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REVITALIZING RIGHTS: PRACTICABLE PROPOSALS FOR THE LAW OF SECTION 35 CONSULTATION AND ENVIRONMENTAL ASSESSMENT

Ryan Ng *

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ABSTRACT

The duty to consult and accommodate Indigenous peoples under section 35 of the *Constitution Act*, *1982* is frequently fulfilled through environmental assessments. However, environmental statutes and the common law do not always properly reflect the constitutional nature of the duty, nor do they ensure that decisions are environmentally sound. In light of these shortcomings, this paper recommends three reforms: (1) a revision of the federal *Impact Assessment Act;* (2) the codification of environmental rights; and (3) a change in the standard of review applied to administrative decisions stemming from environmental assessments. These adjustments would not subvert the current legal framework. Nonetheless, they have the potential to assist in advancing the related goals of sustainable development and reconciliation between Canada and Indigenous peoples.

* JD (Osgoode Hall Law School, 2021) and Student-at-Law, Ontario Ministry of the Attorney General. The views expressed herein are my own and do not purport to represent the positions of the Ministry of the Attorney General. Special thanks to Professor Karen Drake for her mentorship and comments on earlier versions of this paper. I also thank Rebecca Gill, Sarah Lachance, the other Appeal editors, and the two anonymous reviewers for their feedback and help in bringing the article to fruition.

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INTRODUCTION

The intersection between the duty to consult Indigenous peoples under section 35 of the *Constitution Act, 1982*[1] and the law of environmental assessment ("EA") is no secret. It has been well-documented by scholars and is frequently the subject of litigation.[2] The purpose of this paper is limited: to suggest potential reforms to the law of section 35 consultation and EA. Specifically, I propose amendments to sections 22 and 63 of the federal *Impact Assessment Act* ("*IAA*");[3] the legislation of environmental rights; and the use of the correctness standard in reviewing the adequacy of consultation carried out by administrative actors. The overarching objective of these proposals is to make environmental decision-making more sustainable and attuned to the concerns of Indigenous peoples.

My aim is not to review the relationship between the duty to consult and EA in a comprehensive manner—nor is it to assess the normative foundations of the two frameworks, though these are by no means beyond reproach.[4] Instead, this paper proceeds on the basis that the convergence of the duty to consult and EA is a given, accepting their stated objectives—reconciliation[5] and environmental protection and sustainable development,[6] respectively—at face value. Before turning to my suggested reforms, however, I begin with a brief explanation of the merger and its drawbacks.

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1 *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

2 The secondary literature and jurisprudence are voluminous. Academic commentary includes Kirk Lambrecht, *Aboriginal Consultation, Environmental Assessment, and Regulatory Review in Canada* (Regina, SK: University of Regina Press, 2013); Neil Craik, "Process and Reconciliation: Integrating the Duty to Consult with Environmental Assessment" (2016) 53:2 Osgoode Hall LJ 632; Matthew Hodgson, "Pursuing a Reconciliatory Administrative Law: Aboriginal Consultation and the National Energy Board" (2016) 54:1 Osgoode Hall LJ 125; and Jocelyn Stacey, "The Deliberative Dimensions of Modern Environmental Assessment" (2020) 43:2 Dal LJ 865. High-profile cases include *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [*Clyde River*]; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 [*Ktunaxa Nation*]; and *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 [*Tsleil-Waututh Nation*].

3 *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].

4 For discussion of the duty to consult, see Gordon Christie, "A Colonial Reading of Recent Jurisprudence" (2005) 23:1 Windsor YB Access Just 17; Timothy Huyer, "Honour of the Crown: The New Approach to Crown-Aboriginal Reconciliation" (2006) 21 Windsor Rev Legal Soc Issues 33; and Robert Hamilton & Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev 729. For discussion of environmental assessment, see Nathalie Chalifour, "Bringing Justice to Environmental Assessment: An Examination of the Kearl Oil Sands Joint Review Panel and the Health Concerns of the Community of Fort Chipewyan" (2010) 21 J Envtl L & Prac 31; Robert Gibson, Meinhard Doelle & John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016) 29 J Envtl L & Prac 257.

5 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 32 [*Haida Nation*].

6 Lambrecht, *supra* note 2 at 39.

I. THE MERGER BETWEEN SECTION 35 CONSULTATION AND ENVIRONMENTAL ASSESSMENT

As environmental law scholar Neil Craik points out, there are practical and theoretical reasons to merge the duty to consult and EA. On a practical level, "much of the information and analysis of the environmental effects of a proposed activity will be required to assess the impacts of that same activity on Aboriginal rights and interests."[7] It is therefore more efficient for governments to fuse the two processes. At the same time, Indigenous communities that may be affected by projects undergoing EAs have an incentive to participate in the combined procedure. These projects can have wide-ranging and lasting impacts—including the exacerbation of climate change, which affects Indigenous communities in a "significant and differential" manner.[8] As constitutional and human rights scholar Brenda Gunn notes, climate change has direct effects on Indigenous peoples' traditional territories, cultural practices, and diets.[9] It also worsens existing inequalities in healthcare and housing.[10] In short, while the duty to consult and EA are not perfectly congruent,[11] an activity's environmental consequences will often dovetail with its consequences for Aboriginal rights and title and *vice versa*.[12]

From a theoretical point of view, the duty to consult and EA share an underlying assumption that, as Craik puts it:

> by requiring decision makers to consider the impacts of an activity on the natural environment or on the rights and interests of Aboriginal peoples, those interests will be accounted for and reflected in the outcome of the decision, notwithstanding the absence of formal substantive obligations to arrive at a particular result.[13]

In this way, the duty to consult and EA both serve as conduits for input that should assist the Crown in decision-making. However, the Crown need not be the only beneficiary of this consonance. As Gunn argues, Indigenous participation in decision-making is a precondition to the meaningful exercise of other rights, such as the right to manage lands and resources and, crucially, the right to self-determination.[14] Procedural entitlements can thus complement substantive ones.

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7 Craik, *supra* note 2 at 633.

8 Brenda L Gunn, "Protecting Indigenous Peoples' Rights Through Indigenous Peoples' Participation in Decision-Making: A Climate Change Example" (2020) 17:1 MJSDL 3 at 9. See also the SCC's recent comment in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 11.

9 Gunn, *supra* note 8 at 7–9.

10 *Ibid* at 9.

