
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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I INTRODUCTION

The duty to consult has greatly changed the relationship between Canada's Indigenous peoples and Canada's natural resource sector. By slowly expanding the scope and importance of the duty to consult, the Supreme Court of Canada has done away with twentieth-century norms and processes for resource development, leaving extractive industries rethinking their planning processes and business strategies. Simultaneously, many First Nations¹ have experienced stronger recognition of land rights, economic opportunity, and political leverage.

Commentators at the Fraser Institute have said that this expansion of the duty to consult creates an economic uncertainty that is harmful for both First Nations and industry alike, as the outcome of the duty is left in the hands of the government and therefore beyond the

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¹. Terms such as First Nations, Indigenous peoples, Indigenous communities, Aboriginal groups, and other descriptors are used throughout this paper. The reason such a variety of terms are used is that they are intended to reflect the intention of each source being cited.

control of the groups involved. These concerns are not without merit, as approval processes for National Energy Board projects and mines in northern Ontario stretch longer and longer, leading many to wonder if they will ever come to fruition. Similarly, First Nations that participate and negotiate in the consultation process often feel sidelined, seeing their efforts and requests treated as optional by regulatory bodies and other agents of the Crown.

This paper argues that there are three common themes frustrating Indigenous economic efforts: land rights, lengthy timelines needed to approve economic endeavours, and the indirect nature of the duty to consult. Accordingly, to reduce uncertainty and strengthen the relationships between industry and Indigenous peoples, the three themes can be addressed through a greater recognition of Indigenous sovereignty.²

A. A Brief Note on Economic Uncertainty³

Friedrich Hayek, the influential liberal economist, saw the complex processes of economic activity as a series of variables to be reduced to foster coordination between economic actors. The more that public institutions could control these variables and create stability, the more efficient the economy would be and the more scope it would have for growth.⁴ Processes that have unknown outcomes therefore suppress economic growth by preventing meaningful investment.⁵ In real terms, if a company cannot put a price on 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 H. Knight, another classical liberal economist, distinguished risk from uncertainty. Knight conceptualized risk (such as determining the chance that an event will occur) as measurable and uncertainty as immeasurable. In this sense, uncertainty is still risk, but risk that is immeasurable.⁶ 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 undertaking a cost-benefit analysis, if a business cannot ascribe values to risks, it becomes difficult for the business to make confident investments and begin new projects.⁷ It follows that stable and predictable policy landscapes are more attractive for businesses, and this is a common principle among economic theories of investment.⁸

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 (see John Borrows, *Recovering Canada*, *infra* note 68; Brian Slattery, “The Metamorphosis of Aboriginal Title,” *infra* note 78; and Felix Hoehn, *Reconciling Sovereignties*, *infra* note 79). The term “sovereignty” will often be used in this paper to reflect the terms used by the sources cited. A fuller discussion of these scholars and their perspectives is found in the text below.

3. This paper does not focus on economics. This section is included to provide context for some of the language used later.

4. Todd Zywicki, “Economic Uncertainty, the Courts, and the Rule of Law” (2011) 35:1 Harv JL & Pub Pol’y 195 at 197.

5. *Ibid* at 198.

6. Frank H Knight, *Risk, Uncertainty, and Profit* (Boston: Houghton Mifflin Company, 1921).

7. 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.

8. Quintin H Beazer, “Bureaucratic Discretion, Business Investment and Uncertainty” (2012) 74:3 J of Politics 637 at 638.

II THE DUTY TO CONSULT

The duty to consult is a common law principle derived from section 35 of Canada's *Constitution Act, 1982*.⁹ The principles of the duty to consult were given form in a series of cases in the early 2000s, starting with *Haida Nation v British Columbia (Minister of Forests)*, which found its way to the Supreme Court in 2004.¹⁰ In *Haida*, the Supreme Court 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 and requires 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 might adversely affect it.”¹⁵ This includes not only situations where the Crown knows a right will be infringed, but also scenarios where the Crown could infer that a right *may* be infringed.¹⁶

