that a substantive concern was not adequately addressed in the consultation process as complaints based in procedure.[41] This ultimately licenses the Crown to impose projects in the face of substantive objections from Indigenous claimants so long as the procedural elements of the duty to consult are satisfied.

Even if one accepts that the duty to consult should be entirely procedural, the process itself also poses limitations in achieving reconciliation. As illustrated in the TMX example in *Tsleil-Waututh* and similarly in the Northern Gateway Pipeline consultations in *Gitxaala*, the consultation process is formulated by the Crown and unilaterally imposed on Indigenous claimants.[42] The federal guidelines on the duty to consult provide that the Crown formulates the "form and content" of the consultation process.[43] The FCA has also confirmed the Crown's discretion in

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[38] *Ibid.*

[39] *Ibid* at 1070.

[40] Young, *supra* note 32 at 1068.

[41] *Ibid* at 1080–1081.

[42] *Tsleil-Waututh*, *supra* note 29 at paras 514, 518; *Gitxaala*, *supra* note 33 at para 8; Young, *supra* note 32 at 1080.

[43] Minister of the Department of Aboriginal Affairs and Northern Development Canada "Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult" (2011) at 43, online (pdf): *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-

structuring the consultation process.[44] Young argues that the unilateral imposition of the consultation framework precludes the claimants' ability to address systemic concerns with the process itself, as the design could be used to undercut substantive concerns.[45]

The imposed framework for the TMX consultation described in *Tsleil-Waututh* particularly impeded the claimants' ability to raise substantive concerns in the consultation. For example, the FCA held that the National Energy Board's ("NEB") decision to circumscribe the procedure for allowing oral histories in the consultation fell within the Crown's discretion.[46] Additionally, the NEB was found to be justified in their decision to allow for the cross-examination of the Stó:lō's oral histories but prohibited the cross-examination of TMX witnesses.[47] Unfortunately, this meant that some claimants may have been limited in their ability to gather the necessary information to demonstrate how their rights would be adversely affected.[48] Moreover, not only do Indigenous claimants hold little authority over the structure of consultations, Indigenous laws and traditions have not been fully integrated into the interpretation of subsection 35(1) rights overall.[49] These examples reveal how the unilateral imposition of consultation structures fail to treat Indigenous groups as "partners working toward reconciliation."[50]

Another limitation of the duty to consult lies within the reciprocal duties placed on Indigenous claimants. In *Haida*, the SCC provided that claimants have a duty not to use the duty to consult to take "unreasonable positions" to prevent the government from acting.[51] In *Ryan v Schultz,* the court concluded that the Gitxsan frustrated the Minister of Forest's attempts at consultation because they insisted that logging activities be accommodated to only allow for selective logging. [52] While the Gitxsan refused to engage in dialogue with the Minister, the court rests this frustration on the

CNSLTENGE/STAGING/texte-text/intgui_1100100014665_eng.pdf> [perma.cc/AUA5-J7ZF].

[44] *Tsleil-Waututh*, *supra* note 29 at para 516.

[45] Young, *supra* note 32 at 1081.

[46] *Tsleil-Waututh*, *supra* note 29 at para 544.

[47] *Ibid* at para 239.

[48] Young, *supra* note 32 at 1087.

[49] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Centre for International Governance Innovation, ed, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws, Special Report* (Waterloo: CIGI, 2017) 63 at 65 [Morales].

[50] Young, *supra* note 32 at 1081.

[51] *Haida*, *supra* note 2 at para 42.

[52] *Ryan v Schultz*, 1994 40 BCAC 91 at para 43.

idea that the Gitxsan only wanted to participate on their own terms.[53] It appears as though attempts by Indigenous claimants to alter the consultation framework or to engage in hard bargaining in order to encourage the Crown to account for a substantive concern will not be tolerated by the court and is deemed contrary to the good faith procedure offered by the Crown. This reality is not only an impediment to gaining any meaningful outcome from the duty to consult, but also harms Indigenous resistors directly when consultation is counterproductive and leads to fractured relationships between Indigenous peoples and the Crown.[54] These damaged relationships are especially harmful to achieving reconciliation when considering the importance of relationality to Indigenous ontologies. Shawn Wilson provides that Indigenous ontologies, or understandings of reality and existence, are based in relationships and that reality for Indigenous peoples is inherently tied to this concept of relationality.[55] Currently, Indigenous reality is inherently tied to the Crown's authority over developments that affect, define, and undermine those rights. The Crown's reproduction of this strained relationship through inadequate consultation with the Indigenous peoples precludes any hope of substantive reconciliation.

3. The "Adversely Affect" Threshold

The threshold to trigger the duty to consult itself also constrains claimants' ability to adequately showcase the adverse impacts of Crown conduct on their interests. As articulated by the SCC in *Haida*, the duty to consult is triggered where Crown conduct might "adversely affect" an Aboriginal right.[56] In *Athabasca Chipewyan First Nation v Alberta* trial decision, the court asserted that the Crown merely taking up land in which an Indigenous group has claimed a right to is not sufficient to satisfy the threshold.[57] The Athabasca Nation argued that taking up any claimed land adversely affects their interests because it reduces the land available to the Athabasca on which to exercise their rights.[58] In response, the Alberta Court of Appeal held that something more is needed in determining whether the effect is adverse, such as impeding harvesting, hunting, or trapping rights on traditional territory.[59] In other words, the court does

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[53] *Ibid.*
[54] Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNBLJ 235 at 248 [Coyle].
[55] Shawn Wilson, *Research Is Ceremony: Indigenous Research Methods* (Black Point, NS: Fernwood Publishing, 2008) at 73–74.
[56] *Haida*, *supra* note 2 at para 35.
[57] *Athabasca Chipewyan First Nation v Alberta*, 2018 ABQB 262 at para 122.
[58] *Athabasca Chipewyan First Nation v Alberta*, 2019 ABCA 401 at para 57 [*Athabasca*].
[59] *Ibid* at paras 57–60.

not measure adversity based on a nation's access to a quantifiable area of land. Rather, the court is interested in how taking up that land would alter the continuity of exercising a particular right on that land, such as having to hunt on a tract of land not traditionally used for hunting.[60]

The adversity requirement for triggering the duty to consult becomes complicated when considering the cumulative and ongoing effects of government action on a right. The SCC confirmed in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc* that cumulative impacts of government action on an interest are relevant for determining the scope of the duty but do not trigger the duty on their own.[61] The court also noted that the duty to consult cannot be used to merely address the effects of prior government action on their own. Rather, past action is relevant in forming the overall context in relation to present proposed actions that collectively pose an adverse effect on an interest.[62]

In the TMX example, following the NEB's subsequent round of consultation, the Crown deferred addressing its cumulative impact on Indigenous interests until later stages in the approval process.[63] While triggering the duty to consult may not be an issue for claimants because the cumulative impacts of the project will be considered in assessing adverse effects, fragmenting the assessment of how a development may adversely affect claimed rights means that claimants will have to re-engage in consultation with the Crown every time the next stage is approved and new concerns arise.