11 Diana Audino, Stephanie Axmann, Bryn Gray, Kim Howard & Ljiljana Stanic, "Forging a Clearer Path Forward for Assessing Cumulative Impacts on Aboriginal and Treaty Rights" (2019) 57:2 Alta L Rev 297 at 318–324 (as the authors rightly point out at 318, EAs will not be triggered in every instance where the duty to consult arises).

12 Latin term indicating that the statement remains true if the main items are flipped. That is, an activity's impacts on Aboriginal rights and title are frequently environmental in nature.

13 Craik, *supra* note 2 at 634–635.

14 Gunn, *supra* note 8 at 23–24. See also John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 177–179 (noting the link between weak environmental protections and barriers to the exercise of Indigenous sovereignty).

The merger goes beyond functional and conceptual harmony. Indeed, it has been formalized in Canadian law by courts and legislatures. In *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, one of the first duty to consult cases, the Supreme Court of Canada ("SCC") held that British Columbia fulfilled its duty to consult by following the process under its *Environmental Assessment Act*.[15] Six years later, in *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, the SCC confirmed that the Crown could delegate its duty to consult to an administrative tribunal.[16] The SCC has reaffirmed in subsequent decisions that an EA overseen by a body like the National Energy Board can effectively fulfill the duty to consult.[17]

Legislatures have been active in this area as well. For example, the *IAA* requires bodies conducting EAs to consider "the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*."[18] The *Canadian Energy Regulator Act*, which created the successor to the National Energy Board in 2019, contains a similar directive.[19]

II. DRAWBACKS TO THE MERGER

It would not be an overstatement to say that, so far, the merger's formalization—initially through judicial decisions and more recently in legislation—has not achieved the goal of dispute resolution through regulatory processes. The protracted litigation over the Trans Mountain Pipeline expansion exemplifies this failure.[20]

The problem lies partly in the design of both the duty to consult and EA. While they seek to mediate between diverse viewpoints and generate compromise, neither is necessarily equipped to do so. With respect to the duty, the SCC remarked in *Haida Nation v British Columbia (Minister of Forests)* that "[t]here is no duty to reach agreement" and "[t]he Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns."[21] In 2017, the Court reinforced these statements in *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*.[22] Former Chief Justice McLachlin and Justice Rowe wrote that "[t]he s. 35 right to consultation and accommodation

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15 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 22.

16 *Rio Tinto Alcan Inc v Carrier Sekani Tribunal Council*, 2010 SCC 43 at para 56 [*Carrier Sekani*].

17 *Clyde River*, *supra* note 2 at paras 30–34; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at paras 32–34 [*Chippewas of the Thames*].

18 *IAA*, *supra* note 3, s 22(1)(c). For a provincial example, see Ontario's *Mining Act*, RSO 1990, c M.14, ss 2, 78.2, and 170.1. These provisions were all added or amended by the *Mining Amendment Act, 2009*, SO 2009, c 21.

19 *Canadian Energy Regulator Act*, SC 2019, c 28, s 10, s 56.

20 Rhianna Schmunk, "Supreme Court of Canada will not hear challenges against Trans Mountain pipeline expansion" *CBC News* (5 March 2020), online: <www.cbc.ca/news/canada/british-columbia/trans-mountain-pipeline-appeals-supreme-court-of-canada-1.5486592> [perma.cc/NB8C-UK3C]; *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at paras 1–4, leave to appeal denied, 2020 CanLII 43130 (SCC) [*Coldwater First Nation*].

21 *Haida Nation*, *supra* note 5 at paras 10, 45.

22 *Ktunaxa Nation*, *supra* note 2.

is a right to a process, not a right to a particular outcome" and, therefore, "in some cases [reconciliation] may not be possible."[23] While consultation may give rise to a duty to accommodate in some cases, there is no guarantee that a requested accommodation will be granted.[24] Similarly, statutes like the *IAA* require decision-makers to consider factors such as sustainability and climate change in approving projects but do not compel them to select the most environmentally responsible option.[25] The ultimate test under the *IAA* is whether the project is "in the public interest."[26]

Another obstacle to satisfactory outcomes is the fact that the duty to consult and EA generally focus on individual projects; neither consistently places decisions in a broader context or addresses the aggregate impacts of industrial activity.[27] Consequently, the extent of the inquiries that the two processes mandate is limited. Historical grievances, however inextricable they may be from the decision in question, are set aside.[28] For example, in *Carrier Sekani*, Justice Binnie rejected "the logic of the poisoned tree," which would "preclude the Crown from subsequently benefitting from [past wrongs]."[29] In that case, the lack of consultation on a dam and water diversion project in the 1950s did not justify a pause on further development and an overhaul of the resource's management.[30]

Relatedly, the existing regime also neglects the problem of long-term environmental degradation. As Justice Burke stated in *Yahey v British Columbia*, which involved an infringement claim under Treaty 8, "reliance on the duty to consult to prevent an infringement … presupposes both the ability of those consultation processes to consider and address concerns about cumulative effects as opposed to simply single projects or authorizations, as well as the success of those consultations."[31] The same is true of EA: reliance on discrete assessments to prevent environmental harm presumes the assessments' capacity to take in the necessary information and facilitate truly sustainable development. As environmental

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23 *Ibid* at para 114.

24 *Ibid* at para 79.

25 *IAA*, *supra* note 3 at s 63. See also *Environmental Assessment Act*, SBC 2018, c 51, s 2.

26 *IAA*, *supra* note 3 at ss 60, 62, 63.

27 To its credit, the *IAA* does require that the "cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out" be considered: *ibid*, s 22(1)(a)(ii). However, as I argue in Part III.A.(i) of this paper with respect to s 22(1)(c), the factors are not arranged in a hierarchy such that the decision-maker must assign particular importance to certain items. Instead, the decision-maker is essentially free to weigh the factors as they see fit.

28 *Chippewas of the Thames*, *supra* note 17 at para 41; Janna Promislow, "Irreconcilable? The Duty to Consult and Administrative Decision-Makers" (2013) 22:1 Const Forum Const 63 at 67–68.

29 *Carrier Sekani*, *supra* note 16 at para 54.

30 *Ibid*.