Though the preconditions for the duty to consult are fairly well established, the surrounding details initially were not, and outcomes often remain highly fact specific. In *Haida*, the Supreme Court reinforced its opinion in *Delgamuukw* that consultation “will vary with the circumstances,”¹⁷ suggesting that it is therefore proportionate to the circumstances. The court described categories of “occasional, rare, or mere consultation,” scaling all the way up to “requiring consent.”¹⁸ While these descriptions imply varying depths of consultation, they do not always assist government, Indigenous communities, or industry in determining when each category can or should be used, and, predictably, each group has very different interpretations.¹⁹

Despite the clear need for leadership on this issue, the federal and provincial governments have been slow to take the initiative and develop a framework for what constitutes “consultation.” It should not be surprising, then, that the duty to consult repeatedly returns to the courts. Over the decade since *Haida* and *Delgamuukw* were released, subsequent cases have

⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35 [*Constitution Act, 1982*].

¹⁰ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*]; see also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

¹¹ *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para 35.

¹² *Haida*, *supra* note 10 at para 35.

¹³ *R v Badger*, [1996] 1 SCR 771 at para 41, SCJ No 39.

¹⁴ *Haida*, *supra* note 10 at paras 17 and 32.

¹⁵ *Ibid* at para 35.

¹⁶ *Ibid* at para 38.

¹⁷ *Ibid* at para 40; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 168, SCJ No 108.

¹⁸ *Ibid* at para 168.

¹⁹ Lee Ahenakew & Clint Davis, “Corporate Partnerships Build Aboriginal Economies” (1 January 2009) *Windspeaker*.

introduced parameters to solidify the constraints of the duty to consult. While many initially saw the doctrine as nebulous and difficult to identify or predict,²⁰ there is a growing consensus that while each case is highly fact dependent, there is now a weight of case law that guides all parties in the doctrine's application. For example, it is now well established that government is capable of delegating the duty to administrative boards and regulators, and that the duty to consult requires written reasons,²¹ but where "deep consultation" or accommodations should take place is still highly fact driven²² and frequently a matter of debate.²³

Ultimately, what the duty to consult poses is a commitment to process, but not to power, and leaves both industry and Indigenous peoples alike with uncertain outcomes and a predilection toward litigation.

A. The Duty to Consult Creates Economic Uncertainty

Recent studies by the Fraser Institute indicate that there has been ebbing confidence among 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 Act, 1982*,²⁶ mineral companies were largely unconcerned with Aboriginal rights. Issues such as Aboriginal title and the Crown's duty to consult did not yet have jurisprudential recognition,²⁷ and industry dealt only with government permits, which were predictable and often relatively easy to obtain.

In Ontario, commentators from the Fraser Institute claim that investment has become 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 stated 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

20. Thomas Isaac & Anthony Knox, "Canadian Aboriginal Law: Creating Certainty in Resource Development" (2005) 23:4 J of Energy & Nat Resource Law 427 at 438.

21. *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 at para 62, citing *Haida*, *supra* note 10 at para 44.

22. *Tsleil-Waututh Nation v Canada (AG)*, 2018 FCA 153 at para 489 [*Tsleil-Waututh*]

23. *William v British Columbia*, 2018 BCSC 1271 at para 62.

24. Malcolm Lavoie & Dwight Newman, "Mining and Aboriginal Rights in Yukon: How Certainty Affects Investor Confidence" (24 September 2015) at 13, online (pdf): Fraser Institute <<https://www.fraserinstitute.org/sites/default/files/mining-and-aboriginal-rights-in-yukon-how-certainty-affects-investor-confidence.pdf>>.

25. *Ibid* at 14.

26. *Constitution Act, 1982*, *supra* note 9, s 35.

27. Dimitrios Panagos & J Andrew Grant, "Constitutional Change, Aboriginal Rights, and Mining Policy in Canada" (2013) 51:4 *Commonwealth and Comp Pol* 405 at 414.

28. Kenneth P Green & Taylor Jackson, "Uncertainty Deterring Mining Investment in Ontario" (12 January 2016), online (blog): FraserForum <<https://www.fraserinstitute.org/blogs/uncertainty-deterring-mining-investment-in-ontario>>.

29. Office of the Auditor General of Ontario, "2015 Annual Report" (2015) s 3.11 at 443, online (pdf): Office of the Auditor General of Ontario <http://www.auditor.on.ca/en/content/annualreports/arreports/en15/2015AR_en_final.pdf>.

30. *Ibid* at 446.

knowledge among 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 one of the “most promising development opportunities of a century,”³⁴ the lack of an adequate plan to consult more than ten 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.