Fragmenting the consultation process exacerbates some of the existing procedural limitations that impede Indigenous claimants' ability to fully participate in the consultation process. The Crown often provides funding for Indigenous claimants to partake in consultation, although it is not necessarily required to do so and funding options are limited.[64] In the initial TMX consultation, two out of the eight Indigenous claimants complained that the funding given by the Crown was insufficient.[65]

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[60] *Ibid* at para 60.
[61] *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 42 [*Chippewas of the Thames*].
[62] *Ibid.*
[63] Young, *supra* note 32 at 1078; See note 73.
[64] *Tsleil-Waututh*, *supra* note 29 at paras 101–108; Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46:2 UBC L Rev 397 at 405 [Ritchie].
[65] *Tsleil-Waututh*, *supra* note 29 at paras 533–538.

However, the court held that although insufficient funding impeded the ability of the Squamish and the Stk'emlupemc te Secwepemc Division to complete a traditional land and resource study to demonstrate adverse effects, these funding issues were not considered systemic in the consultation process because only two groups complained.[66] While only two groups complained of insufficient funding, it is important to note that most groups only received a small fraction of what they initially requested.[67] Young suggests that in viewing these funding insufficiencies as exceptional rather than systemic, the Crown treats Indigenous claimants as a monolith by providing uniform awards.[68] It also ignores the possibility that the groups who did not raise funding concerns had more resources to begin with or felt foreclosed from raising certain concerns in their funding requests.[69]

Kaitlin Ritchie describes another procedural constraint that limits full participation in the consultation. Ritchie criticizes the Crown referral process by which Crown departments will notify affected Indigenous groups, often by sending large volumes of paperwork.[70] The SCC agrees that responding to this notification process requires significant labour and time from Indigenous groups, which makes even initiating a consultation process burdensome.[71] In recognizing that insufficient funding and initiation procedures can constrain the ability to adequately raise concerns about impact, as well as the idea that funding issues may be more systemic than the FCA acknowledges, the unilateral construction of the duty to consult framework limits claimants' ability to properly illustrate the adverse impacts of Crown conduct on their rights.

4. Application to Legislative Development and the Constitutional Character of the Duty to Consult

Another limitation of the duty to consult is that there is no duty for the legislature to consult with Indigenous groups in the development of legislation, even when it poses to adversely affect Indigenous rights or interests.[72] The SCC majority in *Mikisew* held that Crown conduct does not extend to Parliament or provincial legislatures, and that extending the duty to consult to the law-making process would be an undue

[66] *Ibid* at para 538.
[67] *Ibid* at paras 10–108.
[68] Young, *supra* note 32 at 1086.
[69] *Ibid.*
[70] Ritchie, *supra* note 64 at 421.
[71] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 94 [*Tsilhqot'in*].
[72] *Mikisew*, *supra* note 21 at para 32.

judicial constraint of the legislature's authority,[73] although it still applies to subordinate legislation.[74]

Notably in her dissent, Abella J. asserted that the legislature does in fact have this constitutional consultation requirement, and that legislation may be challenged if enacted without properly discharging the duty to consult.[75] Abella J. stated that the honour of the Crown is rooted in the *effects* of government action on claimed rights and not the *source* of government action.[76] She argued that the honour of the Crown is at stake in all Crown-Indigenous dealings, whether executive or legislative.[77] The law-making authority of the legislative branch is an expression of the Crown's sovereignty, and the underlying purpose of the duty to consult and subsection 35(1) as a whole is to reconcile Crown sovereignty with Indigenous rights in any instance where important decisions are being made by the government that may affect those rights.[78] The majority in the *Mikisew* decision asserted that the separation of powers requires the judiciary not to interfere with parliamentary sovereignty so long as it legislates within its constitutional authority.[79] However, Abella J.'s assertion is that Parliament is not in keeping with subsection 35(1) when it fails to consult with Indigenous peoples, so her disagreement fits into the majority's concern about judicial intrusion into the law-making process. Therefore, the majority's assertion that consultation cannot permeate the legislative process within the current constitutional framework needs more massaging to bypass this critique.

Commentary on the application of the duty to consult to the law-making process raises similar uncertainties about reconciling the duty to consult with parliamentary sovereignty and the separation of powers. Zachary Davis argues, pre-*Mikisew*, that consultation should extend to the law-making process insofar that it applies when the government implements a policy and decides to legislate on it, rather than imposing the duty during the actual enactment of legislation itself.[80] The need to uphold the separation of powers must be balanced with other constitutional mandates, including the duty to consult under subsection 35(1). One major issue in the failure of the duty to consult to permeate the legislative process is that although the Crown may

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[73] *Ibid* at para 38.
[74] *Ibid* at para 51.
[75] *Ibid* at para 54.
[76] *Ibid* at paras 54–56.
[77] *Ibid.*
[78] *Ibid* at paras 58–63.
[79] *Ibid* at paras 50–51.
[80] Zachary Davis, "The Duty to Consult and Legislative Action" (2016) 79:1 Sask L Rev 17 at 18 [Davis].

implement policies through other means, they may choose legislation specifically to evade consultation.[81] Davis also points out that consultation is already embedded in the legislative process for the infringement of subsection 35(1) rights.[82] Under the *Sparrow* test, consultation is a factor considered in determining whether a subsection 35(1) infringement is justified.[83] The SCC has confirmed that this consultation factor follows the same duty to consult framework set out in *Haida*.[84] Ultimately, the legislative and executive branches of government are not as severable as the majority in *Mikisew* assert in their ability to impose adverse effects on claimed rights, especially when the SCC itself has stated that the government cannot rely on the separation of powers to avoid its obligations.[85] This is especially true when the executive chooses to enact policy through legislative means. Davis argues that given the permeability of the executive and legislative branches, the executive should not be able to rely on the separation of powers to evade the duty to consult, and adopt an approach that acknowledges that state action may be defined as an exercise of both legislative and executive power.[86]

Post-*Mikisew* commentary has echoed the difficulty in reconciling the constitutional needs to maintain the separation of powers and meaningfully discharge the duty to consult. Nichols and Hamilton argue that the majority's decision in *Mikisew* risks embracing a constitutional hierarchy where subsection 35(1) falls subordinate to seemingly more foundational concepts like the separation of powers and parliamentary sovereignty.[87] This is further evidenced by the reality that there is no obvious source for the justification portion of the subsection 35(1) infringement test in *Sparrow*, and yet the SCC has subjected subsection 35(1) to such a test despite its existence outside of the *Charter*.[88] Nevertheless, the justification analysis afforded within subsection 35(1) only applies to established rights, thus revealing the gap within the doctrine.[89] As Nichols and Hamilton note, the judgments in *Mikisew* rely on

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[81] *Ibid* at 28.
[82] *Ibid* at 24.
[83] *Sparrow*, *supra* note 4.
[84] *Tsilhqot'in*, *supra* note 71 at paras 77–79.
[85] *Wells v Newfoundland*, [1999] 3 SCR 199 at para 53, 177 DLR (4th) 73; Davis, *supra* note 80 at 35.
[86] Davis, *ibid* at 35.
[87] Joshua Nichols & Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution" (2020) 70:3 UTLJ 341 at 349 [Nichols & Hamilton].
[88] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; Nichols & Hamilton, *supra* note 87 at 348.
[89] *Sparrow*, *supra* note 4; Nichols & Hamilton, *ibid* at 347.

varying constitutional understandings that either allow or disallow the duty to consult to permeate the legislature, which ultimately creates uncertainty in the doctrine.[90] The ambiguity surrounding the doctrine's applicability in the legislature highlights the underlying uncertainty about how subsection 35(1) fits into Canadian federalism more generally, and in turn dampens the reconciliation potential embedded within the duty to consult. This uncertainty will be discussed further in section 7.