31 *Yahey v British Columbia*, 2021 BCSC 1287 at para 500 [*Yahey*]. Burke J found that BC had unjustifiably infringed Treaty 8 "in permitting the cumulative impacts of industrial development to meaningfully diminish [the Blueberry River First Nation's] exercise of its treaty rights" (para 1894). The Province declined to appeal: Government of BC, "Attorney General's Statement on *Yahey v British Columbia*" (28 July 2021), online: *BC Gov News* <news.gov.bc.ca/releases/2021AG0117-001488> [perma.cc/3Y7Z-WJZ3].

and natural resources law scholar Martin Olszynski observes, there is a danger that EA's narrow and short-term outlook will lead to the environment's "death by a thousand cuts."[32] The duty to consult and EA thus create pathways to improved decision-making but do not ensure it. The state ultimately retains the power to approve a project over the objections of affected Indigenous peoples.[33]

Moreover, the procedural nature of the duty to consult and EA means that judicial review only offers partial or temporary solutions to parties dissatisfied with a government decision. For example, the Federal Court of Appeal ("FCA") quashed the initial approval for the Trans Mountain Pipeline expansion in *Tsleil-Waututh Nation v Canada (Attorney General)*, in part because the required consultation with Indigenous communities had been deficient.[34] However, a subsequent judicial review application, *Coldwater First Nation v Canada (Attorney General)*—which came after Canada had redone the assessment and consultation in accordance with *Tsleil-Waututh Nation*—was unsuccessful.[35] The FCA upheld the second authorization of the project and noted:

> this was anything but a rubber-stamping exercise. The end result was not a ratification of the earlier approval, but an approval with amended conditions flowing directly from the renewed consultation. It is true that the applicants are of the view that their concerns have not been fully met, but to insist on that happening is to impose a standard of perfection, a standard not required by law.[36]

The Trans Mountain affair shows that Indigenous litigants' recourse is generally limited to delay and a rerun of the decision-making process. At best, they can hope that reconsideration will lead to a different outcome or the attachment of conditions to an approval. But provided that the Crown or its delegate follows the prescribed procedure, the state can proceed regardless of the impact on the claimed rights or title.[37]

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32 Martin Olszynski, "Impact Assessment" in William Tilleman et al, eds, *Environmental Law and Policy*, 4th ed (Toronto: Emond Montgomery, 2020) 453 at 459.

33 Karen Drake, "Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation" (2020) 48:4 Fed L Rev 570 at 584–585 [Drake, "Invitation"]; Hamilton & Nichols, *supra* note 4 at 736.

34 *Tsleil-Waututh Nation*, *supra* note 2 at para 754.

35 *Coldwater First Nation*, *supra* note 20 at paras 75–78.

36 *Ibid* at para 77.

37 The analysis differs where a treaty is involved because treaty rights, unlike freestanding Aboriginal rights and title, are not claimed. Courts presume that the Crown knows the treaty's contents: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34 [*Mikisew Cree 2005*]. Moreover, state action may at some point constitute an unjustified infringement of the treaty: *ibid* at para 48 and *Yahey*, *supra* note 31 at paras 499–543. For commentary on this second point, see Robert Hamilton & Nick Ettinger, "*Yahey v British Columbia* and the Clarification of the Standard for a Treaty Infringement" (24 September 2021), online (blog): *ABlawg*, <www.ablawg.ca/wp-content/uploads/2021/09/Blog_RH_NE_Yahey_Infringement.pdf> [perma.cc/27RT-ZRNF]. While I reference some cases that involve treaties in this paper, my principal concern is the non-treaty context, which is exemplified by *Coldwater First Nation* and *Ktunaxa Nation*.

For example, in *Ktunaxa Nation*, the Ktunaxa claimed that a proposed ski resort would drive away Grizzly Bear Spirit, a principal spirit in their religious tradition.[38] The SCC majority acknowledged that the resort's negative effects on the Nation's spiritual practices could manifest long before the Ktunaxa are able to formally establish section 35 rights or title.[39] They nonetheless held that the court could not make "far-reaching constitutional declarations in the course of judicial review proceedings incidental to, and ill-equipped to determine, Aboriginal rights and title claims."[40] This statement underscores the lack of substantive constraints on government actors in this area of law, even where the potential infringements are serious and the establishment of section 35 rights are distant and impractical.

III. POTENTIAL SOLUTIONS

How, then, can EAs that incorporate consultation avoid creating a negative synergy between the twin processes and instead realize section 35's promise? To my mind, it is possible to move towards this goal by fine-tuning legislation and the common law pertaining to the duty to consult and EA. There are two connected obstacles standing in the way. First, environmental statutes like the *IAA* do not properly reflect the constitutional nature of the duty to consult—nor, for the most part, do they contain independent protection for lands and waters. As a result, Indigenous communities are given an incomplete box of legal tools with which to challenge administrative decisions. Second, courts have been overly deferential in enforcing the duty in the EA context. This deference weakens constitutional guarantees and leaves judicial review applicants without a meaningful oversight mechanism vis-à-vis the state.

My suggested changes can be implemented within the existing legal framework. For present purposes, I do not consider more thoroughgoing reforms, including proposals based on Indigenous laws. That is not to say that these proposals are in any way undesirable or impracticable. They are simply beyond the narrow scope of this paper and, in any case, have been convincingly canvassed by other authors.[41] As well, I believe that notwithstanding the manifest structural problems in Canadian Aboriginal law,[42] incremental steps in the right direction are worth examining—at least as temporary solutions pending a more comprehensive reworking of the framework. Accordingly, I argue here that the law would benefit from a renewed effort at developing—to borrow public law scholar Kate Glover Berger's phrasing—

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38 *Ktunaxa Nation*, *supra* note 2 at para 5.

39 *Ibid* at para 86.

40 *Ibid*.

41 Grace Nosek, "Re-Imagining Indigenous Peoples' Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions," (2017) 50 UBC L Rev 95 at 152–160; Aaron Mills, "Aki, Anishinaabek, kaye tahsh Crown" (2010) 9 Indigenous LJ 109 at 139—147; Karen Drake, "The Trials and Tribulations of Ontario's Mining Act: The Duty to Consult and Anishinaabek Law" (2015) 11:2 MJSDL 184 at 213—217 [Drake, "Trials and Tribulations"]; Drake, "Invitation", *supra* note 33 at 579–585.

42 Christie, *supra* note 4 at 42–53; Drake, "Invitation", *supra* note 33 at 570–573 (both (1) observing that Canadian Aboriginal law rests on a colonial foundation—and continues to reinforce that foundation—and (2) arguing that a fundamental departure is needed).