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 duty to administrative bodies such as the National Energy Board, who have subsequently attempted to delegate the duty to corporations.³⁸

Failures to adequately consult Indigenous communities have repeatedly made national headlines in recent years. Until 2018, the most notorious example was Enbridge’s Northern Gateway pipeline. The multibillion dollar project, designed to move a maximum of half a million barrels of oil a day from the Alberta oil sands to the coast of British Columbia for sale in Asian markets,³⁹ was approved in June 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 2016, when

^{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 & Knox, *supra* note 20 at 443.

^{38.} *Ibid*, *supra* note 20 at 444.

^{39.} Enbridge, “Project Overview,” online: Northern Gateway <<http://www.gatewayfacts.ca/About-The-Project/Project-Overview.aspx>> [Northern Gateway].

^{40.} *Ibid*.

^{41.} David A Rossiter & Patricia Burke Wood, “Neoliberalism as Shape-Shifter: The Case of Aboriginal Title and the Northern Gateway Pipeline” (2016) 29:8 Soc and Nat 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* (4 December 2015), online: <<http://www.theglobeandmail.com/news/british-columbia/why-the-northern-gateway-project-is-probablydead/article27620342/>>.

a Federal Court overturned the approval granted by the governor in council.⁴⁴ Enbridge has since stated that it will not seek to appeal the decision, noting 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

Since Northern Gateway, the expansion of the Trans Mountain Pipeline, formerly owned by Kinder Morgan, has dominated headlines. First announced in 2012, approval for the line was granted in 2017, but construction was immediately delayed because of litigation and civic action. In August 2018, the Federal Court of Appeal quashed the project’s approval, both for failing to adequately consider or plan for “downstream” environmental risks and for failing to reach a standard of meaningful consultation with Indigenous communities along the pipeline’s path.⁴⁶

Site C is a further example of a highly controversial project in British Columbia where the duty to consult has played a pivotal role. Site C is a hydroelectric dam planned for the Peace River in northeast British Columbia, with an estimated cost of \$9 billion.⁴⁷ This is the third such dam along the Peace River, and it is expected that the reservoir will be 83 kilometres long and flood more than 5,500 hectares of land in Treaty 8.⁴⁸ The Government of British Columbia drafted a five-stage process to move the project from initial planning to approval and has made assurances that the project will not go ahead without “ensuring that the Crown’s constitutional duties to First Nations are met.”⁴⁹ Stage 2 was intended for consultations with First Nations and stakeholders such as property owners, but once the Government of British Columbia received environmental approval, construction began, with many Indigenous groups, such as the Treaty 8 Tribal Association, still opposed to the project and concerned about the depth and quality of consultation.⁵⁰

Despite confirming with Treaty 8 First Nations 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 only halfway complete when the scope of the project was decided.⁵¹ Furthermore, it is argued that for adequate consultation to have taken place, the Treaty 8 First Nations should have been involved in the initial planning stages, and that

^{44.} *Gitxaala Nation v Canada*, 2016 FCA 187 at para 344.

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

^{46.} *Tsleil-Waututh*, *supra* note 22.

^{47.} 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/>>.

^{48.} BC Hydro, “Project Overview” (2017), online: Site C: Clean Energy Project <<https://www.sitecproject.com/about-site-c/project-overview>>.

^{49.} West Coast Environmental Law Association, “Legal Backgrounder: Site C Dam—The Crown’s Approach to Treaty 8 First Nations Consultation” (28 May 2010), online (pdf): West Coast Environmental Law at 2 <<https://www.wcel.org/sites/default/files/publications/Site%20C%20Dam%20%E2%80%93%20The%20Crown%E2%80%99s%20Approach%20to%20Treaty%208%20First%20Nations%20Consultation%20-%20Legal%20Backgrounder.pdf>>.

^{50.} Treaty 8 Tribal Association, “About Site C,” online: Treaty 8 <<http://treaty8.bc.ca/about-site-c/>>.

