The Decline of the Duty to Consult, and a Possible Solution

Nathan Hume

1. Introduction

The duty to consult is no longer a new doctrine. It has been ten years since the Supreme Court of Canada decided *Haida Nation v. British Columbia (Minister of Forests)*, fifteen years since the British Columbia Court of Appeal decided *Halfway River First Nation v. British Columbia (Ministry of Forests)*, and roughly the same amount of time since the first influential Canadian law reviews on the topic were published. On this anniversary, the duty to consult warrants careful consideration. Despite initial promise, it has not delivered a new relationship between aboriginal peoples and the Crown. The duty is increasingly understood exclusively in procedural terms. That procedural conception has supported, and been supported by, the use of weak formal remedies for breaches of the duty to consult. Those weak remedies, perhaps intended to facilitate compromise between aboriginal peoples and the Crown, have instead fostered incompatible routines. In turn, those routines have led the parties further from their common goal of reconciliation. This paper suggests a practical solution to this malaise: by adding an interim stay to the standard suite of remedies for a breach of the duty to consult, courts could reallocate the uncertainty associated with an unconstitutional Crown decision and begin to create the institutional and political conditions for the rigorous experiments and real inquiries that reconciliation requires.

2. The Promise of Consultation

The duty to consult was a major development in Canadian constitutional law. It promised to transform, or at least reorient, Crown conduct with respect to aboriginal peoples and their constitutionally protected rights. It offered an alternative to inaction, direct action, and court action: an apparently pragmatic middle ground that lowered the stakes for everyone involved and encouraged conversation and compromise over confrontation and binary outcomes.

The doctrine was designed to be practical. It was intended to keep aboriginal peoples, Crown officials, and industry proponents out of the courtroom, in the boardroom, and at work in various ways on the land. The courts set a low threshold for the duty: it is triggered when the Crown

has knowledge of an asserted or established aboriginal or treaty right and contemplates conduct that might adversely affect it.[1] The courts also ensured it is flexible, as the scope and content of the duty to consult are proportionate to (i) the strength of the claim to the aboriginal or treaty right and (ii) the seriousness of the potentially adverse impact upon the right or title claimed.[2] The actual requirements of the duty to consult depend on the context. They range from mere notification to deep engagement and accommodation.

The courts take the notion of a "spectrum" seriously and have avoided establishing clear levels (e.g. shallow, middle, and deep) for "meaningful consultation". This flexibility concedes the wild variety of potential disputes as well as the limits on the predictive and prescriptive powers of courts. It provides some basic guidance to the parties who are typically better positioned to work through their differences and disagreements. The duty to consult is not a court-centric doctrine. Due in large part to the diversity, complexity, and ambiguity of consultation cases, judgments may have less value as precedents for future cases than as prompts for parties to solve their own problems.

Of course, the duty to consult also raises deep conceptual issues. Chief among these concerns are the nature, source, and purpose of the duty. It is a constitutional obligation.[3] That status is no longer in doubt. The duty to consult is a basic legal obligation of the Crown that, once triggered, must be satisfied before a valid decision can be made. It has been described as a "constitutional prerequisite" to lawful Crown conduct.[4] It also has been described as lying "upstream" of any positive government authority.[5] The duty to consult cannot be circumscribed or circumvented by statute, policy, or

---

[1] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at ¶35.
[2] *Id.* at ¶39.
[3] *R. v. Kapp*, 2008 SCC 41 at ¶6.
[4] *Gitxsan v. British Columbia (Minister of Forests)*, 2002 BCSC 1701 at ¶65 (*Gitxsan Houses*).
[5] *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at ¶19 (Southin, JA).

internal organization. It is a "constitutional imperative."[6] The rhetoric is powerful and, at least in this instance, consistent: the duty must be met.

It must be met, in part, because of what is at stake. The duty to consult concerns not only aboriginal and treaty rights (and the aboriginal ways of life those rights are intended to protect) but also the honour of the Crown. Recently confirmed as an unwritten constitutional principle, the honour of the Crown remains uncertain.[7] According to the Supreme Court of Canada, it is always at stake in the Crown's dealings with aboriginal peoples.[8] It is at stake because the Crown has asserted sovereignty over them and the assertion of sovereignty carries the inherent promise to act lawfully. That assertion of sovereignty is the source of the duty to consult.[9]

To invoke the honour of the Crown is a fancy way to say that the Crown keeps its promises. It has special significance for explicit promises such as grants[10] and treaties[11], but it colours all Crown conduct. The Crown has promised to respect aboriginal and treaty rights, but protracted litigation and negotiation processes threaten to erode that promise as natural resource projects and other developments proceed often with severe consequences for the territories, traditions, and aspirations of aboriginal peoples.[12] Therefore, to uphold its promise and preserve its honour, the Crown must meaningfully consult with aboriginal peoples before authorizing activities that could have such adverse effects.

The function of the duty to consult can be understood as the preservation of aboriginal and treaty rights pending

---

[6] *Nlaka'pamux Nation Tribal Council v. British Columbia (Project Assessment Director, Environmental Assessment Office)*, 2011 BCCA 78 at ¶68.
[7] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at ¶69 (*Manitoba Metis*); *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at ¶42 (*Little Salmon*).
[8] *Haida Nation*, *supra* note 1 at ¶16.
[9] *Id.* at ¶53.
[10] *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, at p. 67b and p. 1026, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555, at p. 56b and pp. 557-58.
[11] *R v George*, [1966] SCR 267 at 279 (Cartwright J, dissenting).
[12] *Haida Nation*, *supra* note 1 at ¶¶27 and 33.

settlement, but the purpose of the duty is less commonplace. That purpose is "reconciliation": a lofty notion that resists easy definition.[13] The Court has tried on many occasions to explain reconciliation and what it requires, with mixed results. It is both a process and the intended outcome of that process.[14] It is a journey as well as the desired destination.[15] Apparently, it is also an ethos.[16] Reconciliation first appeared as an imperative internal to the Crown, when Dickson CJ and La Forest J considered the implications of s. 35(1) of the *Constitution Act, 1982* and wrote that "federal power must be reconciled with federal duty."[17] However, in subsequent decisions, the Court clarified that reconciliation also makes demands on aboriginal peoples. Expressed in doctrinal terms, it entails reconciling the fact of prior aboriginal occupation with the assertion of Crown sovereignty.[18] In a less technical turn of phrase, it aims at "the reconciliation of aboriginal societies with the rest of Canadian society."[19] As the Court has observed, reconciliation truly is a work in progress.[20]

Binnie J. captured the scope and significance of reconciliation when he opened the Court's judgment in *Mikisew Cree First Nation v. Canada* as follows:

> "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[21]

---

[13] See e.g. *id* at ¶¶14, 38, and 45; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 at ¶34 (*Rio Tinto*).
[14] See e.g. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at ¶51 (*Mikisew Cree*); *Manitoba Metis Federation*, *supra* note 7 at ¶140; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at ¶¶82 and 87.
[15] *Little Salmon*, *supra* note 7 at ¶12 and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 at ¶42 (*Taku River*).
[16] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at ¶17.
[17] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1109.
[18] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at ¶31; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at ¶165.
[19] *R. v. Gladstone*, [1996] 2 S.C.R. 723 at ¶75. See also *Tsilhqot'in*, *supra* note 16 at ¶28.
[20] *Lax Kw'alaams v. Canada (AG)*, [2011] 3 SCR 535 at ¶52 (*Lax Kw'alaams*).
[21] *Mikisew Cree*, *supra* note 14 at ¶1.

