Does the Duty to Consult Create Economic Uncertainty?

How Greater Recognition of Self-Determination Can Benefit Both Industry and Indigenous Peoples

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Introduction

The duty to consult has greatly changed the relationship between Canada's Indigenous peoples and Canada's natural resource sector. Recent jurisprudence from the Supreme Court of Canada has done away with the old and well-established norms and processes for resource development, forcing many corporations to radically rethink their planning processes and business strategies. Simultaneously, many First Nations[1] have attained stronger recognition of land rights and political leverage, and are now experiencing great concern over how those rights are being realized and how that political leverage will be used.

Commentators such as the Fraser Institute have said that these changes create economic uncertainty that is harmful for both First Nations and industry. These concerns are not without merit, as approval processes for National Energy Board projects and mines in Ontario's Ring of Fire become longer and longer, leading many to wonder if they will ever come to fruition. However, for many First Nations these changes represent an unprecedented level of recognition from industry and government, bringing economic and political opportunity. Yet these changes are not enough. The duty to consult in its current form is nebulous and difficult for both Indigenous communities and industry to fully grapple with. How the duty to consult is to be implemented is not explained in the jurisprudence; it is left vague for government, First Nations and industry alike. This has created great variance across Canada, as governments attempt to create and refine processes for consulting First Nations.

This paper argues that, rather than seeing the duty to consult and Indigenous systems of governance as a time-consuming hurdle to be avoided or overwhelmed, a greater recognition of Indigenous sovereignty[2] would create certainty for industry, reduce pressure on government, and allow First Nations to position themselves at the center of resource development.

What is Economic Uncertainty?

Frederich Hayek, a classical liberal economist, saw the complex processes of economic activity as a series of variables to be reduced.[3] The more that institutions such as government and corporations could control these variables, the more efficient the economy would be and the more scope for growth existed. Processes that took too long or had unknown outcomes would suppress economic growth and prevent meaningful investment.[4] In real terms, Hayek's theories mean that if a company cannot put a price on

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[1] The choice to use the term First Nations is recognition of how similar arguments have been articulated by various Indigenous political bodies. Terms such as First Nations, Indigenous peoples, Indigenous communities, aboriginal groups, and other descriptors are used throughout the paper. The reason such a variety of terms are used is that they are intended to reflect the source being cited and to convey that author's intent.

[2] Sovereignty is a weighty term, and carries European notions of nationhood and political autonomy that are not necessarily in line with Indigenous concepts of political and cultural self-determination. This is recognized by a number of Indigenous scholars, who debate its use. The term sovereignty will often be used in this paper to reflect the terms used by the sources cited.

[3] Frederich Hayek, "The Use of Knowledge in Society" (1945) XXXV:4 American Economic Review 519.

[4] *Ibid*.

an investment or know when it will come to fruition, it will not commit to a project, and investors will not commit to lending.

Frank Knight, another classical liberal economist, distinguished risk from uncertainty. Knight conceptualized risk as measurable, such as determining the chance that an event will occur, and uncertainty as immeasurable. In this sense, uncertainty is still risk, but risk that is immeasurable.[5] This is troubling for businesses that want to make good on their investments, as it creates a situation that is increasingly difficult to plan for. When undergoing a cost-benefit analysis, if a business cannot ascribe values to risks, it becomes very difficult for the business to make confident investments and begin new projects.[6] It then follows that stable and predictable policy landscapes are more attractive for businesses, and this is a well-established principle amongst economic theories of investment.[7]

The Duty to Consult

The duty to consult is a common law principle derived from Section 35 of the Canada's *Constitution*.[8] The principles of the duty to consult were given form in a series of cases in the early 2000s,[9] starting with *Haida Nation v British Columbia (Minister of Forests)*, which found its way before the Supreme Court in 2004.[10] In *Haida*, the Supreme Court of Canada determined that the Crown (the governments of Canada and the provinces, as representing the Queen)[11] has an obligation to consult with Indigenous groups before beginning an undertaking that may alter their rights or impact land within their traditional territories.[12] This is premised upon the honour of the Crown, which finds its foundation in "the solemn promises between the Crown and various Indian nations,"[13] requiring the Crown to avoid sharp dealings and conduct itself honourably with reconciliation in mind.[14]

The duty to consult demands that the Crown take reasonable steps to consult and accommodate Indigenous peoples when the Crown "has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that