^{51.} West Coast Environmental Law Association, *supra* note 49 at 3–4.

the decision to build Site C should have required the consent of each First Nation involved.⁵² Prophet River First Nation and West Moberly First Nation, two of the nations whose traditional territories will be impacted by the dam, have moved to litigate the decision. Despite lengthy court proceedings, neither First Nation was successful in challenging the consultation or obtaining an injunction to stop the construction.⁵³

Where litigation has failed or is ongoing, Indigenous communities have also moved toward protest and other direct action. All of the major projects mentioned above faced significant public protest. In particular, this has delayed construction of Site C, worsened public relations regarding the Trans Mountain Pipeline, and threatened continued litigation for both.⁵⁴

That such massive, multimillion dollar pipeline investments could be shut down or significantly delayed by the duty to consult creates uncertainty for industry. Despite the considerable effort and expense by Kinder Morgan to consult with First Nations on the Trans Mountain Pipeline and meet the requirements set out by the National Energy Board and the Government of Canada, the court still quashed the approval. This was not the fault of Kinder Morgan, who believed they had met their requirements.⁵⁵ This was the failure of the federal government and National Energy Board to create a process that ensures adequate consultation.

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 have even less control over the outcome of the approval process. At the same time, results are not guaranteed for either side of these conflicts. First Nations looking to exert control over their traditional territories and to be involved in the economic future of their land must resort to litigation and are forced into relationships more akin to concerned stakeholders than nations.

B. Indigenous Frustrations with the Duty to Consult

While economic certainty is of immediate and obvious benefit to corporations seeking predictability and efficiency, the framework that existed before the duty to consult was largely indifferent to Indigenous rights and sovereignty.⁵⁶ While pundits at institutions like 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

⁵² *Ibid* at 4.

⁵³ See *West Moberly First Nations v British Columbia*, 2018 BCSC 1835; *Prophet River First Nation v British Columbia (Minister of the Environment)*, 2017 BCCA 58.

⁵⁴ Andrew Kurjata, “Site C Dam Could Still Be Cancelled at ‘11th Hour’ if First Nations Successful in Court,” *CBC* (3 March 2019), online: <<https://www.cbc.ca/news/canada/british-columbia/site-c-dam-could-still-be-cancelled-at-11th-hour-if-first-nations-successful-in-court-1.5040244>>; Jason Markusoff, “The Trans Mountain Expansion Will Struggle for Years—Even if It Gets the Green Light in 2019,” *Maclean’s* (17 December 2018), online: <<https://www.macleans.ca/politics/trans-mountain-expansion-challenges-2019>>.

⁵⁵ The author of this paper worked as an environmental consultant and was part of the consultation process as a subcontractor.

⁵⁶ Anna Fung, 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.

process and largely ignored.⁵⁷ For many Indigenous communities, the Supreme Court rulings present political tools that have the potential to pave the way toward economic and political autonomy. However, for many First Nations, these tools seem hollow and do not overcome many of the obstacles to economic development or self-governance.

Indigenous communities are often dissatisfied with how government and industry fail to recognize assertions of nationhood and sovereignty. A study in British Columbia found that many Indigenous peoples involved in the consultation process were frustrated by being considered “stakeholders,” viewing it as a misrepresentation of history and their desired role in creating and managing proposed projects on the land.⁵⁸ 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.⁵⁹ This misunderstanding of Indigenous concerns and perspectives is not necessarily an ill-intentioned rhetoric, as evidenced by discussions with community members, but one that needs to change in the interest of advancing a new paradigm on Indigenous governance.⁶⁰ Instead of being viewed as members of a self-governing nation or political force, Indigenous peoples are stereotyped in the role of environmental stewards and lumped in with environmental advocacy groups. This is not only at odds with sovereignty,⁶¹ but also obstructs conceptualizing First Nations as economic actors in their own right and perpetuates myths surrounding the attitude of Indigenous persons toward industry.⁶²

Another frustration is the tendency of consultation to be incorporated into environmental impact assessments, community consultations, and other project preliminaries.⁶³ While this perpetuates the stakeholder status mentioned above, it also deprives Indigenous communities of opportunities to centre the discussion on their concerns and forces them to confine their issues to whatever forum is at hand.⁶⁴ This causes important issues to go unheard and can prevent Indigenous communities from engaging in higher-level discussions with project decision makers.

⁵⁷ “Fraser Institute: Supreme Court Decisions Creating Economic Uncertainty for First Nations, for Canada,” *GlobeNewsWire* (9 April 2015), online: <<https://www.globenewswire.com/news-release/2015/04/09/1275931/0/en/Fraser-Institute-Supreme-Court-Decisions-Creating-Economic-Uncertainty-for-First-Nations-for-Canada.html>>.