Although the current doctrine precludes Indigenous claimants from challenging legislation based on the lack of consultation alone, the Crown in its executive capacity is still bound by its consultation duties when contemplating conduct pursuant to that legislation.[91] This reality reinforces the practical impediments raised previously by subjecting claimants to procedural and funding constraints. However, as Nichols and Hamilton acknowledge, there are also practical concerns in requiring consultation in the legislative process that would place significant burdens on the legislature itself, as well as on Indigenous governments.[92] These practical burdens highlight the need to re-imagine the duty to consult altogether to create a doctrine that not only upholds the constitutional obligations of the Crown and promotes reconciliation, but also one that is more efficient and certain for all parties involved.

5. Questions Raised by *UNDRIP*

The *United Nations Declaration on the Rights of Indigenous Peoples* sets out the minimum standards for the "survival, dignity and well-being of the Indigenous peoples of the world."[93] In Canada, international treaties must be adopted into domestic law in order to be enforceable but may be used by the court as interpretive aids if not yet transformed into legislation.[94] Parliament[95] and the British Columbia legislature[96] have enacted legislation to facilitate the implementation of *UNDRIP*.

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[90] *Ibid* at 350.
[91] *Mikisew*, *supra* note 21 at para 52.
[92] Nichols & Hamilton, *supra* note 87 at 355.
[93] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013, art 43, online: <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> [perma.cc/5EKS-JQME] [*UNDRIP*].
[94] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 10, 70, 174 DLR (4th) 193.
[95] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIPA*].
[96] *Declaration of the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*].

Neither statute has incorporated *UNDRIP* as enforceable Canadian law, but rather these Acts purport to achieve its objectives.[97]

Article 32.2 of *UNDRIP* provides that states must consult with Indigenous peoples to obtain "free, prior and informed consent" ("FPIC") for any projects impacting Indigenous lands and resources.[98] As noted previously, the current application of the duty to consult does not allow Indigenous claimants consent nor a veto power over proposed government action. Since its introduction, much of the *UNDRIP* commentary has centered around whether FPIC has a place in the current conception of the duty to consult. Michael Coyle states that the language in article 32 denotes a consultation standard between requiring consent and consulting "with a view to acquire consent," and does not apply where development does not stand to substantially affect rights.[99]

International tribunals have articulated the consultation standard to be a culturally informed and contextual one that aligns with the group's own traditions and customs.[100] Article 27 requires states to develop procedures in conjunction with Indigenous peoples for adjudicating rights related to their lands and resources, and should recognize Indigenous traditions, customs, and land tenure systems in doing so.[101] These applications seem to allow for internal balancing mechanisms that consider larger societal interests in addition to Indigenous ones, thereby posing as another form of consultation rather than relaying a veto power. However, *UNDRIP* seems to offer a broader scope of protection than the current duty to consult application. FPIC is required where any government action, including legislative development, affects Indigenous rights.[102] Additionally, *UNDRIP* expresses a need for a standard that resembles a consent-based approach, or one that places Indigenous law, traditions, and customs at the forefront of consultation. Ultimately, *UNDRIP* raises questions about the ability of the duty to consult to comply with international requirements if *UNDRIP* is implemented into Canadian law. The possibility of incorporating FPIC principles into a Canadian framework will be explored in Part III of this paper.

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[97] *UNDRIPA*, *supra* note 95, ss 6(1)–(3); *DRIPA*, *ibid* note 96, s 4.
[98] *UNDRIP*, *supra* note 93, art 32.2.
[99] Coyle, *supra* note 54 at 242.
[100] *Ibid.*
[101] *UNDRIP*, *supra* note 93, art 27.
[102] *Ibid*, art 19.

6. Development and the Allocation of Benefits

As described in *Haida*, the scope of the duty to consult exists on a spectrum determined on the strength of the claimed right and the severity of the adverse impact.[103] Coyle argues that the allocation of benefits acquired from Crown developments on claimed land has not received sufficient weight within accepted practices in resource development, nor has it been expressly identified as a requirement by the court within the *Haida* consultation framework.[104] The failure to recognize benefit allocations as a core part of the duty to consult framework is inconsistent with the corporate trend of developing impact-benefit agreements with Indigenous communities.[105] Benefit allocation is also recognized under *UNDRIP*, which requires that Indigenous peoples receive fair and equitable compensation for the use of their land without their consent.[106]

Since the duty to consult does not require consent, Indigenous interests must be balanced with those of society more generally in the consultation process.[107] By extension, Coyle argues that this balancing should consider the benefits accrued to Indigenous claimants as part of broader Canadian society if Crown actions move forward as proposed.[108] Impact-benefit agreements may address education, employment, business opportunities, social and cultural support, revenue sharing or compensation, and environmental assessment and monitoring.[109] Coyle proposes that the benefit-allocation factor could be integrated as part of the spectrum mechanism within the current *Haida* framework where a strong *prima facie* claim would yield a stronger claim to a share in the benefits accrued from Crown developments.[110] The need for benefit allocation within the duty to consult framework is also consistent with historical treaties where Indigenous groups held a legal right to share in the economic benefits of Crown projects on their territory.[111] At a minimum, benefit allocation could serve as a substantive component of the duty to consult, although likely not one that would always be sufficient in achieving reconciliation.

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[103] *Haida*, *supra* note 2 at para 39.
[104] Coyle, *supra* note 54 at 259.
[105] *Ibid.*
[106] *UNDRIP*, *supra* note 93, art 28.
[107] *Haida*, *supra* note 2 at para 45.
[108] Coyle, *supra* note 54 at 260–261.
[109] Thomas Isaac & Anthony Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2004) 53 UNBLJ 3 at 31.
[110] Coyle, *supra* note 54 at 261.
[111] *Ibid* at 262–263.

7. Certainty and Negotiating Power

Consultation is a process that relies heavily on negotiation, and in turn, the outcome will largely depend on the negotiating power of each party. Felix Hoehn suggests that successful and fair negotiation in the duty to consult is a preferable path to achieve reconciliation, where parties reach an agreement that reflects mutual interests and improves the overall relationship.[112] The vast disparities in negotiating power between the Crown and Indigenous claimants can be characterized by lack of veto power, no requirement to agree, and the duty to consult's failure to preclude the Crown from "hard bargaining."[113] These disparities in negotiating power ultimately mean that Indigenous claimants will often have to compromise in the course of consultation and accommodation.[114] While negotiation on equal footing, rather than the prospect of hard bargaining or "winning," should embody the spirit of the duty to consult, this is difficult to achieve given the inherent imbalance in social, economic, and political power.