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[5] Frank Hyneman Knight, *Risk, Uncertainty, and Profit* (Boston: Hart, Schaffner & Marx, 1921).
[6] Stephanie Riegg Cellini & James Edwin Kee, "Cost-Effectiveness and Cost-Benefit Analysis" in Joseph S Wholey, Harry P Hatry, & Kathryn E Newcomer, eds, *Handbook of Practical Program Evaluation*, 3rd ed (San Francisco: Jossey-Bass, 2010) 493 at 499.
[7] Quintin H Beazer, "Bureaucratic Discretion, Business Investment and Uncertainty" (2012) 74:3 The Journal of Politics 637 at 638.
[8] *Constitution Act*, 1982, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Constitution*].
[9] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550*, Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*].
[10] *Ibid.*
[11] *Halfway River First Nation v British Columbia (Ministry of Forests),* 1999 BCCA 470 at para 35.
[12] *Haida*, *supra* note 9 at para 35.
[13] *R v Badger*, [1996] 1 SCR 771 at para 41.
[14] *Haida*, *supra* note 9 at paras 17 and 32.

might adversely affect it."[15] Effectively, this means that the Crown must consult and accommodate even in situations where a right or claim is in dispute.[16]

Though the preconditions for the duty to consult are fairly well established, the surrounding details are not. While relatively straightforward concepts can be inferred, such as that consultation must take place before an infringement of rights has occurred, there is still significant gaps in how the duty to consult should be applied, with potentially vast differences in outcomes.[17] In *Haida,* the Supreme Court reinforced its opinion in *Delgamuukw* that consultation "will vary with the circumstances" and is therefore "proportionate to the circumstances."[18] The Court described categories of "occasional, rare, or mere consultation", scaling all the way up to "requiring consent."[19] While these descriptions imply varying depths of consultation, they do not assist government, Indigenous communities, or industry in determining what they are, and predictably, each has very different interpretations.[20] The result is that the issue almost begs to be litigated.

How the Duty to Consult Creates Economic Uncertainty

The Supreme Court's statement that the duty to consult is "proportionate to the circumstances"[21] is central to the argument that the duty to consult creates economic uncertainty. With a dearth of accompanying statements on how to pursue the duty to consult, *Haida* turns the duty into an important and necessary but highly nebulous mechanism. In Canada's resource-dependent economy, this has spurred continuing litigation that has uncovered some of the limits and requirements for consultation,[22] but has still left all actors unsure of the full extent of the duty to consult and how it should be satisfied.[23]

Recent studies by the Fraser Institute indicate that there has been ebbing confidence amongst investors, stemming from changes to the legal landscape.[24] The Fraser Institute asserts that this is directly linked to land claims agreements and the duty to consult, stating that industry is concerned about rapid changes to a long-standing regulation framework.[25] Prior to 1982, when Aboriginal Rights were enshrined in section 35 of Canada's *Constitution*,[26] mineral companies were largely unconcerned with

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[15] *Ibid* at para 35.
[16] *Ibid* at para 38.
[17] Thomas Isaac & Anthony Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2005) 23:4 Journal of Energy & Natural Resources Law 427 at 438 [*Issac*].
[18] *Haida supra* note 7 at para 40; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168 [*Delgamuukw*].
[19] *Delgamuukw, supra* note 18 at 168.
[20] Lee Ahemakew & Clint Davis, "Corporate Partnerships Build Aboriginal Communities" (2009) Windspeaker Business Quarterly 14.
[21] *Haida, supra* note 9 at para 40.
[22] *Mikisew Cree*, supra note 7; *The Squamish Nation et al v The Minister of Sustainable Resource Management et al,* 2004 BCSC 1320.
[23] *Isaac & Knox*, *supra* note 17 at 443.
[24] Malcolm Lavoie & Dwight Newman "Mining And Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence" (Fraser Institute: 2015) at 13.
[25] *Ibid* at para 14.
[26] *Constitution*, *supra* note 8.

Aboriginal Rights. Issues such as Aboriginal title and the Crown's duty to consult did not yet have supporting jurisprudence,[27] and industry dealt only with government permits, which were predictable and often relatively easy to satisfy.

In Ontario, commentators from the Fraser Institute claim that investment is becoming tepid due to a lack of "policy attractiveness".[28] This assessment comes from information and commentary found in the Ontario Auditor General's 2015 report, which reported that a "lack of clarity on duty to consult with Aboriginal communities slows investment."[29] Components in this lack of clarity included delegating the duty to consult to private companies,[30] a lack of knowledge amongst investors about what consultation entails,[31] the complexity of consultation,[32] and the lengthy processes involved.[33] Highlighted was investment in the "Ring of Fire", an area of Northern Ontario where numerous valuable mineral deposits have been recently discovered. Despite being heralded as the "most promising development opportunities of a century",[34] the lack of an adequate plan to consult more than 10 different First Nations has been cited as delaying significant investment, as the province has been unable to make commitments regarding infrastructure and land-use planning.[35] In the Ontario Auditor General's report on mining, the province of Ontario has a stated goal to create a "provincial minerals sector that is healthy, competitive and sustainable."[36] This will not happen without recognizing and cooperating with First Nations.