"statutory frameworks of principle, procedure, and obligation" on the part of legislatures and a rediscovery of "healthy vigilance and skepticism" on the part of the courts.[43]

However, I would be remiss to skate over the concept of "free, prior, and informed consent" ("FPIC"), which has application in Canadian law as part of the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("*UNDRIP Act*") that was enacted by Parliament in June 2021.[44] Prior to the passage of the *UNDRIP Act*, there was significant advocacy for the implementation of FPIC but also disagreement about what it would look like in practice. Some, like climate law scholar Grace Nosek, felt that FPIC should supplant the duty to consult. Nosek argued that, unlike the malleable duty, FPIC would empower Indigenous communities and create legal certainty; it was therefore a better basis for Crown-Indigenous relationships.[45]

Others suggested that the principle of consent was compatible with the existing framework.[46] For example, the Expert Panel for the Review of Environmental Assessment Processes wrote in its 2017 report to the Minister of Environment and Climate Change: "FPIC is not in conflict with the duty to consult and accommodate; to the contrary, it should strengthen and supplement consultation and accommodation."[47] The federal government has since taken a similar position, writing on the Department of Justice website that FPIC "builds on and goes beyond" the duty.[48] The webpage goes on to say that "the [*UNDRIP Act*] does not immediately change Canada's existing duty to consult Indigenous groups, or other consultation and participation requirements set out in legislation like the *Impact Assessment Act*."[49]

Given the infancy of the *UNDRIP Act* and the contending interpretations of FPIC's precise meaning, it is difficult (and perhaps unwise) to predict how the legislation will affect the law of consultation and EA—not to mention how it will interact with various Indigenous perspectives. For these reasons, I leave a more detailed discussion to another day and proceed with my analysis of the law as it stands, beginning with environmental statutes.

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43 Kate Glover Berger, "Diagnosing Administrative Law: A Comment on *Clyde River* and *Chippewas of the Thames River First Nation*" (2019) 88 SCLR (2d) 107 at 127, 136.

44 *United Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIP Act*]. "Application" is the word used in ss 2(3), 4. FPIC is mentioned in arts 10, 11, 19, 28, 29, 32 of the *Declaration*: see the Schedule to the Act.

45 Nosek, *supra* note 41 at 124–141.

46 Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNBLJ 235 at 265–267.

47 Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa, ON: Canadian Environmental Assessment Agency, 2017) at 29.

48 Government of Canada, "About the legislation" (last modified 10 December 2021), online: *Department of Justice* <www.justice.gc.ca/eng/declaration/about-apropos.html> [perma.cc/C4TA-F497].

49 *Ibid*.

A. Statutory Frameworks

i. EA Statutes

Legislatures should amend statutes that govern EAs to reflect the constitutional status of section 35 obligations. While this suggestion applies equally to provincial EA legislation, I spotlight the *IAA* for two main reasons: (i) as a federal statute, it has wide application; and (ii) it is the easiest to build on because it clearly intends to integrate the law of section 35.[50]

As previously mentioned, the *IAA* mandates consideration of the impact that a project may have on any Indigenous group and on section 35 rights. Sections 22 and 63 read (in part):

> 22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
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> …
>
> (c) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*, 1982;
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> …
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> 63 The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:
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> …
>
> (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act*, 1982; …[51]

However, at the impact assessment stage (section 22), this factor is only one of 20; at the decision-making stage (section 63), it is one of five.[52] What is more, the Act does not require that this factor be given particular weight, despite the fact that other enumerated factors—such as "comments received from the public"—are non-constitutional in nature. [53] As the SCC noted in *Carrier Sekani*, "the constitutional dimension of the duty to consult gives rise

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50 Compare, for example, Ontario's *Environmental Assessment Act*, RSO 1990, c E.18, which is less clear about the position of Aboriginal and treaty rights (not to mention Indigenous concerns more generally): ss 2.1, 16(6).

51 *IAA, supra* note 3 at ss 22(1)(c), 63(d).

52 *Ibid* at ss 22(1)(a)–(t), 63(a)–(e)

53 *Ibid* at s 22(1)(n).

to a special public interest" that surpasses economic concerns.[54] This statement should apply equally to all non-constitutional concerns.[55]

That is not to say that the other factors are unimportant. Indeed, the *IAA*'s list represents a significant improvement over the one in its predecessor, the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*"), which contained only 10 factors—none of which mentioned Indigenous peoples.[56] On top of section 22(1)(c), section 22 of the *IAA* requires that the following be taken into account: "Indigenous knowledge provided with respect to the designated project," "considerations related to Indigenous cultures raised with respect to the designated project," and "any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project."[57] I see the inclusion of such items as a positive development because it alerts decision-makers to potential nonphysical impacts of industrial projects and thereby promotes EA's capacity to gather pertinent information.

Nonetheless, the point stands: although some of the other factors may be relevant, they do not amount to constitutional responsibilities—unlike the duty to consult. The *IAA* could be improved by making clear the unique position of the duty. Analogous amendments have been made in the *Charter* context.[58] For example, in 2017, the *Criminal Code* was revised to include provisions that recognize—in light of section 2(b)'s guarantee of freedom of the press—the need for additional procedural protections for journalists whose work product is sought by the police in the course of a criminal investigation.[59] Section 488.01(3) of the *Code* reads:

> (3) A judge may issue a warrant, authorization or order under subsection (2) only if, in addition to the conditions required for the issue of the warrant, authorization or order, he or she is satisfied that
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> (a) there is no other way by which the information can reasonably be obtained; and
>
> (b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.[60]

In my view, this provision legislates a variation on the dissent by Justice McLachlin (as she then was) in *Canadian Broadcasting Corp v Lessard*, where she proposed that search warrants

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54 *Carrier Sekani*, *supra* note 16 at para 70. See also *Clyde River*, *supra* note 2 at para 40.

55 Huyer, *supra* note 4 at 48.

56 *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s 19 [*CEAA 2012*]. Martin Olszynski has compared the two Acts in detail: Olszynski, *supra* note 32 at 466–485.

57 *IAA*, *supra* note 3, s 22(1)(g), (l), (q). These are not, however, mandatory considerations under s 63. Under the *CEAA 2012*, assessments were permitted—but not required—to consider "Aboriginal traditional knowledge" (*CEAA 2012*, *supra* note 56, s 19(3)). Several other items pertaining to Indigenous peoples were listed as possible environmental effects under s 5.

58 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

59 *Criminal Code*, RSC 1985, c C-4, ss 488.01, 488.02 [*Criminal Code*]. These provisions were added by the *Journalistic Sources Protection Act*, SC 2017, c 22. Amendments were also made to the *Canada Evidence Act*, RSC 1985, c C-5, respecting the production of journalistic materials in judicial proceedings. The SCC interpreted the latter in *Denis v Côté*, 2019 SCC 44 [*Denis*].