Power imbalances in consultation are embodied in the procedural issues and failure to require consent for proposed developments, as discussed previously. After all, it is difficult to conceptualize how negotiation could be fruitful for Indigenous parties if they cannot refuse the Crown's offer.[115] The duty to consult assumes equal bargaining power between parties, but the power discrepancies between the Crown and Indigenous claimants have not been adequately acknowledged by the court. How can Indigenous claimants, and even the Crown, ever hope to enter consultation with a view to achieve accommodation or a substantive result when the doctrine fails to account for the historical, social, and political inequities present in the relationship? Young argues that the court's limited ability to review the substantive outcomes of consultation is embedded in the procedural nature of the duty to consult, and narrowing the duty to a procedural one that does not require a substantive outcome ignores the reality that these consultations are never a neutral process.[116] This unequal negotiating power means that when Indigenous concerns are not adequately addressed in the post-consultation course of action the Crown is still permitted in

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[112] Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83:1 Sask L Rev 1 at 38 [Hoehn].
[113] *Haida*, *supra* note 2 at para 48, 49, 42; Ritchie, *supra* note 64 at 400.
[114] Ritchie, *ibid* at 401.
[115] Joshua Nichols & Sarah Morales, "Finding Reconciliation in Dark Territory: *Coastal Gaslink, Coldwater,* and the Possible Futures of *DRIPA*" (2021) 53:4 UBC L Rev 1185 at 1213 [Nichols & Morales].
[116] Young, *supra* note 32 at 1078.

imposing those projects. The uncertainty embedded within the duty to consult's application and the imbalance in negotiating power means that Indigenous claimants cannot participate equally in consultation as it currently stands, thereby impeding the underlying goal of reconciliation.

The SCC in *Haida* asserted that the duty to consult must be understood generously in favor of Indigenous peoples in order to further reconciliation.[117] *Tsilhqot'in* affirmed this sentiment, stating that the "governing ethos [of consultation] is not one of competing interests but of reconciliation."[118] In *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, the court affirmed that there is a strong "public interest in achieving reconciliation with Indigenous peoples."[119] Part II of this paper has outlined how the current conception of the duty to consult is limited in its ability to achieve substantive reconciliation. These gaps include the procedural nature of the duty, the unilateral imposition of a consultation procedure, assessment of adverse effects, the doctrine's implication to the legislative process, its failure to account for the allocation of development benefits, as well as the imbalance in negotiating power. Reconciliation is the animating principle for the duty to consult. Therefore, if the duty to consult, or at least its underlying rationale, is to persist, it must be re-imagined to better reconcile the interests of Indigenous Canadians, the Crown, and those of broader Canadian society.

III: ALTERNATIVE CONCEPTIONS OF THE DUTY TO CONSULT

In response to the duty to consult's failure to promote reconciliation in its current form, some alternatives to the duty to consult will be explored in Part III of this paper. Some of these alternatives assert that the duty to consult is a workable doctrine that could achieve this goal with some alterations, while others propose a novel approach to guide the relationship when the Crown proposes action that adversely affects a claimed Indigenous right. All of the alternatives that will be explored in this section involve a move toward achieving a substantive outcome for Indigenous claimants, including empowering Indigenous claimants in their negotiations with industry proponents in the regulatory process, incorporating FPIC or a consent standard more generally, implementing Indigenous jurisdiction and a

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[117] *Haida*, *supra* note 2 at paras 16–17.
[118] *Tsilhqot'in*, *supra* note 71 at para 17.
[119] *Redmond v British Columbia (Forests, Lands, Natural Resource Operations and Rural Development)*, 2020 BCSC 561 at para 38; *Restoule v Canada (Attorney General)*, 2018 ONSC 114 at para 56.

duty to negotiate into the current federalism framework, and incorporating Indigenous laws and worldviews into the framework.

1. Empowering Indigenous-Industry Negotiations in the Regulatory Process

As noted in *Haida*, the Crown is free to delegate its consultation obligations to industry proponents regarding a particular development.[120] As the SCC notes, this is often the case for environmental assessments.[121] There is an ongoing trend for Canadian industry participants to seek out consent in the face of risk and uncertainty surrounding the duty to consult.[122] Industry participants typically undertake daily consultation efforts by disseminating information, organizing information settings, leading meetings with affected groups, and incorporating feedback into project proposals.[123] Due to the reality that industry participants are often leading consultations on behalf of the Crown, it is prudent to discuss how the regulatory process may be altered to empower Indigenous participants in their negotiations with industry.

Subsuming consultation into confines of administrative law has often served as an impediment to reconciliation.[124] For example, there has been significant uncertainty within the National Energy Board in evaluating industry-led consultation against the consultation standard required by that of the Crown directly.[125] Graben and Sinclair advocate for the adoption of a legal process in which administrative decision-makers evaluate consultation outcomes against constitutional standards and ensuring consultation mirrors the requirements set out in *Haida*.[126] Additionally, when the Crown is not a specified applicant in a dispute, administrative tribunals avoid evaluating whether the Crown's duty to consult has been met,[127] thereby diluting the procedural requirements needed to fulfill this portion of the regulatory process. In order to avoid this, Graben and Sinclair argue that tribunals should no longer be permitted to create arbitrary standards for evaluating whether a requirement has been

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120 *Haida*, *supra* note 2 at para 53.
121 *Ibid.*
122 Coyle, *supra* note 54 at 241.
123 Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult: A Study of the National Energy Board" (2015) 65:4 UTLJ 382 at 388 [Graben & Sinclair].
124 Matthew Hodgson, "Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board" (2016) 54:1 Osgoode Hall LJ 125 at 125 [Hodgson].
125 Graben & Sinclair, *supra* note 123 at 432.
126 *Ibid.*
127 *Ibid* at 392.

met, and instead subject these tribunals to the constitutional mandates from which these consultations stem.[128]

Similarly, Hodgson argues for integrating consultation with the regulatory review process such that it is tailored to the constitutional standards that inform the duty to consult.[129] In doing so, tribunals can give appropriate weight in their reasoning to the constitutional status of the Aboriginal rights that may be infringed. As Hodgson explains, it is often difficult for tribunals to uphold their public interest mandate while also balancing the "moral and legal obligations" to uphold Aboriginal rights.[130] If tribunals are properly considering the constitutional weight of the impugned rights in their review, the outcome of the regulatory process may inspire more faith amongst participants that the review process properly accounts for consultation as it has been articulated in *Haida*. Additionally, this allows for a more robust reasonableness review should the matter be submitted to the courts for judicial review.[131] In order to achieve this, Hodgson argues that a specialized tribunal, composed of Indigenous leaders, could be implemented alongside the administrative agency as part of the regulatory process to solely evaluate whether the consultation has met constitutional standards.[132] This way, the principle of deference to the tribunal is still upheld, while also ensuring that those evaluating the quality of consultation hold the necessary expertise to do so.[133] Although this modification does not impose a substantive requirement in place of a procedural one, it seeks to significantly empower Indigenous claimants in the consultation process by heightening the standard against which consultation is reviewed by regulators. While it may seem as though evaluating the duty to consult according to its established constitutional weight would offer minimal improvement for Indigenous claimants, it is a small but impactful alteration in the regulatory process which insulates Indigenous interests from what is currently subject to the rigidity of the administrative review process. Considering the reality that much of the Crown's duty to consult is delegated to industry proponents in the regulatory process, the integration of the duty to consult with the regulatory process in such a way that honors the constitutional status of the duty will greatly empower Indigenous participants by constraining the regulator's evaluative standard.