The blame for this uncertainty cannot be entirely laid on the nonspecific wording of the Court. Academics have noted that there is a considerable lack of consistent policies across Canada to support consultation.[37] This trend was noticed even before *Haida*, and still has not been resolved. Instead there have been attempts to delegate the power to administrative bodies such as the National Energy Board, or to private parties.[38]

Failures to adequately consult Indigenous communities have repeatedly made national headlines in recent years. Perhaps the most obvious example is Enbridge's Northern Gateway pipeline. The multi-billion dollar project, designed to move a maximum of half a million barrels of oil a day from the Alberta tar sands to the coast of British Columbia for sale in Asian markets,[39] was approved by the Harper Government in

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[27] Dimitrios Panagos & J Andrew Grant, "Constitutional Change, Aboriginal Rights, and Mining Policy in Canada" (2013) 51:4 *Commonwealth and Comparative Politics* 405 at 414.
[28] Kenneth P Green & Taylor Jackson, "Uncertainty Deterring Mining Investment in Ontario" (12 January 2016), *FraserForum* (blog), online: < https://www.fraserinstitute.org/blogs/uncertainty-deterring-mining-investment-in-ontario>.
[29] Ontario, Office of the Auditor General of Ontario, *Mines and Minerals Program,* Section 3.11 of the 2015 Annual Report, (Queen's Printer for Ontario) at 443.
[30] *Ibid* at 446.
[31] *Ibid* at 448.
[32] *Ibid* at 447.
[33] *Ibid* at 448.
[34] *Ibid* at 449.
[35] *Ibid* at 450.
[36] *Ibid* at 467.
[37] *Isaac, supra* note 17 at 443.
[38] *Ibid* at 444.
[39] Northern Gateway (Enbridge), "Project Overview" (undated), *Northern Gateway,* online: <http://www.gatewayfacts.ca/About-The-Project/Project-Overview.aspx> [*Northern Gateway*].

June of 2014, with 209 conditions,[40] despite facing vigorous opposition from numerous environmental and civil society groups.[41] Planning for the project started in 1998,[42] and it is estimated that to date, Enbridge has spent more than half a billion dollars attempting to get the project approved.[43] It is well established that Enbridge's consultation with First Nations was inadequate for the project, and repeated litigation eventually culminated in the deathblow for project approval in June of 2016, with a federal Court overturning the decision of the Governor in Council.[44] Enbridge has since stated that it will not seek to appeal the decision, stating in their press release that "in order to encourage investment and economic development, Canadians need certainty that the government will fully and properly consult with our nation's Indigenous communities.[45]

Site C is another highly controversial project in British Columbia where the duty to consult is playing a pivotal role in the success of the project. Site C is a hydroelectric dam planned for the Peace River in northeast British Columbia, with an estimated cost of $9 billion dollars.[46] This is the third such dam along the Peace River, and it is expected that the reservoir will be 83 kilometers long and flood more than 5,500 hectares of land in Treaty 8.[47] The B.C. government fashioned a five-stage process to move the project from initial planning to approval, and gave assurances that the project would not go ahead without "ensuring that the Crown's constitutional duties to First Nations are met."[48] Stage 2 was intended for consultations with First Nations and stakeholders such as property owners, but the B.C. government has since received environmental approval and construction has begun, with many Indigenous groups, such as the Treaty 8 Tribal Association, still opposed to the project.[49]

Many of the frustrations and criticisms from Indigenous groups surrounding Site C are related to the consultation process. Despite negotiating with Treaty 8 First Nations

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[40] *Ibid.*

[41] David A Rossiter & Patricia Burke Wood, "Neoliberalism as Shape-Shifter: The Case of Aboriginal Title and the Northern Gateway" (2016) 29:8 Society and Natural Resources 900 at 902.

[42] *Northern Gateway*, supra note 39.

[43] Justine Hunter & Carrie Tait, "Why Northern Gateway is Probably Dead", *The Globe and Mail* (5 December, 2015), online: < http://www.theglobeandmail.com/news/british-columbia/why-the-northern-gateway-project-is-probablydead/article27620342/>.