60 *Criminal Code*, *supra* note 59, s 488.01(3). See also *Canada Evidence Act*, *supra* note 59, s 39.1(7).

targeting journalists be justified under section 1 of the *Charter*.[61] Like Justice McLachlin's inquiry, section 488.01(3) of the *Criminal Code* is meant to ensure that journalistic materials, which are protected by section 2(b) of the *Charter*,[62] are accessible to law enforcement only (i) as a last resort and (ii) if the investigative need exceeds the negative impact on press freedom. For the purposes of this paper, it shows how legislatures can weave together constitutional guarantees and statutory processes, with the intention of making certain—*ex ante*[63]—that discretionary decisions are lawful.

There is no reason why a similar harmonization of EA legislation and the duty to consult could not occur. Such an alignment would not completely remove the discretion that decision-makers need to respond to complex factual matrices. It would merely remind them of the unique relationship between the state and Indigenous peoples and the responsibilities that flow therefrom.[64] Relatedly, my proposal would be a natural extension of the reasoning in *R v Sparrow*, where the SCC held that Aboriginal rights under section 35, though not absolute, should be given priority by governments in regulating access to resources.[65] This logic should apply equally to the duty to consult, which (though not an Aboriginal right *per se*) enjoys constitutional status. A foregrounding of the duty, like the elevation of press rights in the *Criminal Code*, is necessary to ensure that government action is constitutionally compliant—not a bonus.

Therefore, consultation and accommodation should be brought to the fore and made preconditions to the advancement of a project in a revised *IAA*. This revision would move the Act towards a reaffirmation of section 35 interests, including the right to consultation and accommodation, and away from a *Gladstone*-like model, under which section 35 is placed on the same footing as an array of non-constitutional objectives.[66]

If Parliament amended the *IAA* in light of the above discussion, drawing in particular on the example of the *Criminal Code*, sections 22 and 63 might look like the following:

> 22 (1) The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
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> …

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61 *Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421 at 455–457, 130 NR 321.

62 *Denis*, *supra* note 59 at para 46.

63 Latin term meaning "before the event."

64 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 21 [*Mikisew Cree 2018*].

65 *R v Sparrow*, [1990] 1 SCR 1075 at 1116, 1119, 111 NR 241. That is, "after valid conservation measures have been implemented."

66 *R v Gladstone*, [1996] 2 SCR 723 at paras 56–75, 200 NR 189. Lamer CJ expanded the list of government objectives that can be asserted in infringing s 35 rights without "internal limitations". For an explanation of how *Gladstone* departed from *Sparrow*, see John Borrows & Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials, & Commentary*, 5th ed (Toronto: LexisNexis Canada, 2018) at 135, 141–142.

> (c) the impact that the designated project may have on any Indigenous group and whether the obligations owed to the Indigenous peoples of Canada under section 35 of the *Constitution Act, 1982*, including the duty to consult and accommodate, have been fulfilled; …
>
> 63 (1) The Minister's determination in respect of a designated project under paragraph 60(1)(a) or the Governor in Council's determination in respect of a designated project under section 62 that the designated project is in the public interest must be based on the report with respect to the impact assessment and shall be made only if:
>
> …
>
> (d) the obligations owed to the Indigenous peoples of Canada under section 35 of the *Constitution Act, 1982*, including the duty to consult and accommodate, have been fulfilled; … [emphasis added]

There are, of course, other ways to revise the *IAA*. I recognize that these modest amendments would not change the law to the extent that consultation is already required and its parameters are governed by *Haida Nation* and its successors. I recognize as well that they would not be foolproof; there will undoubtedly be cases where consultation is alleged to be insufficient and must be contested via judicial review. My proposed revisions should nonetheless advance the objectives of making the special status of section 35 obligations explicit and ensuring that genuine consultation—which "substantially addresses the concerns" of the Indigenous peoples involved[67]—occurs prior to the authorization of a project by the Minister of the Environment or Cabinet, thereby averting costly litigation after the fact.

ii. Environmental Rights

Another possible improvement in the legislative arena would be the codification of environmental rights, such as the right to a healthy environment. This right has been recognized in international law[68] and exists in several provincial and territorial statutes. For example, Yukon's *Environment Act* provides "the right to a healthful natural environment."[69] Quebec's *Environmental Quality Act* goes further, promising the "right to a healthy environment and to its protection, and to the protection of the living species inhabiting it."[70] The same province's *Charter of Human Rights and Freedoms* similarly provides "[the] right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards

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67 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 220 NR 161, Lamer CJ ("consultation must be in good faith, and with the intention of substantially addressing the concerns of aboriginal peoples whose lands are at issue" at para 168). Of course, *Delgamuukw* preceded *Haida Nation* and Lamer CJ was referring to situations in which Aboriginal title had already been established.

68 *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*, UN Doc A/CONF.48/14/Rev. 1 (1972) at 3. Also, article 6 (the right to life) of the *International Covenant on Civil and Political Rights* has been interpreted by the Human Rights Committee as encompassing environmental rights: *General Comment No 36*, UN Doc CCPR/C/GC/36 (2019) at 13.

69 *Environment Act*, RSY 2002, c 76, s 6 [*Environment Act*].

70 *Environmental Quality Act*, CQLR c Q-2, s 19.1 [*Environmental Quality Act*].

provided by law."[71] However, the right is not recognized at the federal level,[72] nor has it been read into the Constitution[73]—though the SCC has acknowledged it, without elaborating, on occasion.[74]

While rights like the right to a healthy environment would apply to the general public, environmental rights can also be specific to Indigenous peoples. For example, article 29 of *UNDRIP*—now part of the aforementioned *UNDRIP Act*—provides that "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources."[75] It bears repeating that much about the *UNDRIP Act* remains uncertain. The numbered provisions merely commit Canada to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration" and, more specifically, to "prepare and implement an action plan to achieve the objectives of the Declaration."[76] This language implies that further steps are needed to operationalize the right contained in article 29 before it can have the effects contemplated below. Thus, for now, this paper continues on the assumption that legislation of environmental rights is not a moot point.

How might statutory rights interact with the duty to consult and EA? I suggest that they would provide a meaningful check on administrative decision-making as one of the "contextual constraints [that] dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt."[77] In the absence of a treaty, environmental rights may help bridge the gap between asserted rights or title, which currently give rise to the purely procedural protection of the duty to consult, and established rights or title, which are costly and time-consuming to prove. *Ktunaxa Nation* illustrated the remedial lacuna between an unsatisfactory decision-making process and a successful section 35 rights or title claim that would result in enforceable obligations. In the interim, until they established Aboriginal rights or title, the Ktunaxa were faced with the despoliation of the lands that they held to be sacred. However, even where there is a treaty, statutory rights could act as a supplement.