Reconciliation is clearly a profound concern. In addition to the purpose of s. 35(1)[22] and the fundamental objective of aboriginal law[23], reconciliation is also the "ultimate purpose" of the honour of the Crown.[24] There are few, if any, more potent expressions in the Court's constitutional idiom. Yet reconciliation also appears to involve some rough calculations. The Court has repeatedly observed that reconciliation requires compromise between aboriginal and non-aboriginal peoples.[25] At times, it has facilitated the compromise by using language that seems to equate *sui generis*, constitutionally protected aboriginal and treaty rights with the legal rights and even the mere interests of non-aboriginal Canadians.[26] In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, McLachlin CJ eschewed rights altogether and described consultation as "a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests."[27]

Most recently, in *Tsilhqot'in Nation v. British Columbia*, the Chief Justice hedged and referred to s. 35(1) as a framework for reconciliation not only "of Aboriginal rights with the interests of all Canadians" but also "of Aboriginal interests with those of the broader public."[28] It is difficult to understand how fundamental rights can be "reconciled" with or balanced against each other, let alone generic interests.[29] The Court implied that constitutionally protected rights can be converted into, or at least equated with, interests without sacrificing their distinctive character. However, the Court has not distinguished the different registers in which these claims sound: deontological, teleological, and instrumental. The Court's rhetorical recourse to interests suggests they can serve as

---

[22] *Delgamuukw*, *supra* note 18 at ¶141.
[23] *Lax Kw'alaams*, *supra* note 20 at ¶12.
[24] *Manitoba Metis Federation*, *supra* note 7 at ¶66.
[25] *Haida Nation*, *supra* note 1 at ¶50; *Taku River*, *supra* note 15 at ¶2.
[26] *Van der Peet*, *supra* note 18 at ¶135; *R. v. Kapp*, *supra* note 3 at ¶65; *R. v. Moses*, 2010 SCC 17 at ¶14.
[27] *Rio Tinto*, *supra* note 13 at ¶74.
[28] *Tsilhqot'in Nation*, *supra* note 16 at ¶¶118 and 125.
[29] Taku *River*, *supra* note 15 at ¶42; *Tsilhqot'in Nation*, *supra* note 16 at ¶125. See also George Pavlakos, "Constitutional Rights, Balancing and the Structure of Autonomy" (2011) 24 Can. J. L. & Jurisprudence 129.

a common denominator or currency.[30] For example, Aboriginal peoples may be understood as having an interest in upholding and exercising their rights. Of course, the language of "interests" does not negate notions of duty. Rather, it reframes them, for the modern idea of interests implies an obligation, or at the very least an expectation, to act in accordance with them.[31] The Court has not explicitly engaged the extensive and consequential debates concerning these potent terms, so the intent and implications of the presumed commensurability of rights and interests remain unclear.

One way to make sense of this mess is to use the classic heuristic of ends and means. The Court has used the same term to refer to both a desired end and the means of achieving it. In a sense, it has said aboriginal peoples and the Crown must reconcile by reconciling. However, any circularity is only apparent. A closer look at the language employed by the Court reveals a promising interpretation.

A "golden thread" runs through the Court's many versions of reconciliation. The Crown must reckon with the implications of asserting sovereignty over aboriginal peoples in Canada. As a sovereign, the Crown bases its authority in the law and needs to know what the law requires of it in dealing with aboriginal peoples who did not invite or consent to the imposition of its rule. In *Sparrow*, the Court wrote of reconciling federal power with federal duty. The federal power in that case was Parliament's legislative authority over Indians under s. 91(24) of the *Constitution Act, 1867*, and the federal duty was the obligation to respect aboriginal and treaty rights, recently raised to constitutional status by s. 35(1). In more recent cases, the jargon has changed but those two elements remain.

Now, the Court refers to reconciling prior aboriginal occupation (or pre-existing aboriginal societies) with the assertion of Crown sovereignty.[32] Since prior occupation of

---

[30] *Tsilhqot'in Nation*, *supra* note 16 at ¶139.

[31] Albert O. Hirschman, The Passions and the Interests (Princeton University Press, 2013) at 40.

[32] *Van der Peet*, *supra* note 18 at ¶¶31 and 45; *Gladstone*, *supra* note 19 at ¶72; *Delgamuukw*, *supra* note 18 at ¶81; *Taku River*, *supra* note 15 at ¶42; *Manitoba Metis Federation* at ¶66. For an interim formulation, see McLachlin J (as she then was), dissenting in *Van der Peet*, *supra* note 18 at ¶231: "Federal power is to be reconciled with aboriginal rights by means of the doctrine of justification."

the land by pre-existing aboriginal societies is the source of aboriginal rights at common law, it is equivalent to "federal duty." [33] Similarly, the assertion of Crown sovereignty is the counterpart to "federal power," since the latter is one expression of the former. The Court is still telling the Crown to determine what the assertion of sovereignty means, or what sovereignty entails in the Crown's dealings with aboriginal peoples, it is just using different words.

There may seem to be a gap between this vital objective and the mundane means described by the Court, namely compromising and balancing interests. [34] However, this disconnect is only linguistic: a matter of metaphor. When, for example, Crown officials issue a mining permit that may infringe aboriginal rights or a court upholds such a permit, they are not "balancing" the economic interests of the proponent and those constitutionally protected rights in the sense of weighing or otherwise quantifying them in some standard unit of measurement. They are not performing calculations; they are making decisions that require them to consider constitutional rights and demonstrate basic values. They are assigning more significance to certain considerations and less to others. [35] They are often obligated to explain their decisions and elaborate those values and considerations in reasons. Those decisions, however prosaic they may seem, implicate the basic questions raised by the assertion of Crown sovereignty. There is no difference in kind between the means and the end of reconciliation.

Despite all this work, reconciliation still lacks a precise definition. It is perhaps easiest understood in a negative sense. It conveys dissatisfaction with the constitutional status quo. It is the term the courts use to acknowledge the schism between aboriginal peoples and "the rest of Canadian society" and to express the need to overcome that gulf. [36] It would be presumptuous to attempt a

---

[33] See e.g. *Van der Peet*, *supra* note 18 at ¶30.
[34] *Id.* at ¶135; *Rio Tinto*, *supra* note 13 at ¶50.
[35] See e.g. Aharon Barak, Purposive Interpretation in Law (Princeton University Press, 2005) at 176-181. See also George Pavlakos, "Constitutional Rights, Balancing and the Structure of Autonomy," 24 Can. J. L. & Juris. 129.
[36] *Gladstone*, *supra* note 19 at ¶75.

more precise explanation or a more extensive catalogue of its requirements because the disputes in question are so complex and contested. It also would be contrary to the nature of reconciliation itself, which must be achieved rather than imposed. Ultimately, we will know we have attained reconciliation when we no longer strive for it via litigation, negotiation, consultation, or other means.

The duty to consult is intended to provide incremental steps toward this transformative result: a new relationship between aboriginal peoples and the Crown. That transformation will take time. As the Court has noted, the duty forms "part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution." [37] Reconciliation is certainly aspirational and possibly unattainable. Nonetheless, it remains the fundamental purpose of the duty to consult and the standard against which efforts at consultation must be judged.[38]

3. The Reality of Consultation

Unsurprisingly, consultation has not delivered on that radical promise. In the decade since *Haida Nation*, the courts have answered some questions about the duty to consult while raising many more. It applies to certain administrative tribunals but not to municipalities [39] ; historic decisions do not trigger it but legislation might[40]; some of its procedural aspects can be delegated to proponents but the formal requirements for effective delegation remain unclear. [41] The doctrine continues to evolve as judicial opinions inspire expectations, inform conduct, and generate disputes that lead some parties back to court in order to perpetuate the cycle. However, it has

---

[37] *Haida Nation*, *supra* note 1 at ¶32.
[38] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at ¶28.
[39] *Rio Tinto*, *supra* note 13 at ¶56; *Neskonlith Indian Band v. Salmon Arm (City)*, 2012 BCCA 379.
[40] *Rio Tinto*, *supra* note 13 at ¶44; R. v. Lefthand, 2007 ABCA 206 at ¶38; *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14; *Courtoreille v. Canada (Aboriginal Affairs and Northern Development)*, 2014 FC 1244.
[41] *Haida Nation*, *supra* note 1 at ¶53; *Wahgoshig First Nation v. Ontario*, 2012 ONSC 2323 at ¶32; *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 272 DLR (4th) 727, [2006] 4 CNLR 152 at ¶92 (*Platinex*); *Hupacasath First Nation v. British Columbia (Minister of Forests) et al.*, 2005 BCSC 1712 at ¶261.

yet to prompt the sort of ongoing, rigorous inquiry required to achieve its purpose.

In essence, reconciliation aims to overcome history. It requires us to understand and reckon with the ramifications of the assertion of Crown sovereignty over aboriginal peoples and their lands. Once the original breach between aboriginal peoples and other Canadians is settled, a new era will commence. Like a pragmatic conception of truth, this conception of reconciliation admits only a formal definition: it is what remains after all disputes between aboriginal peoples and the Crown have been resolved.[42] It is not possible to plan reconciliation in any meaningful sense. Reconciliation is indeterminate. It requires a process but, just as it "does not, in the abstract, mandate a particular content for aboriginal rights," it does not mandate a particular process.[43]

Nor is it possible to proceed directly to reconciliation because the destination will be determined by the journey: many of the disputes and resolutions are interdependent, so the actual sequence of lawsuits, treaties, settlements, and other measures will affect the ultimate result. Interested parties and the courts can only take incremental steps and explore possibilities as they emerge. They must scrutinize incumbent beliefs and established practices, identify errors, consider alternatives, and implement improvements. That work is both practical and principled. It is a genuine inquiry.

The duty to consult has not sparked such an inquiry because it has been diluted and routinized. Over the past decade, the duty has risen to prominence and then declined as prospects for real reform have yielded to procedural adjustments and rhetorical flourishes. What remains of consultation is increasingly codified in anodyne policies and counterproductive routines reinforced by a deferential standard of review. The duty to consult has largely spent its disruptive potential.