[44] *Gitxaala Nation v Canada*, 2016 FCA 187 at 344.

[45] Northern Gateway (Enbridge), "Northern Gateway Announces It Will Not Appeal Recent Federal Court of Appeal Decision that Reversed Project Approval" (20 September, 2016), *Northern Gateway,* online: < http://www.gatewayfacts.ca/Newsroom/In-the-Media/Northern-Gateway-announces-it-will-not-appeal.aspx>.

[46] Mark Hume, "Crown Land Quietly Offered to First nations in Return for Site C Dam Site", *The Globe and Mail* (18 February, 2016), online: <http://www.theglobeandmail.com/news/british-columbia/crown-land-offered-to-first-nations-in-return-for-site-c-dam-site/article28807209/>.

[47] Site C (BC Hydro), "Project overview" (undated), *Site C: Clean Energy Project*, online: < https://www.sitecproject.com/about-site-c/project-overview>.

[48] West Coast Environmental Law, "Legal Backgrounder: Site C Dam – The Crown's Approach to Treaty 8 First Nations Consultation", (28 May, 2010), *Publications,* online: <http://wcel.org/resources/publication/site-c-dam-–-crown's-approach-treaty-8-first-nations-consultation-legal-backgr>

[49] Treaty 8 Tribal Association, "About Site C", (undated), online: <http://treaty8.bc.ca/about-site-c/>.

that consultation would take place at stage 2, public pre-consultation was already complete before the Treaty 8 consultation plans had been negotiated, leaving stage 2 more than halfway complete and the scope of the project already decided.[50] Furthermore, many argue that the Treaty 8 First Nations should have been involved in the initial planning stages, and that the decision to build Site C should have required the consent of each First Nation involved.[51] Prophet River First Nation and West Moberly First Nations, two of the First Nations impacted by the dam, have decided to litigate the decision, but were unsuccessful in their attempt to quash the permit in the Supreme Court of British Columbia,[52] and are now awaiting the results of a challenge before the Federal Court of Appeal.[53]

That such massive, multi-million dollar investments could be shut down or significantly delayed by the duty to consult creates uncertainty for industry. While large companies can pour huge amounts of money into the consultation process in the hopes of gaining some control over the outcome, smaller companies see even greater levels of uncertainty. At the same time, results are not guaranteed for either party. First Nations looking to exert control over their traditional territories and be involved in the economic future of the land must still often resort to litigation, forced into relationships more akin to concerned stakeholders than those of sovereign nations.

Indigenous Frustrations with the Duty to Consult

While economic certainty is of immediate and obvious benefit to corporations seeking freedom, predictability, and efficiency, the framework that existed before the duty to consult was largely indifferent to Indigenous rights and sovereignty.[54] While pundits at institutions such as the Fraser Institute may claim that the developments from the Supreme Court create economic uncertainty for First Nations, uncertainty may be a welcome change from being shut out of the process and largely ignored.[55] For many Indigenous communities, the Supreme Court rulings presented political tools that, while uncertain, have the potential to pave the way towards greater integration in the North American economy. However, for many, these tools seem hollow and do not overcome many of the obstacles for economic development. It seems each victory in court only presents further challenges and frustrations.

Indigenous communities are often dissatisfied with how government and industry fail to recognize assertions of nationhood and sovereignty. A study in B.C. found that

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[50] *West Coast Environmental Law*, *supra* note 48 at 3, 4.
[51] *Ibid*, at 4.
[52] *Prophet River First Nation v British Columbia (Environment),* 2015 BCSC 1682; *Prophet River First Nation v British Columbia (Minister of Forests, Lands and Natural Resource Operations),* 2016 BCSC 2007.
[53] *Prophet River First Nation et al v Attorney General of Canada et al*, 2015 FC 1030, leave to appeal to FCA granted.
[54] Anna Fung, Q.C., Anne Giardini & Rob Miller, A Decade Since Delgamuukw: Update From An Industry Perspective", in Maria Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora: Canada Law Book Ltd, 2009), 205 at 208.
[55] "Fraser Institute: Supreme Court Decisions Creating Economic Uncertainty For First Nations, For Canada", *MarketWired,* (9 April, 2015), online: < http://www.marketwired.com/press-release/fraser-institute-supreme-court-decisions-creating-economic-uncertainty-first-nations-2007970.htm>.