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128 *Ibid* at 426.
129 Hodgson, *supra* note 124 at 144.
130 *Ibid* at 172.
131 *Ibid.*
132 *Ibid.*
133 *Ibid.*

2. FPIC and Consent Standards

Adopting a consent standard into the duty to consult is a topic rife with debate. The SCC in *Tsilhqot'in* stated that the Crown can avoid the difficulties and delays associated with the duty to consult by obtaining consent.[134] As previously described, Canadian companies have also stated they will seek affected Indigenous groups' consent in light of the uncertainty.[135] Additionally, Ritchie points out that the Crown's continuous imposition of development that adversely affects Indigenous rights may result in a landscape where the land base for which claimed rights are to be exercised is diminished, therefore limiting the possibility of future claims.[136] As a result, this could preclude claimants from ever successfully establishing future rights relating to that land.[137] In consideration of the limitations discussed previously, and in recognition of the need for more agency amongst Indigenous claimants, implementing a consent standard is often posed as a solution.

Since Canada's commitment to implement the objectives of *UNDRIP*, the FPIC standard has infiltrated the discourse on consent.[138] The Truth and Reconciliation Commission ("TRC") Call to Action 43 provides that all levels of government adopt *UNDRIP* as a framework for reconciliation and develop strategies to implement its objectives.[139] This includes the incorporation of FPIC when proportionate to the severity of the impact on Indigenous rights.[140] In consideration of the increasing importance of *UNDRIP* in informing the future of the duty to consult, the question arises as to whether FPIC can be incorporated into the current consultation framework, or if it should inform a new standard of consultation altogether.

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134 *Tsilhqot'in*, *supra* note 71 at para 97.
135 Coyle, *supra* note 54 at 259.
136 Ritchie, *supra* note 64 at 398–399.
137 *Ibid.*
138 *UNDRIPA*, *supra* note 95; *DRIPA*, *supra* note 96.
139 Truth and Reconciliation Commission of Canada, "Canada's Residential Schools: Reconciliation, The Final Report of the Truth and Reconciliation Commission of Canada vol 6" (2015) at 28–29, online (pdf): *Truth and Reconciliation Commission of Canada* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Volume_6_Reconciliation _English_Web.pdf> [perma.cc/ECV9-R73D] [TRC].
140 *Ibid* at 27.

i. Consent on a Spectrum

The first difficulty in incorporating FPIC into the duty to consult framework is developing a practical definition of consent. A major ambiguity in implementing consent is whether it is to be subsumed within the spectrum mechanism for determining the depth of consultation or if it replaces the notion of a spectrum altogether. Dominique Leydet posits that the consent standard applies for all Crown actions regardless of where they fall on the spectrum, even if the action is minimally invasive and poses little harm to the claimed right.[141] This is because obtaining consent even when the potential adverse impact is low avoids weakening the power of Indigenous peoples as right-holders.[142] This would also foster greater consistency and certainty in the doctrine, which is essential to maintain respect and strength in negotiating a solution with the Crown if needed.

ii. Impact on Established Subsection 35(1) Rights

Leydet argues that the notion of obtaining consent presupposes an underlying right.[143] Following that logic, the Crown would require consent from Indigenous peoples because they are deemed holders of a particular right or tract of land which grants them agency to give consent. Following this argument, the power to give consent is the expression of a right. The difficulty in applying this consent standard is that the rationale underlying the duty to consult is to protect outstanding rights from adverse impacts. While it may be argued that the process of having to prove rights and establish continuity through the complex *Sparrow-Van der Peet* test is onerous and rests on the colonial doctrine of discovery, altering the framework for establishing an Indigenous right to include these claimed rights is a much larger task.[144] If consent is the standard when a right is only claimed, how does that change the character of an established right? It may be that doing so would equivocate the two. This question is especially important if the consent is to be established across the consultation spectrum, in which case the need to obtain consent would become ubiquitous any time the Crown seeks development in such a way that would affect a claimed right.

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[141] Dominique Leydet, "The Power to Consent: Indigenous Peoples, States, and Development Projects" (2019) 69:3 UTLJ 371 at 379 [Leydet].
[142] *Ibid* at 380.
[143] *Ibid* at 374.
[144] *Sparrow*, *supra* note 4; *Van der Peet*, *supra* note 4; TRC, *supra* note 139 at 29.

Leydet offers a solution for this problem. Instead of focussing on whether implementing FPIC would provide an absolute veto to Indigenous claimants, the discussion should focus on the rights that source a consent power and the conditions that could override a refusal.[145] In this formulation of FPIC, consent would not be absolute. Even if consent is not absolute, this would be a substantial improvement from the current regime. This would force the Crown to seek to obtain consent, and only allow the Crown to override a refusal where the broader societal interests are particularly compelling and would clearly warrant a proportional infringement on the right. The complication here lies in considering which societal interests could warrant an override. Leydet proposes that the justification test for infringing established subsection 35(1) rights could be a model, but this does not stem naturally from the source of the duty to consult being rooted in the honor of the Crown in relation to unproven rights.[146] Still, this would acknowledge that consent is a function of Indigenous peoples having claimed a right, and the burden to warrant overriding consent would be placed on the Crown rather than having the Crown consult with claimants who hold unequal bargaining power. It would also place much more control over the structure of the process in the hands of Indigenous claimants, which could avoid the issues associated with unilateral imposition of the consultation framework outlined in part II.

iii. The Issue of Sovereignty

An additional complication in incorporating FPIC is that it must be applied in accordance with the whole declaration. Article 46(1) provides that nothing in the instrument should be construed in a way that would "dismember or impair, totally or in part, the territorial integrity or political unity" of the sovereign state.[147] This means that FPIC and self-determination more generally must be implemented within the legal borders of the home state. Article 46(2) provides that limitations to rights should be exercised when necessary to ensure the rights and freedoms of others and to meet the "most compelling objectives of a democratic society."[148] Leydet points out that this is narrower than the extensive list of compelling objectives given by the SCC in *Delgamuukw*, and it would not submit to purely commercial interests.[149] Incorporating this justification dimension into the FPIC standard accounts for some of the concerns

[145] *Ibid* at 4.
[146] Leydet, *supra* note 141 at 380.
[147] *UNDRIP*, *supra* note 93, art 46(1).
[148] *Ibid*, art 46(2).
[149] *Delgamuukw*, *supra* note 19 at para 165; Leydet, *supra* note 141 at 385.

related to an unlimited veto power as it would allow for a rebuttable standard of consent. It also promotes reconciliation by recognizing that truly compelling societal objectives, unrelated to corporate interests, that could justify the limitation of FPIC also affect Indigenous peoples as they are situated within the broader societal context too, as noted in *Delgamuukw*.[150] Importantly, it flips the onus on the Crown to justify an infringement on the power to consent.