---

[42] See e.g. Charles S Peirce, "How to Make our Ideas Clear", (1878) 12 Pop. Sci. Monthly 286; David Dyzenhaus, "The Legitimacy of Legality" (1996) 46 U Tor LJ 129 at 179.

[43] *Van der Peet*, *supra* note 18 at ¶50; *Taku River*, *supra* note 15 at ¶24.

a. Procedure Dominant

In its early days, the duty to consult promised serious changes to both the procedure and the substance of relations between aboriginal peoples and the Crown. As explained by Finch JA (as he then was) in the 1999 case *Halfway River First Nation v. British Columbia*, the procedural aspects of the duty were initially expected to shape Crown conduct:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they 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...[44]

According to this excerpt, the default rule was that aboriginal interests and concerns would be incorporated into the Crown's "plan of action." Binnie J. quoted this account of the duty in *Mikisew Cree*, and lower courts both in British Columbia and beyond regularly recite it.[45] However, the rhetoric has proven more influential than the content. Fifteen years later, only in exceptional cases does the duty to consult require adjustments to a project or permit. More often, it is reduced to a procedural checklist.

In a 2010 article on the duty to consult, Dean Sossin has summarized the relative appeal of procedure "in the aboriginal context." Among other things, procedural solutions to disputes can convey respect for aboriginal peoples, their perspectives, and their contributions. They also can defer difficult decisions and marshal the parties to shape and support the final result.[46] His article noted a tension between cases that emphasized procedural elements of the duty to consult and cases that focused on the outcomes of those procedures.[47] At that point, lower courts had been grappling with *Haida Nation* for just five years, trying to

---

[44] *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at ¶160.

[45] *Mikisew Cree*, *supra* note 14 at ¶64. See also, *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763 at ¶116; *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 FC 1139 at ¶92; *Katlodeeche First Nation v. Canada (Attorney General)*, 2013 FC 458 at ¶146.

[46] Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23 Can J Admin L & Prac 93 at 95.

[47] Id. 107-108.

define "meaningful consultation" across myriad circumstances while establishing a measure of consistency.

By 2010, the procedural elements of meaningful consultation had begun to accumulate. In addition to the minimum requirements of notice, disclosure, and discussion set forth in *Haida Nation*, the Crown's obligations included:

(a) as a first step, discussing the consultation process with the affected aboriginal people[48];
(b) conducting a preliminary assessment of the strength of claim and the potential adverse effect of the proposed Crown conduct[49];
(c) designing a consultation process sufficient to discharge the duty[50]; and
(d) ensuring that process is timely[51], flexible[52], and transparent[53].

The lower court judges in these cases faced a complex knot of challenges and imperatives. They had to develop a doctrine that would be both predictable and responsive to a diverse (and still largely unknown) range of conditions. With scant guidance from the hazy concept of reconciliation, they had to devise a duty that the Crown could realistically perform but that would have the effect of disrupting unacceptable Crown practices. They also had to manage the risk of backlash from individuals and governments unconvinced of the need to further protect aboriginal rights and fearful of what some perceive as undue aboriginal influence over land and resource development.

Procedure offered a familiar and uncontroversial means to address the parties' anxieties and anchor their expectations. The basic procedural elements of the duty, such as performing a preliminary assessment, providing relevant information, and establishing a transparent

---

[48] *Gitxsan Houses*, *supra* note 4 at ¶113.
[49] *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 at ¶147.
[50] *Huu-ay-aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 at ¶113.
[51] *Squamish Nation et al v. The Minister of Sustainable Resource Management et al*, 2004 BCSC 1320 at ¶74.
[52] *Haida Nation*, *supra* note 1 at ¶45.
[53] *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505 at ¶147.

consultation process, both promoted and helped to define reconciliation by obliging responsible Crown officials to attend to the particular circumstances of the aboriginal peoples in question. On a more practical note, these relatively clear guidelines for Crown officials also serve as relatively clear criteria for judicial review, at least in contrast to more abstract standards such as "meaningful consultation," "seriously considered," or "demonstrably integrated". As a result, they introduce the prospect of path dependency because they create incentives for the Crown and aboriginal peoples alike to place greater emphasis on those better-defined features of the duty, which may lead to additional cases involving the same elements that further compound the procedural bias.

Since Sossin's article, the procedural turn in the duty to consult has become more pronounced. Recently, in *Tsilhqot'in Nation v. British Columbia*, the Supreme Court of Canada likely resolved the issue by repeatedly referring to the duty as procedural.[54] However, even as its character has crystalized, the content of the duty has been muddled. Among other things, a number of cases have dealt with the interaction between the duty to consult and various regulatory and administrative schemes, and therefore have raised complicated fact- and statute-specific concerns.[55] Some cases appear to have struck elements from the list of procedural requirements, such as a preliminary assessment of the aboriginal right at stake and the potential impact on it.[56] Others have adopted an approach that stresses the opportunities for consultation afforded to aboriginal peoples rather than the consultation that actually occurred.[57] As a result, although we know the duty is procedural, we do not always know what procedures it entails.

During this period, the emphasis shifted even for Finch CJBC. In the 2011 case of *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, after citing

---

[54] *Tsilhqot'in* Nation, *supra* note 16 at ¶¶77, 78, 80, and 88.
[55] See e.g. *Nlaka'pamux Nation*, *supra* note 6; *Rio Tinto*, *supra* note 13; *Little Salmon*, *supra* note 7.
[56] See e.g. *Adams Lake Indian Band v. Lieutenant Governor in Council*, 2012 BCCA 333.
[57] See e.g. *Brokenhead Ojibway Nation v. Canada (Attorney General)*, 2009 FC 484 at ¶42.

the paragraphs from *Mikisew Cree* that quoted his reasons from *Halfway River*, he wrote that

> "The consultation process does not mandate success for the First Nations interest. It should, however, provide a satisfactory, reasoned explanation as to why their position was not accepted. "[58]

This obligation to provide reasons for rejecting the aboriginal position is the procedural counterpart to the obligation to demonstrably integrate, "wherever possible," aboriginal interests and concerns: the Crown must explain itself when such integration proves "unnecessary, impractical, or otherwise unreasonable."[59] Finch CJBC also suggested the Crown must at least consider the possibility of preferring the aboriginal position and perhaps denying a proponent's application, but that would only be another procedural requirement.[60] The default requirement for the Crown to change its "plan of action" arguably persists, but it is now obscured and understood primarily in terms of its procedural implications.

Even reframed, Finch CJBC's account of the duty to consult is an outlier. More common are conceptions of the duty that draw a sharp distinction between consultation as a process of exchanging information and accommodation as a practice of making substantive adjustments in rare cases. For example, in a recent B.C. case, Savage J. wrote:

> Meaningful consultation is a process that involves gathering information, sharing preliminary proposals, seeking opinions, informing other parties of relevant information, listening, being prepared to alter and adapt the original proposal, and providing feedback. In short, the process is one which involves two or more parties and ensures the parties are consulted and leave better informed.
>
> Good faith consultation may reveal a duty to accommodate. For example, a strong *prima facie* Aboriginal rights claim coupled with significant potential impacts of the contemplated Crown conduct on those rights might require the Crown to take steps to avoid irreparable harm or

[58] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at ¶148.
[59] *Id.*
[60] *Id.* at 149.

> minimize the potential impacts, pending final resolution of the underlying Aboriginal rights claim: *Haida* at para. 47.[61]

Paragraphs like these do not simply prioritize procedure by relegating to a later stage any changes to the proposed project or the parties' material circumstances.[62] They also reinforce the distinction between procedure and substance, as does the Supreme Court's insistence that the duty to consult is procedural. However, such statements fail to illuminate how this doctrine and the resulting consultation processes can reinforce the status quo in which the legitimacy of Crown conduct is presumed and aboriginal and treaty rights must be asserted, established, and otherwise defended.

b. Weak Remedies and Their Influence

The formal and procedural remedies the courts favour for breaches of the duty to consult have facilitated this retreat from substance. Judges have broad discretion to award, design, and decline remedies for a breach of the duty. Among other things, they have recourse to the prerogative writs of mandamus, certiorari, and prohibition.[63] However, they rarely revel in that discretion and tend to fall back on a limited set of solutions: a declaration that the Crown owed a duty to consult and failed to discharge it, combined in some cases with an order to fulfill the duty.[64] However, courts typically allow the tainted Crown decision to stand.