many Indigenous persons involved in the consultation process were frustrated by being considered stakeholders, which they see as a misrepresentation of their history and their desired role in creating and managing proposed projects on the land.[56] Being described as a stakeholder was seen as a flattening of Indigenous views on governance and in many ways an outright denial of nationhood. The description of stakeholder puts Indigenous peoples in the same box as concerned community groups, industry, and landowners.[57] This misunderstanding of Indigenous concerns and perspectives is not necessarily an ill-intentioned rhetoric, as evidenced by discussions with community members, but it is one that needs to change in the interest of advancing a new paradigm on Indigenous governance.[58] Too often, Indigenous peoples are stereotyped in the role of environmental stewards, viewed simply as stakeholders and lumped in with environmental advocacy groups. Not only is this an ideological deprivation at odds with the various understandings of Indigenous self-governance,[59] but the benefits of conceptualizing First Nations as economic actors in their own right should not be understated, and overcoming myths surrounding attitudes towards industry and outside actors would go a long way to building economic futures and developing positive partnerships with industry and government.[60]

Another frustration is the tendency of consultation to be incorporated with environmental impact assessments, community consultations, and other project preliminaries.[61] As well as perpetuating the stakeholder status mentioned above, this also prevents Indigenous communities from centering the discussion on their concerns, and forces them to confine their issues to whatever forum is at hand.[62] This causes important issues to go unheard and can prevent Indigenous communities from engaging in higher-level discussion with project decision-makers.

For many Indigenous communities, the fact that the duty to consult does not contain anything akin to a veto frustrates their desire to be recognized as self-governing. Despite an emerging international consensus that Indigenous peoples are entitled to free, prior, and informed consent, the current duty to consult does not allow Indigenous peoples to make autonomous choices.[63] For Indigenous peoples, the lack of a veto leaves the duty to consult seeming less like a useful tool, and more like a rubber lever that cannot do the job it looks as though it is able to do. The lack of a reliable veto to control infringements on aboriginal rights compounds other issues discussed at length elsewhere. These include the difficulties Indigenous communities face when trying to fund

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[56] Suzanne Von Der Porten & Robert C de Loë, "Collaborative Approaches to Governance for Water and Indigenous Peoples: A Case Study From British Columbia, Canada" (2013) 50 Geoforum, 149 at 154 [*Von Der Porten*].
[57] *Ibid* at 157.
[58] *Ibid* at 158.
[59] *Ibid* at 152.
[60] Warren I Weir, "First Nations Small Businesses and Entrepreneurship in Canada" (2007) Research Paper for the National Centre for First Nations Governance, at 8.
[61] Martin Papillon & Thierry Rodon. "Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada" (2016) Environ Impact Assess Rev 1 at 5.
[62] *Ibid.*
[63] *Ibid* at 3.

consultation, the inevitability of litigation, the imbalance in power when negotiating, and other concerns.[64]

Perspectives on Sovereignty

Indigenous resistance to the paradigm presented by the Government of Canada is nothing new. Harold Cardinal's book, *The Unjust Society*,[65] written in the 1960s, labeled the history of Canadian policies towards aboriginal peoples as 'cultural genocide', and proposed a multitude of solutions that centered on Indigenous self-governance and political identity.[66] These ideas were later affirmed by the Canadian government itself in the Report of the Royal Commission on Aboriginal Peoples in 1996, with far-reaching suggestions based upon a premise of Aboriginal control over Aboriginal affairs.[67]

The report acknowledged that "many Aboriginal people see sovereignty as much as a human right as a political and legal one. Seen in this way, sovereignty is an inherent human attribute that cannot be surrendered or taken away."[68] In this sense, sovereignty can be a problematic word to use, as it infers European concepts and power structures.[69] Various Indigenous groups have other terms they feel more appropriate, such as the Mohawk word *tewatatowie*. Understanding how each Indigenous political unit self-defines their political identity is critical, as concepts of self-governance, nationhood, and identity may vary with each group's unique history, culture and circumstance. What joins these varying concepts is a fundamental right to self-determination.[70]

John Borrows, a prominent Indigenous legal scholar, stresses that the concept of Aboriginal control of Aboriginal affairs must, by necessity, include the "special bond between Aboriginal peoples and the land they traditionally occupy."[71] This was again underlined by the Royal Commission on Aboriginal Peoples.