⁵⁸ 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.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at 155.

⁶¹ *Ibid* at 152.

⁶² Warren I Weir, “First Nations Small Businesses and Entrepreneurship in Canada” (December 2007) at 8, online (pdf): National Centre for First Nations Governance, <http://fngovernance.org/resources_docs/First_Nation_Small_Business.pdf>.

⁶³ Martin Papillon & Thierry Rodon, “Proponent-Indigenous Agreements and the Implementation of the Right to Free, Prior, and Informed Consent in Canada” (2017) 62 *Envtl Impact Assessment Rev* 216 at 219.

⁶⁴ *Ibid.*

For many First Nations, the simple fact that the duty to consult does not contain language or relationships founded upon consent frustrate the recognition of self-governance.⁶⁵ Despite an emerging international consensus that Indigenous peoples are entitled to free, prior, and informed consent before embarking on projects that risk infringing their rights or the integrity of their traditional territories, the current duty to consult does not allow Indigenous peoples to make autonomous choices.⁶⁶ For Indigenous peoples, a consultation process that does not include the ability to make a final decision or a process for forming recognizable boundaries leaves the duty to consult seeming less like a purposive process and more like a rubber stamp. This problem compounds others, such as funding meaningful consultation, the balance of power in negotiations, the likelihood of litigation, and more.⁶⁷

III PERSPECTIVES ON SOVEREIGNTY

Whether overt or subliminal, the Government of Canada's policies regarding Indigenous peoples and the Crown's assumed control over natural resources are not new. Harold Cardinal's book, *The Unjust Society*, written in the 1960s, labelled the history of Canadian policies toward Aboriginal peoples as "cultural genocide" and proposed a number of solutions that centred on Indigenous self-governance and political identity.⁶⁸ These ideas were later affirmed by the Government of Canada itself in the Report of the Royal Commission on Aboriginal Peoples in 1996, with far-reaching suggestions based on a premise of Aboriginal control over Aboriginal affairs.⁶⁹

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."⁷⁰ In this sense, sovereignty can be a problematic word to use, as it infers European concepts and power structures.⁷¹ Various Indigenous groups have other terms they feel are more appropriate, such as the Mohawk word *tewatatowie*, which can be translated as "we help ourselves."⁷² Understanding how each Indigenous political unit self-defines their political identity is critical, as concepts of self-

⁶⁵. While *Haida* does state that the duty to consult could give rise to a requirement of consent, that standard is not employed by the court.

⁶⁶. Papillon & Rodon, *supra* note 63 at 3.

⁶⁷. Kaitlin Ritchie, "Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation" (2013) 46:2 UBC L Rev 397.

⁶⁸. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 139, citing Harold Cardinal, *The Unjust Society* (Vancouver: Douglas & McIntyre, 1969) at 139.

⁶⁹. Canada, *Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples: Volume 2: Restructuring the Relationship* (Ottawa: Canada Communication Group—Publishing, 1996) [RCAP].

⁷⁰. *Ibid* at 105.

⁷¹. *Ibid* at 108.

⁷². Gerald R Alfred, *The Meaning of Self-Government in Kahnawake* (Ottawa: Royal Commission on Aboriginal Peoples, 1994). See RCAP, *supra* note 69.

governance, nationhood, and identity may vary with each nation's unique history, culture, and circumstance. What joins these varying concepts is a fundamental right to self-determination.⁷³

John Borrows 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."⁷⁴ 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.⁷⁵

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 society."⁷⁶ 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.⁷⁷ Brian Slattery 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.⁷⁸

Felix Hoehn sees concepts of sovereignty and the duty to consult as inextricably linked, with the duty to consult stemming directly from the "Crown's unilateral assertion of sovereignty over Aboriginal nations."⁷⁹ 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.⁸⁰ With the issue of competing jurisdictions and lawmaking settled on a constitutional level in *Campbell v British Columbia (AG)*,⁸¹ Hoehn asserts that there is no constitutional limit to simultaneous sovereignties cooperating at different political levels. There is space for Indigenous sovereignty without threatening the unity of Canada,⁸² but it must be created through negotiation and cannot be imposed by a court.⁸³

^{73.} *RCAP*, *supra* note 69 at 111.