The standard rationale for this leniency is predictably practical: anticipated harm to the commercial development or industrial project in question.[65] These weak remedies are often difficult to square with the rationale for the duty to consult: the protection of aboriginal and treaty rights pending settlement. If the duty to consult has been

---

[61] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568 at ¶¶195-196.
[62] See e.g. *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1139 at ¶178.
[63] See e.g. *Wii'litswx v. British Columbia (Minister of Forests)*, 2008 BCSC 1620.
[64] See e.g. *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Attorney General)*, 2011 BCSC 620 at ¶234.
[65] See e.g. *Musqueam Indian Band v. Richmond (City)*, 2005 BCSC 1069 at ¶117; *Hupacasath First Nation*, *supra* note 41 at 317; *Chartrand v. The District Manager*, 2013 BCSC 1068 at ¶175.

triggered and breached, then the decision and activity in question have the potential to harm aboriginal or treaty rights. However, such remedies are consistent with the dominant procedural conception of the duty.

Implicitly or explicitly, when courts permit tarnished Crown licences, permits, or other authorizations to remain in effect, they allow the economic interests of private parties to trump the constitutionally protected rights of aboriginal peoples. They adopt a static conception of reconciliation that assumes judges can discern and strike the proper balance between aboriginal peoples and other Canadians by reference to their estranged incumbent positions. They may intend to foster compromise by mandating more consultation, but they risk rousing resentment among aboriginal petitioners by adopting remedies that carry few costs or other consequences for the Crown or proponents. Courts that allow such decisions to stand also imply that meaningful consultation is not actually a constitutional prerequisite to Crown conduct. Further, not all consultations are created equal. When a court allows a constitutionally defective authorization to remain in force, it gives the Crown the advantage of the incumbent in any subsequent consultations. It also precludes certain opportunities to accommodate the very aboriginal or treaty rights that are in jeopardy, such as cancelling the flawed authorization.

Other remedial approaches to a breach of the duty to consult share this procedural bias. For example, some courts have given specific directions to ensure any additional consultation is meaningful, while trying to avoid being seized of the matter and obliged to monitor the implementation of those directions.[66] Others have expressly authorized the parties to apply for additional directions or relief if further talks prove unsatisfactory.[67] In cases involving significant adverse impacts, courts may order the Crown to accommodate the aggrieved aboriginal people, but even Finch CJBC (as he then was) demonstrated reluctance to order specific forms of accommodation for fear of inhibiting

[66] See e.g. *Hupacasath First Nation*, *supra* note 41. But see *Platinex*, *supra* note 41 at ¶138, where Smith J remained seized of the matter pending further consultation.
[67] *Ka'a'Gee Tu First Nation*, *supra* note 45 at ¶132.

meaningful consultation by stipulating the outcome. [68] Although relative ignorance is a valid reason for a court to favour such a procedural remedy, it may not be sufficient: courts may not know the relevant interests or issues well enough to design an enduring settlement, but that does not mean the parties are able and willing to deploy the necessary information, competence, and resources.

If courts used a broader range of remedies, they could avoid some of these problems. However, they seldom suspend or quash decisions for inadequate consultation. [69] In part for procedural reasons, they rarely enjoin private parties from carrying out activities authorized under decisions challenged for insufficient consultation. [70] The Supreme Court has confirmed that damages also are available for a breach of the duty to consult, although the methods for quantifying harm are unclear, especially for potential impacts on asserted rights. [71] Further, damages are one form of remedy unavailable on judicial review, so aboriginal peoples would need to choose between challenging the validity of an authorization and seeking compensation for it. In the absence of such strong remedies, aboriginal peoples bear most of the uncertainty spawned by inadequate consultation: their rights are exposed to potential adverse effects while proponents keep their contested government authorizations and the Crown continues to collect related fees and revenues.

Under the influence of weak remedies, the Crown has relatively few incentives to improve its consultation practices. More precisely, declarations and orders to consult further in a particular case rarely give the responsible Crown officials reason to change their conduct going forward. To begin, consultation cases are highly contextual and often easily distinguished. As the Court noted in *Haida Nation*, each case must be approached

---

[68] See e.g. *West Moberly First Nations*, *supra* note 58 at ¶163 (Finch CJBC). See also *Wii'litswx v HMTQ*, 2008 BCSC 1620 at ¶23 and *Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, 2005 BCCA 128 at ¶¶99-100 (Hall JA) and 104-105 (Lowry JA).
[69] But see e.g. *Squamish Nation v. Minister of Sustainable Resource Management*, 2004 BCSC 1320; *Musqueam Indian Band v. BC*, 2005 BCCA 128.
[70] But see e.g. *Platinex*, *supra* note 41; *Taseko Mines Limited v. Phillips*, 2011 BCSC 1675; *Wahgoshig First Nation v. Ontario*, 2011 ONSC 7708 (overturned 2012 ONSC 2323).
[71] *Rio Tinto*, *supra* note 13 at ¶37.

individually and flexibly.[72] Each aspect of the doctrine, and in particular the trigger, content, and discharge of the duty, is heavily dependent on facts. Aboriginal and treaty rights are *sui generis* and diverse; written, oral, and opinion evidence about traditional practices is often required to understand them. The quantity and quality of such evidence can vary widely from case to case, even if the rights claimed are similar. Further, the decisions challenged can be technical, as can the evidence about the potential impacts from those decisions. Finally, the consultation record can be complicated, especially if the project was large, the proponent was involved, or it involved a regulatory process, such as an environmental assessment. There are many dimensions on which consultation cases can differ, and the demands of the doctrine are intended to respond to those differences. As a result, a declaration issued about the existence, requirements, or breach of the duty in one case may have little relevance or use, let alone authority, in subsequent decisions or cases.

The challenges presented by the contextual nature of the duty to consult are compounded by inconsistencies in the case law. For example, in *Haida Nation* and *Taku River*, the Court defined the low end of the duty to consult as giving notice, disclosing information, and discussing any issues raised in response.[73] However, in more recent cases, lower courts have adopted different versions of the low end, from "mere notice"[74] to an extensive engagement that begins with notice and includes disclosure of potential impacts, sufficient time for the aboriginal people to respond, attempts to minimize any impacts on their rights, and delays and other measures as necessary "to facilitate a true dialogue."[75]

A similar problem concerns the assessment of the strength of the aboriginal claim at the outset of consultation. Early cases established this step as essential to meaningful consultation, for unless the Crown understood the claimed right, it could not ascertain the potential

---

[72] *Haida Nation*, *supra* note 1 at ¶45.
[73] *Id.* at ¶43; *Taku River*, *supra* note 15 at ¶32. See also *Dene Tha' First Nation v. British Columbia (Minister of Energy and Mines)*, 2013 BCSC 977 at ¶117.
[74] *Cook v. The Minister of Aboriginal Relations and Reconciliation*, 2007 BCSC 1722 at ¶179.
[75] *Moulton Contracting Ltd. v. British Columbia*, 2013 BCSC 2348 at ¶296.

impacts, design a proper consultation process, or implement workable accommodation.[76] Some 2012 cases suggest the Crown need not perform such an assessment at all, so long as the impacts are expected to be insubstantial or the Crown undertakes to provide deep consultation regardless of the level of consultation required by the Constitution.[77] However, it is unclear how consultation could be "approached individually" as required by earlier cases, unless the Crown first attends to the claim in question.[78] Accordingly, a more recent case indicates the Crown's failure to consider the strength of claim or the degree of infringement would be a "complete failure of consultation," in light of constitutionally required criteria.[79] Such developments create divergent expectations on basic procedural issues and encourage parties to adopt mismatched strategies that can frustrate meaningful consultation.

c. Crown Policies and Counterproductive Routines

The federal and provincial governments have tried to corral the duty to consult by adopting various policies and guidelines. The documents differ from jurisdiction to jurisdiction, but they share certain characteristics. These policies are, like the duty itself, iterative: updated from time to time in response to changes in the law.[80] They are also generic, as they are intended to inform a range of government conduct that engages the duty. These public policies are not specific to particular ministries or departments, although they may be supplemented by more targeted directives.[81] They are also abstract, in the sense

---

[76] See e.g. *Wii'litswx*, *supra* note 68 at ¶147.
[77] *Adams Lake Indian Band v. Lieutenant Governor in council et al.*, *supra* note 56 at ¶74; *Halalt First Nation v. British Columbia*, 2012 BCCA 472 at ¶¶118 and 127.
[78] *Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al.*, 2005 BCSC 697 at ¶116.
[79] *Kwakiutl First Nation v. North Island Central Coast Forest District*, 2013 BCSC 1068 at ¶158.
[80] See e.g. Government of Canada, Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult, March 2011, https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf at 10.
[81] See e.g. Government of Newfoundland and Labrador, Aboriginal Consultation Policy on Land and Resource Development Decisions, April 2013 at 5; British Columbia, Ministry of Forests, Consultation Guidelines 2003, December 6, 2003, http://www.for.gov.bc.ca/haa/Docs/MOF_Consultation_guidelines_final.pdf.

that they primarily restate the relevant case law rather than provide concrete directions about how officials should address specific situations.