iv. Implementation Issues Raised by Federalism

Dwight Newman notes that the jurisdiction to implement FPIC does not exist at the federal government.[151] The federal government has jurisdiction over "Indians and Lands Reserved for the Indians" under subsection 91(24) of the *Constitution Act, 1867*, but provinces have jurisdiction over many of the lands and resources at play in development negotiations under subsection 92(13).[152] The SCC confirmed in *Tsilhqot'in* that provincial regulation of a general application regarding land applies to Indigenous rights under subsection 92(13) within the federal confines of subsections 35(1) and 91(24).[153] Therefore, provincial laws of general application may apply to land held under Aboriginal title.[154] Even if the federal government endorsed implementing FPIC into the duty to consult framework, much of what must be consented to is controlled by the provinces, and the federal government cannot merely step in to override objections from the provinces.[155] However, this argument disregards the reality that provinces such as British Columbia have implemented legislation to incorporate the principles of *UNDRIP* into provincial law. For example, British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act* in 2019.[156] The Annex of DRIPA mirrors the language found in both *UNDRIP* and the federal *UNDRIPA* by requiring consultation efforts to achieve FPIC on projects that may affect Indigenous lands and resources.[157] Additionally, provinces are not free to disregard the thrust of customary international law. Some have argued that *UNDRIP*

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150 *Delgamuukw*, *ibid* at para 161.
151 Dwight Newman, "Part 13: Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior and Informed Consent in Canada" in Brian Lee Cowley & Ken Coates, eds, *Aboriginal Canada and the Natural Resource Economy Series* (Ottawa: MacDonald-Laurier Institute, 2017) at 17 [Newman].
152 *Constitution Act, 1867*, *supra* note 23, ss 91(24), 92(13).
153 *Tsilhqot'in*, *supra* note 71 at para 102; *Constitution Act, 1867*, *ibid*, s 92(13).
154 *Tsilhqot'in*, *supra* note 71 at para 106.
155 *Newman*, *supra* note 151 at 17.
156 *DRIPA*, *supra* note 96; *UNDRIP*, *supra* note 93, art 32(2).
157 *Ibid.*

may be interpreted by Canadian courts to have customary status, especially given their reminiscence to other customary international human rights laws and its status as a declaration.[158]

Relying on the courts to interpret *UNDRIP* as customary law to uphold its animating principles is uncertain and potentially overly optimistic. Therefore, it is worth exploring the mechanisms by which *UNDRIP* may be incorporated into provincial law to ensure its consistent application. Hamilton argues that implementation may be conceived of through uniform or decentralized implementation.[159] A uniform approach would result in the consistent application of a consent standard across the country by way of a constitutional amendment or relying on subsection 91(24) to occupy jurisdiction.[160] The benefits of this approach include providing certainty and consistency amongst all actors while also ensuring the principles of *UNDRIP* are upheld in provinces that do not adopt incorporating legislation.[161] However, the difficulties with this approach include garnering provincial support necessitated by the constitutional amendment formula, particularly if these same provinces have not yet adopted their own legislation to implement *UNDRIP*. Another obstacle in this approach includes a general reluctance amongst provinces to relinquish jurisdiction in this area, particularly as it affects natural resources. Alternatively, the decentralized approach would allow for provinces to develop their own implementing legislation.[162] Hamilton describes the benefits of decentralized implementation as being more responsive to local circumstances, adaptability, and allowing for innovation amongst the provinces.[163] However, as Hamilton notes, subsection 91(24) still allows for federal involvement in areas of provincial action which may continue to result in further disagreement.[164] The key lesson here is that ensuring FPIC is implemented across Canada may be accomplished through either a uniform or decentralized approach, with either option offering their respective benefits and challenges. Nevertheless, the notion of decentralized governance raises an important point regarding the inclusion of Indigenous governance. This topic will be discussed in the subsequent section.

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158 Robert Hamilton, "The United Nations Declaration on the Rights of Indigenous Peoples and the Division of Powers: Considering Federal and Provincial Authority in Implementation" (2021) 53:4 UBC L Rev 1097 at 1102–1104 [Hamilton]
159 *Ibid* at 1128–1129.
160 *Ibid* at 1105.
161 *Ibid* at 1129.
162 *Ibid* at 1130.
163 *Ibid.*
164 *Ibid* at 1131.

3. Duty to Negotiate and Shared Jurisdiction

i. Negotiation in a New Constitutional Order

Some alternative conceptions of the duty to consult embrace an altered negotiation regime instead of one based on consent. There is also some evidence of a push toward a regime centered around negotiation as opposed to one of mere consent, as seen in the BC *DRIPA*. Sections 6 and 7 of the BC *DRIPA* provide that the government may negotiate and enter into an agreement with an "Indigenous governing body" relating to provincial statutory powers of decision.[165] Hamilton and Nichols suggest a generative duty to negotiate that better distributes negotiating power by altering the presumption of "thick" Crown sovereignty which subjugates Indigenous groups and limits their jurisdiction.[166] The authors argue that this rigid perception of Crown sovereignty has resulted in the notion that a veto power cannot be worked into the duty to consult as it stands.[167] This underlying presumption of thick sovereignty is what allows the duty to consult to impose development in the face of disagreement because even if it is meant to preserve Indigenous interests in outstanding claims, it still rests on the assumption of Crown sovereignty.[168] This assumption is what allows positive assessments of the Crown's discharge of the duty to consult and good faith negotiation in such a way that does not account for the disparity in negotiating power.[169]

Hamilton and Nichols purport that the disparity in negotiating power between the Crown and Indigenous claimants is irreconcilable with fostering a productive nation-nation relationship, and precludes any possibility of any meaningful outcome for claimants.[170] The authors suggest that the solution to this problem lies in interpreting subsection 35(1) to establish a regime of shared jurisdiction between Indigenous groups and the Crown.[171] Mark Mancini notes that delegated Indigenous authority over some aspects of their rights relies on the presumption of Crown

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165 *DRIPA*, *supra* note 96, ss 6, 7.
166 Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: Ktunaxa Nation and the Foundation for the Duty to Consult" (2019) 56:3 Alta L Rev 729 at 737–738 [Hamilton & Nichols].
167 *Ibid* at 738.
168 *Ibid.*
169 *Ibid* at 744.
170 *Ibid* at 751.
171 *Ibid.*

sovereignty, rather than an inherent right to self-governance.[172] The establishment of subsection 35(1) rights submits to the former presumption of Crown sovereignty. The reformulation Hamilton and Nichols propose relies on the latter presumption of an inherent right to self-governance. The duty to consult is even further removed from Indigenous agency as it provides for no true authority over the outcome, only the right to participate. To implement this reformulation, Crown sovereignty would be relinquished of its underlying title and Indigenous peoples would form a third head of jurisdictional power. Negotiation between federal, provincial, and Indigenous heads of power in the absence of its entrenchment in the *Constitution Act, 1867* would be triggered to mediate disputes regarding jurisdiction.[173]

The merit in this conceptualization is that it sources the failures of the duty to consult in the assumption of absolute Crown authority over subsection 35(1) rights and addresses these presumptions head on in its novel formulation. By virtue of it being a negotiation framework, there is no guarantee of a substantive outcome, but this does not mean it to be a procedural one. Rather, it relays jurisdictional power on to Indigenous peoples in a way that is less circumscribed. The newly formed jurisdictional structure would have all the tools of federalism at its disposal in order to negotiate who has jurisdiction when Indigenous groups assert authority over claimed rights.[174] The authors posit that the current duty to consult model does not streamline decision-making because, as has been explained above, it leads to uncertainties and pushback from Indigenous claimants who do not feel that the consultation process is legitimate.[175] However, one has to wonder how efficiently an Indigenous-controlled head of power can be reconciled with the federal and provincial heads of power, and how it would resolve conflicts in duties owed to the broader Canadian society.