^{74.} *Borrows*, *supra* note 68 at 157.

^{75.} *RCAP*, *supra* note 69 at 416.

^{76.} *Ibid* at 138

^{77.} *Ibid* at 138–140.

^{78.} Brian Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85:2 *Can Bar Rev* 255 at 282.

^{79.} Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre University of Saskatchewan, 2012) at 51.

^{80.} *Ibid* at 53; *Nisga'a Final Agreement Act*, SBC 1999, c 2 [NFAA].

^{81.} *Campbell v British Columbia (AG)*, 2000 BCSC 1123.

^{82.} *Hoehn*, *supra* note 79 at 55.

^{83.} *Ibid* at 79.

On an international level, there is a firm framework for recognizing and accepting Indigenous sovereignty. The United Nations Declaration on the Rights of Indigenous Peoples,⁸⁴ fully supported by Canada as of 2016,⁸⁵ asserts broad rights to self-determination that include political status and economic development.⁸⁶ While the current government has expressed its intention to begin a new age of communication and cooperation with Indigenous peoples on a nation-to-nation basis,⁸⁷ how the government plans to follow through on its support for the resolution has yet to be seen.

A. Sovereignty as A Vehicle for Economic Certainty

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,⁸⁸ a sentiment echoed by scholars and Indigenous politicians alike.⁸⁹ Recognizing Indigenous sovereignty and requiring consent from Indigenous political bodies would put Indigenous communities at the forefront of any economic activity and 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 economic opportunities. From the *Indian Act*⁹⁰ to the duty to consult to the myriad consultation policies of Canada's various levels of government,⁹¹ there are three common themes frustrating Indigenous economic efforts. The first is land rights, the second is the lengthy timescales needed to approve economic endeavours, 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*⁹² or pursuing land claims or Aboriginal title, many of these plans do not account for concepts of Indigenous sovereignty or nationhood.

^{84.} *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, 2007, Supp No 49, UN Doc A/61/49 (2007) 1 [UNDRIP].

^{85.} Indigenous and Northern Affairs Canada, "Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples" (10 May 2016), online: Government of Canada <<https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>>.

^{86.} See art 3 of UNDRIP, *supra* note 84 at 4.

^{87.} Canada, Governor General, *Making Real Change Happen: Speech from the Throne to Open the First Session of the Forty-Second Parliament of Canada*, 42-1 (4 December 2015) (Hon David Johnston).

^{88.} National Aboriginal Economic Development Board, "2012–2013 Annual Report" (2013) at 6, online (pdf): National Aboriginal Economic Development Board <<http://www.naedb-cndea.com/reports/naedb-2012-2013-annual-report.pdf>>.

^{89.} 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>>.

^{90.} *Indian Act*, RSC 1985, c I-5.

^{91.} Ravina Bains & Kayla Ishkanian, "The Duty to Consult with Aboriginal Peoples: A Patchwork of Canadian Policies" (May 2016) at 7, online (pdf): Fraser Institute <<https://www.fraserinstitute.org/sites/default/files/duty-to-consult-with-aboriginal-peoples-a-patchwork-of-canadian-policies.pdf>>.

^{92.} *First Nations Land Management Act*, SC 1999, c 24.

If the duty to consult creates economic uncertainty for businesses concerned about the outcome 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.⁹³ 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 consensus.⁹⁴ 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 the northwest of British Columbia. Land rights were central to the negotiation of the Nisga'a treaty, 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.⁹⁵ Alongside these land rights, the Nisga'a treaty also provides the Nisga'a exclusive power over mineral wealth and other resources.⁹⁶

There have 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.⁹⁷ 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. This power has been upheld as constitutionally valid.⁹⁸

A similar result may be found where Aboriginal title is established. In *Tsilhqot'in Nation v British Columbia*,⁹⁹ Aboriginal title was established and the Crown could no longer make decisions for the land, as the decision-making powers under the *Forest Act* no longer applied (as it was no longer Crown land). The Tsilhqot'in gained control over their traditional territories, and their consent is now required for forest management, outside province-wide regulations of general application.¹⁰⁰

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 Istchee, or "people's land" in northern Quebec.¹⁰¹

⁹³. Louise Mandell, "The Ghost," in Maria Morellato, ed, *Aboriginal Law since Delgamuukw* (Aurora: Canada Law Book Ltd, 2009) 55.