Some of the documents are very short and do little more than acknowledge the duty and pledge to fulfill it in accordance with certain broad principles. [82] Others are longer and provide a more extensive discussion of the law, with a few going so far as to provide a conceptual framework for decisions and some practical suggestions, such as lists of questions to consider at points in the process. [83] However, even the expansive documents offer no guidance on how to evaluate or respond to the answers to those questions. It is difficult to see how foresters or engineers responsible for authorizing cuts or issuing water licences can translate six pages of broad principle, let alone sixty-nine pages of dense prose, into transparent and reliable processes that seriously address aboriginal interests and concerns.[84]

Ultimately, these policies and guidelines all rely on the discretion of the responsible Crown officials. They do not explain, for example, how the consultation process for (a) a two-year investigative use permit that would authorize the drilling of 24 boreholes for sand-and-gravel exploration in a wooded area populated by moose, visited occasionally by endangered caribou, and subject to a proven aboriginal right to hunt should differ from (b) a five-year "notice of work" that authorizes a gravel quarry in a grassy area near a

---

[82] See e.g. Government of Manitoba, Interim Provincial Policy For Crown Consultations with First Nations, Métis Communities and Other Aboriginal Communities, May 2009, http://www.gov.mb.ca/ana/pdf/pubs/interim_aboriginal_consultation_policy_and_guidelines.pdf; Aboriginal Affairs Secretariat Province of New Brunswick, Duty to Consult Policy, November 2011, http://www2.gnb.ca/content/dam/gnb/Departments/aas-saa/pdf/en/DutytoConsultPolicy.pdf.

[83] See e.g. Government of Ontario, Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal Rights and Treaty Rights, June 2006, http://www.aboriginalaffairs.gov.on.ca/english/policy/draftconsultjune2006.pdf; British Columbia, Updated Procedures for Meeting Legal Obligations When Consulting First Nations – Interim, May 2010, http://www2.gov.bc.ca/gov/DownloadAsset?assetId=9779EDACB673486883560B59BEBE782E.

[84] See e.g. Government of Canada, Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult, *supra* note 80.

river inhabited by beavers and pike and subject to asserted treaty rights to trap, fish, and gather food. Nor would it be feasible to construct a database and program that could assess every possible state and interaction of every conceivably relevant variable and yield an effective and uncontroversial consultation process. Among other impediments, the facts are rarely so clear at the outset, so some measure of consultation would need to occur before the algorithm or matrix could be used to determine the appropriate steps in consultation. Nuances and complications are inevitable but unpredictable. Some measure of discretion is critical to consultation, so an examination of practice cannot stop with Crown policies since they do not and cannot provide a complete account of "meaningful consultation."

The Government of Alberta's relatively new policy on consultation, adopted in 2013, demonstrates this challenge. After summarizing the case law on the trigger, content, and principles of the duty to consult, the policy explains that a new provincial office will be established under the Minister of Aboriginal Relations to manage "all aspects of consultation" and that Alberta will delegate procedural elements of consultation to proponents when the scope of the duty is limited.[85] The policy refers to a matrix contained in a separate document that sets out three "levels" of consultation with timelines for each stage in the process (i.e. Pre-Consultation Assessment, Written Notice and First Nations Response, Consultation Continues, and Decision on Adequacy). However, the matrix does not provide directions on how to consult. Instead, it presents simple statements that do not illuminate the actual requirements of the duty, such as "The consultation office will determine whether further consultation is required" and "Alberta will undertake consultation with the First Nation(s) and adopt mitigation strategies including accommodation (if required)."[86] Further, the policy may envision extensive delegation of the duty to proponents, but Crown officials remain responsible for streaming each application into one

[85] The Government of Alberta's Corporate Guidelines for First Nations Consultation Activities, 2013, http://www.aboriginal.alberta.ca/documents/GoACorpGuidelines-FNConsultation-2013.pdf at 5.
[86] Alberta Consultation Matrix, http://www.aboriginal.alberta.ca/documents/GoAMatrix-FNConsultation-2013.pdf.

of the three levels at the outset and determining whether consultation was adequate at the end. Governments can try to simplify and rationalize the duty to consult, but they cannot eliminate the discretion involved, for example, in deciding whether the potential impacts on treaty rights will be "low" or "significant."

Even bilateral agreements between the Crown and aboriginal peoples present a similar dynamic: the parties aim to make consultation more predictable by establishing a mutually agreeable process, but Crown discretion proves irreducible. One important difference between these agreements and default Crown policies is that the aboriginal signatories receive capacity and other funding in exchange for their participation. Another important difference is that the aboriginal party typically acknowledges that the process, in combination with the funding, satisfies the Crown's duty to consult. Bilateral consultation agreements have become common in British Columbia, where the provincial government confronts a resource-dependent economy challenged by unresolved rights and title claims. During the last two decades, the B.C. government and aboriginal peoples have developed a range of options to deal with the resulting risk and uncertainty, from project- and ministry-specific deals to sophisticated reconciliation agreements that cover most if not all Crown decisions.[87]

These agreements are generally reserved for those aboriginal peoples with the desire and leverage, whether on a particular project or over a larger territory, to bring the government to the table. Recent reconciliation agreements contain elaborate "engagement frameworks" and matrices that subject Crown decisions to complex formulas involving escalating levels and stages, with aggravating and mitigating factors similar to sentencing guidelines.

[87] See, e.g., Economic and Community Development Agreement between Her Majesty in Right of British Columbia and the McLeod Lake Indian Band, dated August 25, 2010, http://www2.gov.bc.ca/gov/DownloadAsset?assetId=A26A692EA89743409648D98FC6BF8A52&filename=ecda_mcLeod_lake.pdf; Oil and Gas Consultation Agreement between Her Majesty in Right of British Columbia and Halfway River First Nation, dated April 5, 2013, https://www.bcogc.ca/node/8241/download; Nanwakolas/British Columbia Framework Agreement, between Her Majesty the Queen, the Nanwakolas First Nations, and the Nanwakolas Council Society, December 16, 2009 http://www2.gov.bc.ca/gov/DownloadAsset?assetId=44F7C03A315B4B84A59F1635A61AF460&filename=sea_nanwakolas.pdf.

Typically, the consultation "level" depends on the nature of the decision and its potential environmental impact.[88] In turn, the level determines which "stages" the decision qualifies for and how long it will spend in each: the higher the level the more intensive and extensive the consultation.[89]

Bilateral agreements use procedure to discipline, and thereby both justify and preserve, Crown discretion. Crown officials remain responsible for both the initial classification and the ultimate decision.[90] In practice, their discretion can prove determinative because aboriginal parties tend to lack the organizational capacity to fully engage, let alone challenge, all problematic proposals.

The agreements also closely track provincial policy, as the government negotiates from narrow mandates and then, once a deal is struck, from precedent. The resulting procedures, even in the most elaborate agreements, are often quite similar. For example, two agreements signed with different aboriginal peoples in northeast BC during March and April 2013 employ almost identical timeframes across engagement levels: 32 days versus 30 days in level 2; 52 days versus 55 days in level 3; and a minimum of 45 days for each in level 4.[91] The Crown's agenda continues to determine the form and practice of consultation under such agreements.

---

[88] See, e.g., Secwepemc Reconciliation Framework Agreement, between Secwepemc and Her Majesty the Queen in Right of British Columbia, April 10, 2013, Appendix B, http://www2.gov.bc.ca/gov/DownloadAsset?assetId=FF086ADF3EAC4114BDF84A1FA0C78724&filename=reconciliation_secwepemc.pdf.

[89] See, e.g., Tsilhqot'in Stewardship Agreement, Among the Province of British Columbia, the Tsilhqot'in Nation and the Tsilhqot'in National Government, June 10, 2014, Appendix A, http://www2.gov.bc.ca/gov/DownloadAsset?assetId=11C19AFF61454FB88A0A8CBF2841644F.

[90] See, e.g., id and Strategic Engagement Agreement, between Sto:lo First Nations and British Columbia, 25 March 2014, Appendix C, http://www2.gov.bc.ca/gov/DownloadAsset?assetId=6051F09C91534A38BAEC645F36426360&filename=sea_stolo_nations.pdf.

[91] Shared Decision Making Agreement between the Tahltan Nation and the Province of British Columbia, March 14, 2013 at Table A, http://www2.gov.bc.ca/gov/DownloadAsset?assetId=8F976A690A934B889F0D02E8E4E297EA; Gitanyow Engagement Framework between Gitanyow Nation and Her Majesty the Queen in Right of the Province of British Columbia, April 23, 2013 at Table A, http://www2.gov.bc.ca/assets/gov/topic/9EFBD86DA302A0712E6559BDB2C7F9DD/agreements/engagement_gitanyow.pdf.