> Governance is inseparable from lands and resources. If self-government is to be a reality, then Aboriginal people need substantially more lands and resources than they have now. While these alone cannot guarantee self-reliance, Aboriginal peoples will be unable to build their societies and economies without an adequate land base.[72]

The report goes on to mention that self-government cannot " . . . be practiced without a land base and resources to support the society and the administration of that

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[64] Kaitlin Ritchie, "Issues Associated With the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46:2 UBC L Rev 398.
[65] Harold Cardinal, *The Unjust Society* (Edmonton: MG Hurtig, 1969).
[66] John Borrows, "The Resurgence of Indigenous Law", (Toronto: University of Toronto Press, 2002) at 139 [*Borrows*].
[67] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, vol 2 (Ottawa: Canada Communication Group, 1996) [*RCAP*].
[68] *Ibid*, at105.
[69] *Ibid*, at 108
[70] *Ibid*, at 111.
[71] *Borrows*, *supra* note 66 at 157.
[72] *RCAP*, *supra* note 67 at 416.

society."[73] Many of the testimonials to the Commission were adamant on this point, repeatedly linking land not just to the future of economic and administrative success but to the very identity of the community.[74] Brian Slattery, another legal scholar, follows in this same mould, with a call for a broad recognition of Aboriginal title, carried by "Principles of Recognition" that encapsulate the rights of a sovereign people with a historical right to lands and self-defined ways of life.[75]

Felix Hoehn, professor of law at the University of Saskatchewan, sees concepts of sovereignty and the duty to consult as intractably linked, with the duty to consult directly emerging from the "Crown's unilateral assertion of sovereignty over Aboriginal nations."[76] This is taken directly from the Supreme Court of Canada's decision in *Mitchell v MNR*, where McLachlin C.J. premised the Crown's obligation to consult on its assertion of sovereignty.[77] This provides a conflict between Indigenous notions of sovereignty and Crown sovereignty, though one that can be reconciled through careful arrangement, such as through the Nisga'a treaty.[78] With the issue of competing jurisdictions and lawmaking settled on a constitutional level in *Campbell v British Columbia*,[79] Hoehn asserts that there is no constitutional limit to simultaneous sovereignties, co-operating at different political levels. There is space for Indigenous sovereignty without threatening the unity of Canada,[80] but it must be created through negotiation and cannot be imposed by a Court.[81]

On an international level, there is a firm framework for recognizing and accepting Indigenous sovereignty. The United Nation Declaration on the Rights of Indigenous Peoples,[82] fully supported by Canada as of 2016,[83] states a right to self-determination that includes political status and economic development.[84] While the current Liberal government has expressed its intention to begin a new age of communication and co-operation with Indigenous peoples on a nation-to-nation basis,[85] how the government plans to follow through on its new support for the resolution is yet to be seen.

Sovereignty As a Vehicle for Economic Certainty

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[73] *Ibid* at 138

[74] *Ibid* at 138 - 140.

[75] Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85:2 Can Bar Rev 255 at 282.

[76] Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Houghton Boston, 2012) at 51 [*Hoehn*].

[77] *Mitchell v MNR*, 2001 SCC 33, [2001] SCR 911, at para 9.

[78] *Hoehn*, *supra* note 70 at 53; *Nisga'a Final Agreement Act*, RSBC 1999, c 2 [*NFAA*].

[79] *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123.

[80] *Hoehn*, *supra* note 70 at 55.

[81] *Ibid* at 79.

[82] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st Sess, 2007, Supp No 49, UN Doc A/61/49 [*UNDRIP*].

[83] Indigenous and Northern Affairs Canada, News Release, "Canada Becomes A Full Supporter of the Untied Nations Declaration on the Rights of Indigenous Peoples", (10 May 2016), online: <http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1063339&crtr.tp1D=1&_ga=1.40822306.1066794629.1422563602>.

[84] See article 3 of *UNDRIP*, *supra* note 76 at 4.

[85] Canada, *Throne Speech*, 42nd Parl, 1st Sess, (4 December 2015).

A report by the National Aboriginal Economic Development Board in 2013 noted that for consultation to be meaningful, it needed to begin at the outset of any project,[86] a sentiment echoed by scholars and Indigenous politicians alike.[87] Recognizing Indigenous nationhood and providing nations with the ultimate decision over their lands would put them at the forefront of any economic activity, and would permit industry to deal with nations directly instead of through consultation and the Crown.

It is widely recognized that there are numerous hurdles for Indigenous communities when accessing, creating, and building up economic opportunities. From the Indian Act,[88] to the duty to consult, to the ineffective consultation policies of the Federal Government,[89] there are three common themes frustrating Indigenous economic efforts. The first is land rights, the second is the lengthy timeframes needed to approve economic endeavors, and the third is the indirect nature of the duty to consult. While various plans have attempted to deal with each of these issues in their own right, such as the *First Nation Land Management Act*[90] or pursuing land claims or aboriginal title, many of these plans do not account for concepts of Indigenous sovereignty or nationhood.