Young raises the criticism that negotiating the scope of an Indigenous head of power within a diverse federalism framework may subjugate Indigenous peoples into the same colonial underpinnings that have impeded negotiating power and self-determination under the duty to consult framework.[176] Clearly, disputes will arise over balancing Crown and Indigenous interests, but these disputes must be resolved in such a way that does not cut Indigenous self-determination short, especially if the

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[172] Mark Mancini, "Wandering Without a Torch: Federalism as a Guiding Light" (2016) 67 UNBLJ 369 at 383 [Mancini].
[173] *Constitution Act, 1867*, *supra* note 23, ss 91, 92; Hamilton & Nichols, *supra* note 166 at 757.
[174] *Ibid.*
[175] *Ibid* at 758.
[176] Young, *supra* note 32 at 1099.

Crown can argue they are representing the interests of the broader Canadian society. There are also some pragmatic difficulties in implementing constitutionally mandated Indigenous jurisdiction in place of the duty to consult as consultation is triggered hundreds of thousands of times each year.[177] While achieving a substantive result for Indigenous communities is a priority in furthering reconciliation, doing so by efficient means is also important. At the very least, the reformed jurisdiction and negotiating structure would alleviate the stall and burden that litigation and judicial review often create following disagreements in consultation, while also evening out negotiating power in jurisdictional disputes. Constitutionally recognized self-governance would also promote reconciliation in that it would afford Indigenous peoples agency over a wider set of activities outside of proven rights under subsection 35(1). It also relinquishes Indigenous claimants' need to repeatedly rely on the Crown or the courts to accommodate their interests through consultation against the backdrop of the greater public interest. This feature of the negotiation model is essential in upholding the self-determination ethos of *UNDRIP*. Article 18 provides that Indigenous peoples have the right to participate in decision-making through representatives and procedures of their choosing and to develop their own decision-making institutions.[178] This sentiment can only be met with widespread jurisdiction and the integration of Indigenous worldviews in those decision-making frameworks.

ii. Negotiation and FPIC

Even in the context of *UNDRIP,* not all interpretations equate FPIC with absolute consent or a veto power. FPIC has also been interpreted to imply a standard of consultation or negotiation that reflects equal and fair bargaining power between parties, with a view to obtain consent without actually requiring consent for every development.[179] In this conceptualization, consent is not required except when the adverse effects are significant.[180] At first glance, this resembles the current conception of the duty to consult and the SCC's expression in *Delgamuukw* that deep consultation may amount to consent in some instances.[181] One point of difference suggested by Leydet is that this conception could allocate more agency on Indigenous claimants to

[177] Newman, *supra* note 151 at 8.
[178] *UNDRIP*, *supra* note 93, art 18.
[179] James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UNHCROR, 12th Sess, UN Doc A/HRC/12/34 (15 July 2009) at para 49 [Anaya]; Leydet, *supra* note 141 at 398.
[180] Anaya, *ibid.*
[181] *Delgamuukw*, *supra* note 19 at para 168.

decide where on the spectrum a proposed development falls and its associated impact, thereby giving claimants more control over the content of the duty to consult.[182] However, even this allocation of control circumscribes the notion of consent to a procedural duty in which a substantive outcome remains at the mercy of the Crown. This is a form of the "delegated" Indigenous authority spoken of by Mancini.[183] Additionally, the variability that would result by refraining from specifically outlining the impacts that warrant a consent standard only further feeds into the uncertainty of the duty to consult going forward, and it circles us back to the spectrum problem. Therefore, the Indigenous jurisdiction and negotiation framework proposed by Hamilton and Nichols seems more promising in promoting reconciliation.

4. Recognizing Indigenous Decision-Making and Worldviews

The FCA in *Tsleil-Waututh* stated that the Crown's consultation was insufficient because there was no representative who was able to meaningfully engage with the concerns of Indigenous claimants or give them adequate feedback.[184] Martin Olszynski and David Wright suggest that these shortcomings in the duty to consult could be improved by making some substantive changes to the consultation procedure.[185] This would include a "special someone" with vested federal authority who can communicate the concerns of Indigenous claimants to the Crown in facilitation of nation-nation communication and make substantive accommodations to the project if necessary.[186] The issue with this reformulation is that Indigenous claimants themselves can relay their interests to the Crown. Additionally, if this representative rests with the federal government, there is nothing preventing them from following the same procedure as the Crown in the current duty to consult structure and then failing to accommodate those interests. However, one strength of this proposal is that it recognizes the need for the Crown and the courts to assess Indigenous concerns according to their own evaluations and worldviews.

The animating principle of *UNDRIP* is self-determination. By extension, a meaningful embrace of *UNDRIP*, whether that be a more extensive consultation regime that relays more negotiating power in the hands of Indigenous claimants or a

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[182] Leydet, *supra* note 141 at 385.
[183] Mancini, *supra* note 172 at 385.
[184] *Tsleil-Waututh*, *supra* note 29 at para 759.
[185] Martin Olszynski & David Wright, "Case Comment: *Tsleil-Waututh First Nation v Canada (Attorney General)*: Clarifying the (F)Laws in Canada's Pipeline Approval Process" (2019) 22 CELR (4th) 8 at 23 [Olszynski & Wright].
[186] *Ibid.*

veto power, decision-making must involve the legal systems and traditions of each individual nation involved.[187] Sarah Morales provides a useful example of the decision-making processes of the Hul'qumi'num Mustimuhw of the Coastal Salish community, recalled by elder Willie Seymour, to paint this picture.[188] In these negotiations, all community members were invited to the waterfront to eat, discuss, rest, and discuss again until the matter was resolved, even if it took days.[189] Each member's agreement would be individually confirmed.[190] Seymour recounts that although reaching a consensus was a long and difficult process, it fostered stronger relationships amongst members.[191] In cases where consensus was not reachable, a trusted and respected elder or leader in the community would make the final decision.[192] Morales suggests that the practice of implementing specific Indigenous laws and decision-making structures into the duty to consult, or any alternative solution, is essential to achieve the principle of self-determination stated in *UNDRIP* and substantive reconciliation.[193]

Integrating Indigenous legal systems and traditions are especially important even if consent is not a feasible alternative to the duty to consult. A true appreciation of the potential impacts on claimed rights requires an understanding of how culture, Indigenous legal orders, and worldviews shape those concerns, and how they might be used to interpret a project's impact on land, activities, plants, animals, and spirituality.[194] When adjudicating Aboriginal rights, the SCC has stated that given their *sui generis* nature, the court must accommodate the rules of evidence to allow for Indigenous knowledge systems like oral histories.[195] However, courts have often failed to properly appreciate the spiritual practices of Indigenous claimants in an accurate and useful way. For example, in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, the SCC majority characterized the Ktunaxa's freedom of religion claim under subsection 2(a)[196] as protecting the focal point of worship.[197] Meanwhile, the Ktunaxa Nation asserted that the resort development would drive out

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[187] Morales, *supra* note 49 at 76.
[188] *Ibid.*
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] *Ibid.*
[193] *UNDRIP*, *supra* note 93, arts 18–19; Morales, *supra* note 49 at 77.
[194] Coyle, *supra* note 54 at 250–251.
[195] *Delgamuukw*, *supra* note 19 at para 84.
[196] *Charter*, *supra* note 88, s 2(a).
[197] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 71 [*Ktunaxa*].

the Grizzly Bear Spirit and render their worship meaningless.[198] The court's failure in *Ktunaxa* to appreciate that Indigenous spiritual practices are often rooted in the land itself reveals that courts often view Indigenous cultural practices and belief systems through a colonial or mainstream lens, and ultimately resulted in a failure to understand the true significance of Crown actions affecting those lands. Although this judgment was complicated in its interpretation of the scope of subsection 2(a), the *Ktunaxa* case is a dire example of how the failure to integrate Indigenous knowledge and of the duty to consult to require a substantive outcome circumvents the honour of the Crown by failing to preserve Indigenous interests. It also reveals the difficulty courts have in taking adequate notice of Indigenous worldviews, thereby highlighting the pressing need to place Indigenous interpretations of their own rights at the forefront of the discussion.