Faced with unclear law, indeterminate policy, and limited agreements, aboriginal peoples and the Crown have come to rely upon other routines. Unfortunately, their routines are rarely complementary. Instead, they are driven by capacity constraints and strategic considerations to adopt approaches that are incompatible at best and counterproductive at worst. In general, aboriginal peoples tend to seek more process while the Crown tends to request substantive information or proposals. Such cases do vary, but a stylized sequence of events can convey a common dynamic.

The Crown often follows a project referral with a request for specific information about its potential effects on any aboriginal or treaty rights. The aboriginal party responds with a request for more time, more process, and more capacity, either via direct funding or technical assistance. The Crown then repeats its demand for specific information, sometimes offering a meeting or extension, sometimes not. The aboriginal party then reiterates its own request for certain procedural steps and capacity, while identifying some technical defects in the application or the consultation process to date, such as an inappropriately narrow scope or the failure to establish an information-sharing protocol. After a few rounds, the parties produce a correspondence record that prepares them better for litigation than for reconciliation. They create a chicken-and-egg problem: the Crown wants substantive information to determine the details of an appropriate consultation process, but the aboriginal people want procedural commitments to identify, gather, and share the relevant substantive information. Which comes first, substance or procedure? Both sides may lack the mandate and the resources (money and information, respectively) to compromise. Yet each can find some support in the complex case law on consultation. In some cases, the parties get stuck on their respective positions and fail to engage at all.[92]

Too often, the parties settle into such a rut, from which they cannot address let alone answer the "controlling question" identified by the Court: "what is required to maintain the honour of the Crown and to effect

[92] See e.g. *Louis v. British Columbia (Minister of Energy, Mines, and Petroleum Resources)*, 2013 BCCA 412.

reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake."[93] As discussed above, this question requires a real inquiry, not a strategic exchange of postures. The Crown made many promises when it asserted sovereignty over aboriginal peoples and it needs help to comprehend and fulfill those promises. In its current state, consultation rarely aids this investigation. The muddled case law, combined with the weak remedies typically awarded for breaches of the duty to consult, does not push the Crown to improve its unhelpful policies and inert routines. On many files, it proceeds to a decision before receiving relevant information from the affected aboriginal peoples, let alone engaging them in an effort to understand and fulfill the demands of reconciliation. Old relationships of inequality and mistrust are perpetuated rather than disrupted.

Finally, these problems are reinforced by the deferential standard of review that applies to Crown consultation efforts. Whereas the Crown's determination of the existence and scope of its duty to consult must be correct, the steps taken to fulfill that duty need only be reasonable.[94] The courts have been clear: perfection is not required.[95] Rather, and in rather circular fashion, the courts determine whether consultation was reasonable by looking at all of the steps taken by the Crown in light of the circumstances and deciding whether the Crown made "reasonable efforts to inform and consult."[96]

In theory, the standard of reasonableness involves examining the decision-making process for justification, transparency, and intelligibility and confirming whether the outcome falls within a defensible range.[97] It even could entail the comparison of actions and outcomes across different issues and contexts and the development of

---

[93] *Haida Nation*, *supra* note 1 at ¶45.

[94] For a recent review and analysis of the standards of review applicable to the duty to consult, see *Squamish Nation v. British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991, at paras. 155-167 and 196.

[95] Hall in Musqueam, 2005 BCCA 128; Hupacasath, 2005 BCSC 1712 at 256; Haida Nation at para. 62.

[96] *Haida Nation* at para. 62. See also *Tsuu T'ina Nation v. Alberta (Environment)*, 2010 ABCA 137 para. 29.

[97] *R. v. Dunsmuir*, 2008 SCC 9 at para. 47; *R. v. Khosa*, 2009 SCC 12 at para. 59.

demanding standards for consultation. In practice, however, judicial review of Crown consultation tends to emphasize the overall character of Crown conduct. In turn, that character is often ascertained from evidence of bad faith or improper motive, such as a political push to make a decision before an election writ is dropped.[98] Absent such evidence, or in the presence of questionable motivations by the aboriginal people, the same Crown conduct may not appear objectionable.[99] Although this permissive approach is understandable, since the content of the duty is in flux, it does encourage the courts to concentrate on the actions of individuals rather than systemic constraints and institutional defects. Breaches of the duty to consult appear as aberrations, often attributable to individual mistakes, rather than the result of institutional design or neglect.

This deferential standard of review allows a significant measure of inconsistency to survive both in Crown practice and in case law. This margin of appreciation might allow the Crown to experiment with new ways of engaging aboriginal peoples, as new problems arise in new contexts. However, it also preserves a role in the implementation and elaboration of the rule of law for individuals and institutions that have ignored aboriginal rights and marginalized aboriginal perspectives for decades. As a result, the doctrine and practice of consultation remain oriented towards the priorities of the Crown and the needs of proponents, rather than the rights and interests of aboriginal peoples. The prospects for reconciliation wane.

4. A Remedy for the Duty to Consult

A doctrinal cure for this malaise is unlikely. The ultimate purpose of the duty to consult remains obscure, understood only in formal and negative terms. Aboriginal peoples and the Crown are left to define reconciliation by achieving it. The outcome cannot be predicted, let alone prescribed, by the courts. As a result, the means of reconciliation are necessarily tentative: if we do not know exactly where we are supposed to go, we cannot say with confidence how to get there. Further, to extend this

[98] See e.g. *Squamish Nation v. British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991 at para. 209-214.
[99] See e.g. *Louis*, *supra* note 92.

navigation metaphor, given the unsettled state of the case law, we do not even know where we are starting from. These circumstances suggest a different role for the court: catalyst rather than captain. If the Crown and aboriginal peoples are required to work out the demands of reconciliation, the courts can play a role in perpetuating that collaboration. Instead of plotting the route, courts should help the parties avoid and overcome particular obstacles.

As cases accumulate, courts can acquire a better sense of the basic procedural elements of a fruitful search, such as the timely exchange of relevant information about both Crown conduct and aboriginal concerns. Other elements are harder to define but equally vital, such as a rough balance of power that prevents either party from dominating the process and dictating results, which might only compound resentments and tempt backlash. This account of the doctrine of the duty to consult implies a related and important role for remedies. Since the demands of the duty are under development, remedies for a breach should not simply compel the parties to fulfill their emergent obligations but should lead the parties to work together to determine what the law requires of them.

Weak remedies are a part of the problem, but that does not mean "strong" remedies are the answer. Even if the definition of a strong remedy were clear and uncontroversial, the courts clearly prefer flexible procedural and formal responses to breaches of the duty to consult. Further, strong remedies might only establish a new, but equally unproductive, equilibrium. For example, to suggest that courts quash impugned authorizations as a default remedy is not only unrealistic given previous judgments but also imprudent. It may be an appropriate response to some circumstances, such as bad faith conduct by the Crown or a total failure to consult.[100] However, in less egregious cases, to quash authorizations as a matter of course may simply create an opposite set of incentives that equally frustrate meaningful consultation. Since the impacts of that remedy would fall instead entirely on the Crown and the proponent, it may encourage aboriginal peoples to adopt a more aggressive approach to consultation that involves

[100] See e.g. *Squamish Nation*, *supra* note 98 at para. 217; *Ehattesaht First Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849 at para. 63.

more frequent court challenges. Such an approach not only would hamper reconciliation but might even diminish the doctrine of the duty to consult if the higher potential rewards induce aboriginal peoples to file more petitions of lower quality. Although it is impossible to foresee all of the potential consequences, it is not clear that such a rigid approach would help the parties to cope with the challenges of reconciliation. Rather than another stock remedy, the duty to consult requires a situational approach. It needs remedies that are effective and realistic, responsive to prevailing institutional conditions as well as doctrinal imperatives.

Situational does not necessarily mean complicated. For example, the situation might seem ripe for structural remedies: a relatively ambitious form of judicial response to chronic constitutional violations. Structural remedies are familiar from public law litigation: injunctions that seek to reorganize a public institution in order to satisfy certain constitutional standards.[101] They generally require a lower court to retain supervisory jurisdiction in order to monitor compliance with the injunction and discipline the recurrence of pernicious practices.[102] However, structural remedies are notoriously difficult to design and implement. However, that difficulty is even greater when the applicable constitutional standards remain unclear and the appropriate, let alone best, practices are unknown. Reconciliation, an enigmatic goal that by definition defers definition, exemplifies both challenges.