If the duty to consult creates economic uncertainty for businesses concerned about outcomes of the consultation process, certainty may be obtained through models of shared decision-making. Models that take into account Indigenous culture, legal systems, knowledge systems, and goals have been greatly successful in the past. A prominent and often-cited example is the Gwaii Haanas, seen as a success by the Haida and the Crown alike.[91] This economic and governance agreement between Canada and the Haida Nation implements a shared decision-making model that does not question who has the final authority, as decisions are made through reaching consensus.[92] This agreement presents a vision of how future arrangements could operate on a nation-to-nation basis, integrating decision-making ability on all levels.

Another example is the modern treaty of the Nisga'a in northwest British Columbia. Land rights were central to the negotiation of the Nisga'a treaty, the negotiation of which spanned decades. The final agreement created what some have referred to as a 'hybrid' system of land ownership and sovereignty, conferring fee simple rights to the Nisga'a, held communally and with a provision that sidesteps the underlying interest of the Crown.[93] Alongside these land rights, the Nisga'a treaty also provides the Nisga'a exclusive power over mineral wealth and other resources.[94]

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[86] National Aboriginal Economic Development Board, "2012-2013 Annual Report" (2013) at 6 [*NAEDB*].
[87] Kyle Bakx, "First Nations Hold Bargaining Power in Pipeline Decisions", *CBC* (5 March, 2016), online: <http://www.cbc.ca/news/business/blaine-favel-first-nations-pipelines-veto-1.3476221>.
[88] *Indian Act*, RSC 1985, c I-5.
[89] Ravina Bains & Kayla Ishkanian, "The Duty to Consult With Aboriginal Peoples: A Patchwork of Canadian Policies" (Fraser Institute: 2016) at 7.
[90] *First Nations Land Management Act*, SC 1999, c 24.
[91] Louise Mandell, "The Ghost", in Maria Morellato, ed, *Aboriginal Law Since Delgamuukw* (Aurora: Canada Law Book Ltd, 2009), 55.
[92] *Moresby Explorers Ltd v Canada (Attorney General)*, [2001] 4 FCR 591.
[93] Tracie Lea Scott, "Postcolonial Sovereignty? The Nisga'a Final Agreement" (Saskatoon: Purich Publishing Ltd, 2012) at 61 [*Scott*].
[94] *NFAA*, *supra* note 70, at c 3, s 19.

There has been a range of criticisms over the appropriateness of this hybrid system, how it reflects on sovereignty and nationhood, and what it will ultimately mean for the Nisga'a and other Indigenous peoples.[95] However, with the Nisga'a now recognized as having exclusive power over mineral wealth and other resources, any industry actor wishing to access these resources must negotiate directly with the Nisga'a. Consultation cannot be sidestepped, and is instead integrated, as any corporation wishing to begin a project on Nisga'a lands must do so on the terms of the Nisga'a.

While in many ways a troubled and imperfect example in the history of sovereignty and partnership, there are a lot of lessons to learn from the experiences of the Eeyou, known as the James Bay Cree, who hail from the Eeyou Itschee or 'people's land' in northern Quebec.[96] What began as a story of frustration and conflict over concepts of nationhood and incompatible views eventually turned to a partnership that created space for recognition of nationhood both within and outside the Eeyou Itschee. While not perfect, it is instructive for other Indigenous groups facing similar pressures.

The agreement signed between the government of Quebec and the Eeyou in 2002 specifically stated that this was to be an agreement between nations, as much a recognition of the national identity of the Quebecois as it was a recognition of the Eeyou.[97] This agreement came in response to years of conflict between the Quebec government hydroelectric aspirations and the Eeyou's desire for independent control over their land and resources. It is important to recognize that the struggles between the Eeyou and Quebec were often painful for the Eeyou, and that they were one of the first Indigenous groups to negotiate a resource-sharing partnership. There is still significant controversy, even within the Eeyou communities, about the success of the partnership and what it means to the future of the Eeyou people.[98]

The great variety in how Indigenous groups endeavor to approach sovereignty, exert control over their lands, negotiate with other actors and pursue economic activities shows that there is no silver bullet to these processes. Proposals such as those of Thomas Flanagan[99] to create a "First Nations Property Ownership Act," which would convert land held collectively by Indigenous communities into private ownership,[100] fail to take into account the vital aspect of self-determination that inherently accompanies concepts of sovereignty. While Flanagan understands that the current economic conundrums facing Indigenous communities often revolve around unequal control over land and resources, his proposal flattens the self-determination of Indigenous peoples and only reinforces their position in existing colonial structures.[101]