Coyle suggests that unless courts take active measures to avoid downplaying the significance of Indigenous concerns, the dominant party, as in the Crown, will succeed in mischaracterizing those concerns as ineffective or carrying less weight.[199] This sentiment can be incorporated into a consent standard in place of the duty to consult because Indigenous claimants will better understand their own concerns in making their final judgments on whether to approve a proposed project. This can also be incorporated into an evolved consultation or negotiation regime if the affected Indigenous groups are involved in designing the consultation and assessment processes. Indigenous worldviews could also play a significant role in the initial negotiations for establishing the scope of an Indigenous head of power under a reformulated federalism framework.[200] In either solution, assessing the significance of the impacts on Indigenous interests should not be limited to the confines of mainstream, Anglo-Canadian worldviews and laws.

IV: SUBSTANTIVE OUTCOMES AND FURTHERING RECONCILIATION

The British Columbia Supreme Court in *Yahey v British Columbia* stated that bringing litigation to the court is currently an essential part of upholding reconciliation, although negotiation and consultation are the preferred method.[201] As has been demonstrated, bringing litigation over inadequate consultation is not

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[198] *Ibid* at paras 58–60.
[199] Coyle, *supra* note 54 at 252–253.
[200] Hamilton & Nichols, *supra* note 166; Mancini, *supra* note 172.
[201] *Yahey v British Columbia*, 2020 BCSC 278 at para 27 [*Yahey*].

sustainable, efficient, nor effective in achieving reconciliation. Rather, it is merely the pathway the Crown and the courts have been relying on in lieu of a practical solution. Mark Walters notes that although the concept of reconciliation is not an inherently legal one, the courts have grappled with trying to reconcile two contradictory legal concepts: the presumption of Crown sovereignty and the reality that prior to European contact Indigenous peoples lived in organized societies on the land we now call Canada.[202] The dominant approach of the courts has been one of reconciling Indigenous rights and governance *within* the larger framework of Crown sovereignty.[203] This conception of reconciliation is inadequate because it submits to the idea of *de facto* authority.[204] Walters argues that the key to reconciliation lies in upholding two distinct legal cultures that are equally entrenched in Canadian law as "inseparable moral imperatives."[205]

In reference to the confusion displayed by the SCC in the *Mikisew* decision regarding how subsection 35(1) fits within the separation of powers, Kate Gunn and Bruce McIvor assert that reconciliation requires the government to recognize Indigenous peoples' "inherent law-making authority" and "place within Canada's constitutional order."[206] This sentiment sets the stage for the need to reconcile the duty to consult with the call for self-determination within the broader constitutional framework. Victoria Freeman provides that positing reconciliation as a process based on mutual respect with no substantive outcome does nothing to nurture Crown-Indigenous relationships.[207] Rather, reconciliation is about practical social and personal transformation. Freeman suggests that true reconciliation cannot be thought of as Indigenous peoples reconciling themselves and their rights with the overarching principle of Crown sovereignty because this legitimizes the subjugation of Indigenous peoples.[208] Instead, it should take on a multi-faceted approach that accounts for the

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[202] Mark Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka & Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (New York: Oxford University Press, 2008) 165 at 178 [Walters].
[203] *Ibid.*
[204] *Ibid* at 189.
[205] *Ibid* at 190.
[206] Kate Gunn & Bruce McIvor, "Change of Direction Required: Case Comment on *Mikisew Cree First Nation*" (2018), online: *First Peoples Law* <https://www.firstpeopleslaw.com/public-education/blog/change-of-direction-required-case-comment-on-mikisew-cree-first-nation> [perma.cc/BP72-82GJ] [Gunn and McIvor].
[207] Victoria Freeman, "In Defence of Reconciliation" (2014) 27:1 Can JL & Jur 213 at 215 [Freeman].
[208] *Ibid* at 215–16.

diversity of opinions and needs of different Indigenous groups.[209] Implementing shared jurisdiction provides ample territory for this transformation as it simultaneously allows for Indigenous self-determination, while also accounting for the varying worldviews individual groups may have in deciding what reconciliation and self-determination looks like for them.

The TRC has stated that any policy or jurisprudence arising out of the doctrine of discovery, which rests on the view that Indigenous Canadians are inherently inferior to Europeans, has no utility in achieving reconciliation.[210] Clearly, any progression of the duty to consult must abandon the colonial presupposition of Crown sovereignty and authority as its guiding principle. Hamilton and Nichols' conceptualization of diverse federalism to accommodate constitutionally entrenched Indigenous self-governance and a duty to negotiate seems to further the idea of self-determination better than implementing a consent standard, which still submits to the overarching legal structure that delegates limited self-determination to Indigenous claimants.[211] The TRC Call to Action 45(iv) asks for Indigenous governance structures to be reconciled with the Crown and for Indigenous peoples to be recognized as partners with the Crown in the Confederation.[212] The TRC also recommends that Canada fully implement *UNDRIP* as a framework of reconciliation.[213] A constitutionally integrated Indigenous third head of power that prioritizes Indigenous decision-making procedures and evidence would meet both of these Calls to Action by fostering inherent Indigenous authority in the negotiation of rights within the larger framework of Canadian governance.

The ambition underlying the duty to consult has always been reconciliation. The SCC in *Haida* stated that reconciliation cannot be limited to the "post-proof sphere."[214] However, the failure of the court to require a substantive outcome in the duty to consult licenses the Crowns to do just that. Based on the discussion in parts II, III, and IV, it is clear that reconciliation requires commitment from the government and the courts to substantiate outcomes in favor of Indigenous peoples.

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[209] *Ibid.*
[210] TRC, *supra* note 139 at 29.
[211] Hamilton & Nichols, *supra* note 166.
[212] Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Commission of Canada: Calls to Action" (2015) at Call No 45(iv), online (pdf): *gov.bc.ca* <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf> [perma.cc/BP6E-H7YR] [*Calls to Action*].
[213] *Ibid*, Call No 43.
[214] *Haida*, *supra* note 2 at para 33.

This also requires the Crown to make concessions in projects that affect Indigenous interests. This need is best met by recognizing inherent Indigenous authority as the substantive solution. In doing so, Canada can move beyond the symbolic and rhetorical hope created through the duty to consult and march toward an era of reconciliation in practice.