Further, as noted above, Canadian courts are reluctant to exercise supervisory jurisdiction over government ministries for breaches of the duty to consult.[103] This reluctance may be due, in part, to the posture of consultation cases, which are typically framed as isolated failures to fulfill the Crown's constitutional obligations rather than the result of systemic institutional dysfunction. It also may be due to the fact that ministries are less discrete than schools or prisons, which are the

---

[101] Owen M. Fiss, "Foreword: The Forms of Justice," 93 Harv. L. Rev. 1 at 1.

[102] Kent Roach & Geoff Budlender, "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?", 122 SAJL 325 (2005). See also, *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at paras. 72-73 and 87.

[103] See text accompanying notes 66 to 68.

classic subjects of structural injunctions; their policies and decisions influence and interact with other institutions both inside government (e.g. other ministries) and outside (e.g. applicants, licencees, and other stakeholders), and those connections make the effects of any structural remedy more difficult to predict or manage. Finally, structural injunctions seem incompatible with reconciliation, which demands that the Crown and aboriginal peoples, not the courts, resolve the terms of their relationship.

To fashion a responsive remedy for the breach of the duty to consult, courts must ascertain the competing concerns in each case, which may include protecting the aboriginal or treaty rights at stake and signaling to the Crown that certain conduct is unacceptable. Different concerns may warrant different remedies. But a common concern must be the duty to consult itself. As explained above, the demands of the duty are poorly understood and often overlooked. However, these needs provide the proper context for other considerations entertained by the courts, such as the commercial interests of proponents.

The duty to consult requires the parties to search for new solutions to an old and very difficult problem. It serves an imprecise yet fundamental constitutional imperative. Reconciliation obliges aboriginal peoples and the Crown to find ways to repair their relationships, which have been twisted and rent by countless misunderstandings, insults, injustices, and other grievances since the assertion of Crown sovereignty. It is an unusual and ambitious common endeavour, conducted indirectly by estranged participants who are scattered across diverse locales and grappling with practical decisions that implicate basic political, cultural, economic, environmental, and other concerns, all in service of an obscure, intangible aim. The duty to consult does not seek a definite outcome, rather to disrupt established beliefs and practices so that the parties can work out better arrangements. In that sense, the disruption is both means and end. The duty to consult is an experimentalist duty, in that it seeks to expand the realm of constitutional possibilities, but its promise has been frustrated by deeply entrenched positions and throttled by routine. It needs a remedy that can yield the conditions for experimentation.

More specifically, the duty to consult needs a remedy that inspires a peculiar combination of conviction and

uncertainty. For aboriginal peoples and the Crown to launch a genuine mutual inquiry, they must know that their incumbent arrangements are untenable without knowing how to fix them. Absent either element, experimentation is unnecessary: there will be no need to change, or the necessary adjustments will be obvious. For the duty to consult to flourish, both aboriginal peoples and the Crown must recognize that the prevailing approaches to reconciliation have failed, although they need not agree on the causes or consequences of that failure. Simply repeating the mantra of reconciliation and reiterating the duty to consult will not bring about this productive ambivalence. Despite their rhetoric, the status quo is still acceptable to many participants. They may need a push, not just a nudge, to abandon deeply ingrained assumptions and habits.[104]

Successful experimentalist regimes typically involve additional features, such as an institutional framework to collect, pool, and analyze relevant data, as well as procedural requirements for regular review and revision.[105] Efforts to establish such an architecture for the duty to consult may face serious challenges, given the scope and size of government bureaucracies involved, the diversity and complexity of the decisions in question, and the reluctance of many aboriginal peoples to frame their constitutionally-protected rights, intertwined with their cultures, histories, and territories, as commensurable. As the discussion of Crown policies and routines indicates, there are significant opportunities for improvement. However, questions of institutional design are premature unless the parties feel compelled to experiment by that provocative blend of knowledge and insecurity.

One way courts could try to catalyze those conditions would be by imposing penalty defaults for breaches of the duty to consult. A penalty default is a remedy that is unpalatable to all the parties. It is intended to prompt them to negotiate and design a better solution to their

[104] Alana Klein, "Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights" (2008) 39 Colum Hum Rts L Rev 357 at 416-421.

[105] See, eg, Michael C Dorf & Charles F Sabel, "A Constitution of Democratic Experimentalism" (1998) 98 Colum L Rev 267 at 268-69 and 414-20; Charles F Sabel & Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU" (2008) 14:3 Eur LJ 271 at 273-74.

common problems. The concept of a penalty default emerged from contract law theory but has been applied to public law disputes.[106] In this context, the standard remedies for a breach of the duty to consult barely inconvenience the Crown. A declaration of breach and an order to resume consultation impose minimal costs, financial or otherwise, on the Crown: a few more letters and meetings are a small price to pay for *de facto* regulatory certainty. These remedies have few implications for vague government policies and little value as precedent in subsequent cases. As a result, even when aboriginal peoples succeed in a petition or application for judicial review, they continue to bear the burden: the impugned authorization stands, the controversial project continues, and the impacts fall where they fall.

In contrast, an effective penalty default would give all of the parties reasons to drop their strategic postures and abandon their unproductive routines. The Crown would perceive some advantage in providing more process and capacity, and aboriginal peoples would have some incentives to share information about their rights and the potential impacts. Ideally, it would turn the duty to consult into a "destabilization right" capable of prompting the review and eventual rehabilitation of dysfunctional institutions.[107]

As defined, this functional concept of a penalty default is indeterminate. The best approach to implementation is not obvious. Any serious suggestion must be both feasible and effective. For example, and for the reasons provided above, to suggest that courts should quash any authorization issued (or set aside any decision made) as a matter of course is not practical given the obvious judicial preference for weaker remedies. In addition, that approach might shift too much of the uncertainty arising from inadequate consultation onto the Crown, with undesirable consequences for future consultation and reconciliation.

---

[106] Ian Ayres & Robert Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules," 99 Yale L.J. 87 at 97; Bradley C Karkkainen, "Information-Forcing Environmental Regulation" (2006) 33 Fl St U L Rev 861 at 868-871.

[107] Charles F. Sabel & William Simon, "Destabilization Rights: How Public Law Litigation Succeeds," 117 Harv. L. Rev. 1015.

Damages are another candidate penalty default. In theory, they are available to aboriginal peoples for a breach of the duty to consult.[108] However, in practice it is hard for aboriginal peoples to quantify their losses from a breach of the duty rather than the impacts of the project in question. It may be especially hard for aboriginal peoples with asserted rather than proven or acknowledged rights to establish such losses. Further, given the serious challenges aboriginal peoples face in establishing their losses, the prospect of paying damages to them is unlikely to create meaningful incentives for Crown officials to reconsider their approaches to consultation. In addition, to rely on damages alone would be inconsistent with the scheme of the duty to consult, which is intended to protect claimed rights prior to a negotiated settlement.

Fortunately, a recent case suggests one way forward. In *Moulton Contracting Ltd. v. British Columbia*, a logging company sued the Fort Nelson First Nation, some of its members, and British Columbia for losses resulting from a blockade that prevented the company from accessing land on which it had licences to harvest timber.[109] Members of the First Nation had blocked the road because they were opposed to logging that could interfere with the exercise of their rights under Treaty No. 8 and they believed consultation on the licences had been inadequate. The company sought damages in tort against them and the First Nation. It also sought damages in tort and breach of contract against British Columbia. Saunders J. of the B.C. Supreme Court dismissed the claims against the members and Fort Nelson First Nation but found British Columbia liable for $1.75 million in lost contract opportunities. He found the province liable because it knew the members intended to block the road but failed to inform the company.[110] The decision has since been appealed both by the company and by the province. Even if the appeals are successful, the trial judgment reveals the basis of a viable penalty default.

Saunders J. also found that British Columbia had breached its duty to consult the Fort Nelson First Nation about the licences and thereby breached an implied term of the licences that the Crown had satisfied this constitutional prerequisite. He did not impose liability on

[108] *Rio* Tinto, *supra* note 13 at para. 37.
[109] *Moulton Contracting Ltd*, *supra* note 75.
[110] Id. ¶3.

this basis for two reasons: first, there was no evidence of a causal connection between the province's breach and the blockade; second, a clause in the licences exempted the province from liability for such a blockade.[111] However, he clearly found that the discharge of the duty to consult is an implied term of Crown authorizations and the Crown can be liable to proponents for losses that result from operational disruptions caused by a breach of that duty.[112] The prospect of liability to a proponent, even discounted for the low likelihood of a breach in light of the lax case law, introduces additional operational and financial uncertainty for the Crown.

That uncertainty could be harnessed in a penalty default remedy with three basic components: a declaration of the breach; a temporary stay (i.e. suspension) of the unlawful decision; and leave to re-apply to the court upon expiry of the stay. The only material change from current practice would be the stay. It would need to be long enough to allow for meaningful consultation to occur, which could also cause material interruptions in the development or operation of the project. The necessary duration would depend on the parties and the project, and the court could hear evidence on the relevant issues.