Many actors in industry do not resist these new paradigms of governance, sovereignty, and economic development. Recent statements from Stockwell Day, former federal energy minister and current chairman of Pacific Future Energy's advisory board,

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[95] *Scott*, *supra* note 87 at 86 – 89.
[96] Caroline Desbiens, "Nation to Nation: Defining New Structures of Development in Northern Quebec" (2004) 80:4 Economic Geography 351 at 352.
[97] *Ibid*, at 359.
[98] Martin Papillon, "Aboriginal Quality of Life Under A Modern Treaty" (2008) 14:9 IRPP Choices 1 at 15.
[99] Thomas Flanagan is a professor of political science at the University of Calgary.
[100] Thomas Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's Press, 2010) at 180.
[101] *Hoehn*, *supra* note 78 at 105.

show that there is willingness amongst industry proponents to recognize First Nations sovereignty – at least in an economic capacity. Day was quoted declaring that

> We need to recognize B.C. First Nations as landowners and governments. We must recognize the true value of First Nations lands, their traditions and their people. We must work with First Nations every step of the way – from concept to implementation – to build any resource projects on their territory.[102]

While from an industry perspective, recognizing Indigenous sovereignty stems from a desire to speed up project approvals, negotiate directly with Indigenous peoples, and reduce overall uncertainty,[103] it does show a willingness to adapt to new norms in resource management and move to new models of governance and policy. Many in industry have already responded proactively, attempting to engage Indigenous peoples and bring them on board with projects as early as possible to ease the consultation process.[104] Cameco, a uranium mining company that operates in northern Saskatchewan, now includes impact benefit agreements for each of its projects, negotiating with communities before any other assessment even begins.[105]

An example of these negotiations is the four-party agreement involving Cameco, Areva (another uranium company), The Kineepik Metis, and the Aboriginal Community of Pinehouse.[106] Signed in 2012, the agreement covers a range of topics from workforce initiatives to dispute resolution, and serves as a platform for the uranium industry to address local concerns on an equal basis. While such negotiations are a step in the right direction, they still do not reflect a full recognition of Indigenous governance, and hardly replace the negotiations and co-operative efforts that would need to take place if the communities had a recognized jurisdiction over the land.

Conclusion

A greater recognition of Indigenous land rights and governance structures has the potential to reduce economic uncertainty for industry and Indigenous communities alike. Currently, the duty to consult does not provide an adequate means of providing confidence to industry actors or self-determination to Indigenous groups. Government recognition of Indigenous sovereignty will allow Indigenous groups to capitalize on the resources within their territories while providing industry with a clear process for planning and negotiating new developments. By necessity, this involves complete

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[102] Sebastian Gault, "How First Nations Resurgence Could Help Or Hinder Pipeline Projects", *Business Vancouver* (8 September 2015), online: <https://www.biv.com/article/2015/9/how-first-nations-resurgence-could-help-or-hinder-/>.

[103] Dwight Newman, "Emerging Challenges on Consultation with Indigenous Communities in the Canadian Provincial North" (2015) 39 The Northern Review 22 at 23.

[104] *Papillon, supra* note 61 at 4.

[105] Cameco, "Aboriginal Peoples Engagement" (undated), *Cameco Sustainable Development Report*, online: <https://www.cameco.com/sustainable_development/2014/supportive-communities/aboriginal-peoples-engagement/>.

[106] Pinehouse Agreement, "Collaboration Agreement Between the Northern Village of Pinehouse and Kineepik Metis Local Inc. and Cameco Corporation and Areva Resources Canada Inc." (December 12th, 2012), online: < http://www.pinehouselake.com/wp-content/uploads/2015/05/Collaboration-Agreement.pdf>.

Indigenous control over developments within their territories, which the current duty to consult does not provide.

Many in industry are already prepared to adjust to this new paradigm, and already put Indigenous communities at the forefront of new developments. However, for these changes to bring full and meaningful change, they must stem from the federal and provincial governments. Whether this means incorporating a veto into the consultation process, legal recognition of Indigenous peoples as self-governing political units with an inalienable land base, or even a re-conceptualization of Indigenous peoples as fully autonomous nations, is yet to be seen. By necessity this will require courage from our elected representatives to step beyond the current norm, and an acceptance of Indigenous paradigms of self-determination that is not just spoken to, but acted upon.

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