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71 *Quebec Charter of Human Rights and Freedoms*, CQLR c C-12, s 46.1.

72 *Canadian Environmental Protection Act, 1999*, SC 1999, c 33. An amendment was proposed by the House of Commons Standing Committee on Environment and Sustainable Development in 2017 and rejected by the federal government: Sara Bagg & Katie Sykes, "Human Rights and Animal Rights" in William Tilleman et al, *Environmental Law and Policy*, *supra* note 32, 575 at 586.

73 Proponents have argued that environmental rights can be located in the *Charter*: David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) at 176–185; Nathalie Chalifour & Jessica Earle, "Feeling the Heat: Climate Litigation Under the *Canadian Charter's* Right to Life, Liberty, and Security of the Person" (2018) 42:4 Vt L Rev 689 at 714–767. Similar arguments have been made in litigation: *La Rose v Canada*, 2020 FC 1008 (granting motion to strike *Charter* claim under ss 7 and 15(1)); *Misdzi Yikh v Canada*, 2020 FC 1059 (granting motion to strike); and *Mathur v Ontario*, 2020 ONSC 6918 (dismissing motion to strike).

74 *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 55, 24 OR (3d) 454.

75 *UNDRIP Act*, *supra* note 44, Schedule, art 29.

76 *Ibid*, ss 5, 6.

77 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 90 [*Vavilov*].

Specifically, statutory rights could provide protection to lands or waters that happen to be culturally or economically significant to an Indigenous community. Such protection might have made a difference, for example, in the two *Prophet River First Nation v Canada (Attorney General)* cases, which proceeded in tandem through the British Columbia and Federal Courts.[78] The Prophet River First Nation ("PRFN") unsuccessfully challenged the approval of a hydroelectric dam, the construction of which is ongoing and will eventually flood significant tracts of Treaty 8 territory.[79] The dam was greenlighted despite the finding that the project would have "significant adverse environmental effects" within the meaning of the *CEAA 2012*—including effects on Indigenous peoples' ability to use the land for traditional purposes.[80] The government had decided that these effects were "justified in the circumstances" under section 54(2) of the Act.[81] There was no possibility of further consultation, as the process was judged to have been adequate.[82] Both the British Columbia Court of Appeal and the FCA rejected the PRFN's remaining argument that the government was required to determine whether the dam's impact would constitute an unjustified infringement of its treaty rights.[83]

The legislation of environmental rights would create a "floor" of entitlements with which decision-makers would have to engage. It is true that the *IAA*, with its explicit mentions of health and sustainability,[84] would have called for a more rigorous assessment than that which occurred under the *CEAA 2012* and gave rise to the *Prophet River* litigation. Still, health and sustainability are only factors to be balanced against the various others in the Act, rather than actionable commitments.

Environmental rights would have bolstered the PRFN's claim for additional consultation and—more importantly—accommodation, because there would have been standalone protection for the land being flooded. Significantly, in cases where there is no treaty, statutory rights would apply regardless of the "strength of the case supporting the existence of the right or title."[85] In *Haida Nation*, the SCC held that the consultation and accommodation required varies with the circumstances. However, an environmental right will always require accommodation, no matter where the claim falls on the *Haida Nation* spectrum and even where it is said to be

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78 *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15, leave to appeal denied, 2017 CanLII 40511 (SCC) [*PRFN FCA*]; *Prophet River First Nation v British Columbia (Environment)*, 2017 BCCA 58, leave to appeal denied, 2017 CanLII 40513 (SCC) [*PRFN BCCA*].

79 *PRFN FCA*, *supra* note 78 at para 7; Andrew Kurjata & Meera Bains, "Site C dam budget nearly doubles to $16B, but BC NDP forging on with megaproject" *CBC News* (25 February 2021), online: <www.cbc.ca/news/canada/british-columbia/site-c-announcement-friday-1.5928719> [perma.cc/24CM-EGTD].

80 *PRFN FCA*, *supra* note 78 at para 5.

81 *Ibid*.

82 *PRFN BCCA*, *supra* note 78 at para 67.

83 *Ibid* at para 33; *PRFN FCA*, *supra* note 78 at para 74. See also *Mikisew Cree 2005*, *supra* note 37 at paras 31, 59 (where the SCC held that not every "taking up" of lands by Canada under Treaty 8 would require a *Sparrow* justification analysis). But see the clarification of the standard for infringement in *Yahey*, *supra* note 31 at paras 499–543 and the discussion in Hamilton & Ettinger, *supra* note 37.

84 *IAA*, *supra* note 3, s 22(1)(a)–(h).

85 *Haida Nation*, *supra* note 5 at para 39.

"dubious or peripheral."[86] In other words, the right would fix a baseline for project approvals. At the very least, the government would have to demonstrate that it took steps to address, in a substantive manner, concerns about the activity's impact on the environment.

To be clear, my argument is not that statutory environmental rights would be a panacea, nor that they can act as substitutes for constitutional rights. Legislation is easily repealed or amended, and the SCC has held that the legislative process itself is not subject to the duty to consult.[87] Despite these shortcomings, I believe that they could supplement the duty to consult and EA framework by constituting part of the "constellation of law" that would inform a decision.[88]

So far, I have spoken generally about environmental rights, advocating for their belonging in that constellation without indicating their precise location. They could be incorporated directly into regulatory statutes like the *IAA* and *Canadian Environmental Protection Act*. Alternatively, they could be written into separate legislation, like Ontario's *Environmental Bill of Rights*.[89]

Another wrinkle that must be ironed out is the procedural mechanism that would allow rights-holders to claim relief. Would it be broadly phrased like section 24(1) of the *Charter*, which allows anyone whose rights or freedoms have been infringed to "apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances"?[90] Or would it be more structured and tailored to the EA context?

Potential models include the statutes mentioned at the top of this section: (i) Yukon's *Environment Act*, which provides a right of action to everyone who has reasonable grounds to believe that "a person has impaired or is likely to impair the natural environment" or that the Yukon government has "failed to meet its responsibilities as trustee of the public trust to protect the natural environment";[91] and (ii) Quebec's *Environmental Quality Act*, which gives Superior Court judges in the province the power to grant injunctions to prevent breaches of section 19.1.[92] However, even if a means of enforcement were set out in legislation, the question of how the right should interact with administrative procedures would remain.

These questions do not have straightforward answers and, therefore, warrant more fulsome consideration in another forum. However, the premise that statutory environmental rights have a gap-filling role to play in this area of law should not be controversial, particularly in light of the disappointing—from the perspectives of sustainability and reconciliation under section 35—outcome of the *Prophet River* appeals.