The practical impediments to Crown liability for breach of the duty in *Moulton* would not arise in the case of a stay. If the proponent were to bring a subsequent action against the Crown for damages due to the delay, whether in tort or in contract, the causal link between the breach and the suspension would be clear. Further, the initial finding of breach would bind the Crown. Typically, the Crown is not liable simply for making an invalid decision, but the proponent could use the Crown's constitutional violation to establish other grounds for liability, such as breach of an implied term, misrepresentation, or perhaps even negligence.[113] In this context, the deferential standard of review applied to the Crown's consultation efforts could prove an advantage, since many breaches of the duty would entail unreasonable conduct.

---

[111] Id. ¶3.
[112] Id. ¶¶290-293.
[113] Peter W Hogg, Patrick J Monahan & Wade K Wright, Liability of the Crown, 4th Ed., p. 196.

Such a remedy would force each interested party to bear some of the resulting uncertainty. The aboriginal people whose constitutionally protected rights are at stake would receive only a short reprieve from the effects of the authorization. They would need to find ways to protect or otherwise accommodate their rights before the stay expired. The proponent would be forced to cope with the myriad practical consequences of the stay but would be able to recover those losses it could prove in an action against the Crown. It would face some measure of doubt and delay in recovery. The Crown would face a more significant likelihood of financial liability for its breach of the duty to consult, since it would be easier for the proponent to prove its losses from suspended operations than for the aboriginal people to establish losses from inadequate consultation.

In some circumstances, such as class actions in tort, there may be reasons to doubt whether economic incentives will effectively and appropriately modify Crown conduct. However, those reasons have less purchase in the context of consultation. For example, governments are thought to be less responsive to economic incentives than theoretically rational private actors.[114] Their relative insensitivity is attributed to a suite of related factors, including the divergent interests of employees, politicians, and voters, the absence of market competition and the discipline it can impose, and the government's ability to delay payment via legal or political action.[115] The common denominator is the fact that "[g]overnments trade in political capital" and respond to political rather than economic incentives.

As a result, economic pressures alone are unlikely to generate the optimal quality and quantity of government activity. But the duty to consult does not seek an ideal amount of consultation, which cannot be specified. Rather, it seeks to disrupt unsatisfactory arrangements. Further, the claim is only that the Crown is likely to be imperfectly responsive to economic incentives, not completely unresponsive. Institutional, ideological, and other details will determine how particular officials and ministries react to the prospect of significant liability for inadequate consultation. Finally, the distinction between economic and

[114] Craig Jones & Angela Baxter, "The Class Action and Public Authority Liability: "Preferability" Re-Examined," (2007) 57 U.N.B.L.J. 27 at 34-35.
[115] Id. at 34-38.

political incentives, to which at least elected members of government are expected to respond, is unclear in the midst of election campaigns that emphasize the ability to attract investment, create jobs, and generate revenue from natural-resource industries. In sum, and this should not be considered a radical observation, it remains possible that the Crown would respond to increased economic liability for breaches of the duty to consult by reconsidering and even adjusting certain aspects of its consultation policies and practices.

Similarly, the concern that increased liability might deter otherwise beneficial Crown activity is less relevant because the Crown has a constitutional obligation to consult aboriginal peoples. It cannot respond to the prospect of liability based on inadequate consultation by refusing to consult, in the same way it might terminate a public program that prompts lawsuits.[116] In addition, any consideration of a "chilling effect" would have to include the deterrent effect the incumbent approach has on aboriginal peoples, who face serious disincentives to bring some legitimate consultation claims, given the financial costs, the political risks, and the limited upside absent meaningful remedies. It is important to evaluate proposals against actual alternatives, and to remember that the duty to consult is supposed to promote experimentation not efficiency. For this penalty default approach to succeed, the Crown does not need to respond like a private party or internalize all externalities, so long as it intensifies the search for better arrangements and relationships with aboriginal peoples.

The redistribution of uncertainty would create a real opportunity for meaningful consultation: serious discussions aimed at understanding and addressing the concerns of the aboriginal people whose rights are at risk. It would give the Crown, in particular, reason to reconsider the policies and routines currently used to satisfy the duty to consult. The potential damages from disruptions to mining or oil-and-gas operations could far exceed the damages resulting from missed logging opportunities in *Moulton*. In addition, the Crown would likely fear lost or delayed investments, jobs, and revenues from other potential projects. Ideally, the spectre of this penalty default scenario would lead the

[116] Id at 38-39.

parties to consult more seriously and creatively from the outset and reduce the number of consultation cases that reach the courts. Among other things, the Crown would have greater incentives to make more money and other resources available for specialized staff, capacity funding for aboriginal peoples, internal reviews of its own policies, and other institutional improvements.

This penalty default remedy would be consistent with the directions given by the courts. It would neither prescribe a particular form of accommodation nor commit the court to monitor the consultation process.[117] It would not impose obligations on a specific individual or department but rather allow the Crown to determine how to discharge the duty in collaboration with the affected aboriginal peoples.[118] It would not convert operational decisions into strategic, higher-level decisions that require more expansive consultation but would allow the parties to attempt ambitious arrangements if they desired.[119] It would not expose proponents to undue harm but would require them to bear some of the risks introduced by their proposals. Finally, it would not allow the "remedy tail" to wag the "liability dog," since the Crown would remain liable for its constitutional failures.[120]

However, this proposed remedy would have second-order effects, which should be acknowledged even if they cannot be fully explored at this time. The Crown would almost certainly respond to the diffusion of this new remedial approach and the attendant increase in potential Crown liability. That response need not – and likely would not – be uniform. Especially at the outset, as the practice began to spread and its legal implications remained unclear, different authorities likely would adopt different approaches. While some ministries or provinces might simply address the uncertainty directly by bolstering consultation efforts, others could try to shift some of the uncertainty back to the proponent, whether through revised contract or permit terms that release the Crown from liability for

---

[117] *West Moberly*, *supra* note 68 at ¶163; *Adams Lake*, *supra* note 56 at ¶63.
[118] *Lax Kw'alaams Indian Band v British Columbia (Minister of Sustainable Resource Management)*, 2002 BCSC 1075 at ¶¶34 and 37.
[119] See e.g. *Louis*, *supra* note 92 at ¶¶93-118; *Chartrand*, *supra* note 65 at ¶200.
[120] *Haida Nation*, *supra* note 1 at ¶55.

disruptions arising from inadequate consultation or via new regulations or even legislation that limits Crown liability.

In turn, proponents likely would respond with a combination of exit and voice.[121] Some proponents would decline the additional uncertainty, forego their prospective projects, and invest their capital into other pursuits. Reduced demand for Crown authorizations might then induce governments to cut the overall cost of projects by lowering fees, royalties, and taxes or relaxing regulations that impose indirect costs. In contrast, proponents that are less sensitive to legal and economic uncertainty could work with the Crown to help it fulfill the duty to consult, whether formally (e.g. by accepting more delegated procedural responsibilities) or informally (e.g. by encouraging officials to consult properly on individual decisions or even lobbying politicians to address the duty at a higher level). Of course, each such response would have its own consequences, which would provoke further deliberations, decisions, and ramifications into the future. The ultimate effects of this simple remedial adjustment cannot be predicted. The relationships are too complex, the conditions too diverse, the developments too ambiguous, and the range of responses too broad. However, these uncertain impacts are not a reason to reject this proposal. Rather, they are the point.

This penalty default remedy would provide a practical step toward the sort of inquiry required by reconciliation. It would spread the uncertainty arising from the finding of a constitutional breach among the parties best positioned to devise a satisfactory response. It would encourage them to contemplate, explore, and develop new possible relationships. But this proposed approach is not a panacea. It would not ensure the parties solve their common problems. It only would improve the odds by making the *status quo* untenable for everyone. The "unfinished business of reconciliation" would remain the responsibility of aboriginal peoples and the Crown, as it must.[122]

---

[121] Albert O. Hirschman, Exit, Voice, and Loyalty (Harvard University Press, 1970), ch. 9.
[122] *Manitoba Metis Federation*, *supra* note 7 at ¶140.

5. Conclusion

The duty to consult needs work. The doctrine is at risk of going stale, characterized by thin procedural requirements and weak remedies. Similarly, the practice of consultation has grown stolid with impassive policies and tiresome routines. Their promise has dimmed but they are not beyond redemption. A penalty default remedy that increases and more evenly distributes uncertainty could revive their prospects and prompt some steps toward reconciliation. However, unless lawyers, courts, and academics identify other practical ways to encourage experimentation, reconciliation will remain out of reach.