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86 *Ibid* at paras 37, 43–45.

87 *Mikisew Cree 2018*, *supra* note 64 at paras 50 (Karakatsanis J), 144 (Brown J, concurring), 171 (Rowe J, concurring). But see para 92 (Abella J, concurring in the result but dissenting on this point).

88 *Vavilov*, *supra* note 77 at para 105.

89 *Environmental Bill of Rights, 1993*, SO 1993, c 28 (I note, in passing, that the "right to a healthful environment" is in the Preamble to the legislation but not any of its numbered provisions).

90 *Charter*, *supra* note 58 at s 24(1).

91 *Environment Act*, *supra* note 69 at s 8.

92 *Environmental Quality Act*, *supra* note 70 at s 19.2.

B. Judicial Review

As shown in the previous two sections, many of the disappointments illustrated by the case law are attributable to the legislative schemes within which administrative actors operate, rather than to the courts. These schemes favour flexibility, leaving the balancing of competing factors to frontline decision-makers and allowing Canadian governments to move forward despite lingering disagreements between them and other stakeholders. That said, courts have also contributed to the attenuation of section 35 by adopting a deferential posture in reviewing government decisions.

Deference has principled rationales: respect for the legislature's choice to delegate decision-making authority; recognition of non-judicial decision-makers' expertise and proximity to the evidence; and an acknowledgement that administrative proceedings are often more accessible than judicial proceedings.[93] Tying these rationales together is the notion that law is not the sole province of judges—i.e., that administrative actors may take part in applying and shaping it. A corollary of this notion is courts' increasing comfort with, or toleration of, statutory decision-makers deciding not only "ordinary" legal questions but also constitutional matters.[94]

This trend has resulted in an elision of administrative and constitutional law, or what is sometimes referred to by scholars as "administrative constitutionalism."[95] For example, the SCC has moved away from the *Oakes* justification framework[96] when dealing with individual state decisions that engage the *Charter*, instead conducting reasonableness review.[97]

Arguably, an analogous development has occurred in the duty to consult context. The default position is now that the determination of the scope of the duty is reviewed on the correctness standard, while the determination of whether the duty has been fulfilled is reviewed on the reasonableness standard.[98] In *Ktunaxa Nation*, the majority explained: "[a] decision that

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93 *Vavilov*, *supra* note 77 at para 29. I leave to other commentators the question of whether all decision-makers are equally entitled to deference: Sari Graben & Abbey Sinclair, "Tribunal Administration and the Duty to Consult" (2015) 65:4 UTLJ 382; Joseph Robertson, "Administrative Deference: The Canadian Doctrine That Continues to Disappoint" (2018) at 26–30, online: *CanLII* <www.canlii.ca/t/stvr> [perma.cc/3WWE-5K4F].

94 *Carrier Sekani*, *supra* note 16 at para 56; *R v Conway*, 2010 SCC 22 at paras 78–81.

95 Matthew Lewans, "Administrative Constitutionalism and the Unity of Public Law" (2018) 55:2 Osgoode Hall LJ 515.

96 *R v Oakes*, [1986] 1 SCR 103 at 138–140, 53 OR (2d) 71. See also *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, especially Charron J's remarks at paras 15–23.

97 *Doré v Barreau du Québec*, 2012 SCC 12 at paras 33-58. See also *Loyola High School v Quebec*, 2015 SCC 12; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32. In *Doré*, the court maintained that there was "conceptual harmony between reasonableness review and the Oakes framework" (para 57). On that point, see also *Loyola* at para 40.

98 *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 at paras 82–83 [*Ermineskin*].

an adequate consultation and accommodation process occurred is entitled to deference."[99] Therefore, "[a] reviewing judge does not decide the constitutional issues raised in isolation on a standard of correctness, but asks whether the decision…, on the whole, was reasonable."[100] This kind of review requires, as the FCA put it in *Coldwater First Nation*, "that we refrain from forming our own view about the adequacy of consultation," as "this would amount to what has now been recognized as disguised correctness review, an impermissible approach."[101]

This bifurcation of the duty into questions of scope and adequacy can be said to derive from *Haida Nation*. There, the SCC wrote that while the "existence or extent of the duty … is a legal question" that may require correctness review (to the extent that it is isolable from the facts), "the process itself would likely fall to be examined on a standard of reasonableness."[102] The Court went on: "[s]hould the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable."[103]

However, in a subsequent decision, *Beckman v Little Salmon/Carmacks First Nation*, the SCC appeared to contradict itself, stressing that decision-makers are "required to respect legal and constitutional limits" in exercising their discretion.[104] The majority continued: "In establishing those limits no deference is owed … The standard of review in that respect, *including the adequacy of the consultation*, is correctness."[105] Accordingly, "[a] decision maker who proceeds on the basis of inadequate consultation errs in law."[106] On the other hand, "if there was adequate consultation," then the remainder of the decision should be reviewed for reasonableness.[107]

In a recent paper regarding the impact of *Vavilov* on the duty to consult, Professors Howard Kislowicz and Robert Hamilton argue that *Haida Nation*'s reference to process does not encompass adequacy—thus leaving room for courts to follow *Beckman*, which has been sidelined.[108] Kislowicz and Hamilton state:

> The consultation "process" refers to the procedures and means of consultation and asks whether they were designed in such a way that they *could* permit sufficient consultation

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99 *Ktunaxa Nation*, *supra* note 2 at para 77. However, note that—paradoxically—the SCC gave no deference to the Minister on the freedom of religion question: *ibid* at paras 58–75; Paul Daly, "The Supreme Court of Canada and the Standard of Review: Recent Cases" (11 November 2017), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2017/11/11/the-supreme-court-of-canada-and-the-standard-of-review-recent-cases/> [perma.cc/V5EJ-63GC].

100 *Ktunaxa Nation*, *supra* note 2 at para 77.

101 *Coldwater First Nation*, *supra* note 20 at para 28.

102 *Haida Nation*, *supra* note 5 at paras 61–62.

103 *Ibid* at para 63.

104 *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 48 [*Beckman*].

105 *Ibid* [emphasis added].

106 *Ibid*.

107 *Ibid*.

108 Howard Kislowicz & Robert Hamilton, "The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What is the Impact of *Vavilov*?" (2021) 59:1 Alta L Rev 41 at 48.

> to occur. Adequacy of consultation speaks to whether the Crown's consultation as actually carried out was sufficient to discharge its constitutional obligations to consult and accommodate.[109]

If this distinction is maintained, as the authors advocate and as they read *Beckman* as doing, then courts can defer to the decision-maker's choice of procedure while ensuring that the consultation itself is adequate by performing correctness review.[110]

In a brief response to Kislowicz and Hamilton, administrative law scholar Paul Daly asserts that the duty to consult, being procedural, should not be subject to the *Vavilov* framework—which focusses on the substance of decisions—at all.[111] Instead, it should be assessed under a separate framework based on *Haida Nation*, just as procedural fairness is governed by *Baker v Canada (Minister of Citizenship and Immigration)*.[112]

Although Daly's argument is attractive, it is unlikely that the courts would jettison the jurisprudence described above (*Ktunaxa Nation*, *Coldwater First Nation*, etc.). It is more likely that they could be persuaded to rediscover *Beckman*. Moreover, Daly concedes that his proposed avenue would lead to "(more or less) the destination that Kislowicz and Hamilton seek" in that the courts "would have the 'last word' on whether consultation was adequate in all the circumstances."[113]

Meaningful oversight should be the goal of judicial review. There may be different ways to achieve this goal: correctness review, *Haida Nation* and procedural fairness review, or perhaps even "robust" reasonableness review.[114] However, applying *Beckman*—which would allow courts to scrutinize the adequacy of consultation to a greater degree—would be the most direct.

As Kislowicz and Hamilton write, "[consultation] is one process through which constitutional authority and jurisdiction are worked out, and it plays a legitimating function in seeking to mitigate the effects of the most colonial features of Canada's Constitution."[115] In my view, litigants turn to courts for relief because they perceive the latter as enjoying a degree of independence from the executive-legislative apparatus that statutory decision-makers do not share. Consequently, it is important to accept that administrative actors and courts have different roles to play in this sphere. Daly's comments in another piece, on administrative law's relationship to the *Charter*, are apposite—:"Courts and administrative decision-makers need not apply the same analytical frameworks in their respective roles. Indeed, there are good reasons to

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109 *Ibid* at 46 [emphasis in original].

110 *Ibid* at 59–60. The authors also make the case for recognizing adequacy of consultation as one of the "rule of law" exceptions to the presumption of reasonableness established in *Vavilov*: *ibid* at 54–59.

111 Paul Daly, "The Duty to Consult and the Standard of Review: A Suggestion" (26 August 2021), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2021/08/26/the-duty-to-consult-and-the-standard-of-review-a-suggestion/> [perma.cc/8HPJ-E3A8].

112 *Ibid*; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699.

113 Daly, *supra* note 111.

114 *Vavilov*, *supra* note 77 at para 13.

115 Kislowicz & Hamilton, *supra* note 108 at 59.

keep their functions distinct: administrative decision-makers' primary role is the attainment of their statutory objectives, while the courts' primary role is the enforcement of legal values."[116]

While administrative actors may be required—as they are, for example, under the *IAA*—to balance an Indigenous community's claimed rights or title against other considerations, courts are not similarly bound. Applying *Beckman* to a hypothetical project approval shows what a sharper delineation of administrative and judicial roles might look like. A reviewing court would not defer to the decision-maker's assessment of the adequacy of consultation. Adequacy is a "threshold question;"[117] consultation is either adequate or it is not. If the consultation was inadequate, then the decision cannot be upheld. This assessment would be similar to the inquiry that courts already undertake when determining whether a decision-maker has properly answered the question of scope.[118] However, once adequacy has been established, subsequent determinations (e.g., the determination of whether the project is "in the public interest" under the *IAA*) can be subject to reasonableness review.[119] From that point on, with the decision's basic constitutionality having been established, the decision-maker's weighing of the statutory factors and objectives need not be "correct", only "reasonable"—though, under *Vavilov*, a reasonable decision must still be "internally coherent and rational" and "justified in relation to the facts and law that constrain the decision-maker."[120]

To clarify, using the correctness standard does not mean that there would be a single "correct" answer that applies in all cases. The content of the duty will continue to vary with the circumstances, as required by *Haida Nation*, and the form of engagement preferred by the Indigenous community or communities involved.[121] However, the problematic practice of having decision-makers validate the adequacy of their own consultation and deferring to their self-evaluations at the judicial review stage, exemplified by *Ktunaxa Nation*,[122] would be curtailed.

CONCLUSION

The critiques and proposals covered in this paper are instantiations of a simple proposition: that administrative decision-making in the field of EA and consultation must be constrained through legislation and judicial oversight in light of the constitutional character of the duty to consult. The legislative and judicial branches of government have ceded too much ground to the executive and should step back into the picture. Fortunately, they can do so without

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116 Paul Daly, "Modes of Rights Protection III: *Doré v Barreau du Québec*" (15 December 2016), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2016/12/15/modes-of-rights-protection-iii-dore-v-barreau-du-quebec-2012-1-scr-395/> [perma.cc/B7YE-UDAP]. See also *Mikisew Cree 2018*, *supra* note 64 at para 87 (Abella J, concurring).

117 Kislowicz & Hamilton, *supra* note 108 at 58.

118 *Coldwater First Nation*, *supra* note 20 at para 27; *Ermineskin*, *supra* note 98 at paras 82–83.

119 *Beckman*, *supra* note 104 at para 48; Kislowicz & Hamilton, *supra* note 108 at 59–60.

120 *Vavilov*, *supra* note 77 at para 85. Moreover, a decision-maker must demonstrate any institutional expertise and experience through reasons: *ibid* at para 93.

121 Drake, "Trials and Tribulations", *supra* note 41 at 214–215 (highlighting two Anishinaabek legal principles relevant to consultation and giving the specific example of the Kitchenuhmaykoosib Inninuwug First Nation's consultation protocol).

122 *Ktunaxa Nation*, *supra* note 2 at para 82.

rewriting the law from scratch. Changes such as the revision of EA statutes, the entrenchment of environmental rights and the selective curtailment of deference are highly feasible. Most importantly, they would re-centre section 35 in the legal discourse and thereby effectuate what I see as *Haida Nation*'s intent—to require that discretionary decisions comply with, and indeed nourish, the Constitution.

I want to emphasize that these relatively simple suggestions are not ends in themselves. As I have said throughout this paper, none of my suggestions—alone or together with the others—promise to provide a complete answer to the myriad issues that beset the juridical relationship between Indigenous peoples and the Crown. However, they can serve as a means to nudge the law away from condoning unilateral action by the state and towards the ideal of responsive, responsible, and reconciliatory decision-making.