⁹⁴. *Moresby Explorers Ltd v Canada (AG)*, 2001 FCT 780.

⁹⁵. Tracie Lea Scott, *Postcolonial Sovereignty? The Nisga'a Final Agreement* (Saskatoon: Purich Publishing Ltd, 2012) at 61.

⁹⁶. *NFAA*, *supra* note 80 at c 3, s 19.

⁹⁷. Scott, *supra* note 95 at 86–89.

⁹⁸. *Sga'nism Sim'augit (Chief Mountain) v Canada (AG)*, 2013 BCCA 49.

⁹⁹. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

¹⁰⁰. *Ibid* at para 101.

¹⁰¹. Caroline Desbiens, "Nation to Nation: Defining New Structures of Development in Northern Quebec" (2004) 80:4 *Econ Geography* 351 at 352.

What began as a story of frustration and conflict between concepts of nationhood and incompatible views eventually turned to partnership that created space for recognition of nationhood both within and outside the Eeyou Istchee, and, 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 Québécois as it was a recognition of the Eeyou.¹⁰² This agreement came in response to years of conflict between the Quebec government's 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 some 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.¹⁰³

The variance in how Indigenous groups approach sovereignty, exert control over their lands, negotiate with other actors, and pursue economic activities show that there is no silver bullet or ready-made process.

Beyond those efforts of Indigenous communities themselves, further proposals exist that attempt to mesh Indigenous desires for self-governance with European conceptions of property ownership and legal systems. One such example is Thomas Flanagan's "First Nations Property Ownership Act," which advocates a transfer of reserve land to First Nations in fee simple title.¹⁰⁴ Criticisms of Flanagan's proposal note that, among other glaring issues, it fails 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, critics point out that his proposal flattens self-determination of Indigenous peoples and only reinforces their position in existing colonial structures.¹⁰⁵

Many actors in industry do not resist these new paradigms of governance, sovereignty, and economic development. Recent statements from Stockwell Day, former energy minister and current Senior Advisor of Pacific Future Energy's advisory board, show that there is willingness among industry proponents to recognize First Nations sovereignty—at least in an economic capacity:

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

^{102.} *Ibid* at 359.

^{103.} Martin Papillon, "Aboriginal Quality of Life under a Modern Treaty," IRPP Choices 14:9 (August 2008) 1 at 15, online (pdf): <<https://irpp.org/wp-content/uploads/assets/research/aboriginal-quality-of-life/aboriginal-quality-of-life-under-a-modern-treaty/vol14no9.pdf>>.

^{104.} Thomas Flanagan, Christopher Alcantara, & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's Press, 2010) at 180.

^{105.} Hoehn, *supra* note 79 at 105.

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.¹⁰⁶

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,¹⁰⁷ 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 responded proactively, attempting to engage Indigenous peoples and bring them on board with projects as early as possible to ease the consultation process.¹⁰⁸ 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.¹⁰⁹

An example of these negotiations is the four-party agreement between Cameco, Areva (another uranium company), the Kineepik Métis, and the Aboriginal Community of Pinehouse. Signed in 2012, the agreement covers a range of topics, from workforce initiatives to dispute resolution, and serves as a platform for the uranium industries to address local concerns on an equal basis.¹¹⁰ While such negotiations are a step in the right direction, they still do not reflect a full recognition of Indigenous governance and do not replace the negotiations and cooperative efforts that would need to take place if the communities had a recognized jurisdiction over the land.

B. Free, Prior, and Informed Consent

Beyond the examples given above of the different ways that Indigenous peoples have moved to have their sovereignty recognized by both private and state actors in Canada, there is a strong framework to be found in Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):

States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them.¹¹¹

Free, prior, and informed consent has been raised by numerous Indigenous organizations and political bodies as a framework for creating dialogue not only with the Crown, but

¹⁰⁶ 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/>>.

¹⁰⁷ Dwight Newman, “Emerging Challenges on Consultation with Indigenous Communities in the Canadian Provincial North” (2015) 39 *N Rev* 22 at 23.

¹⁰⁸ Papillon, *supra* note 103 at 104.

¹⁰⁹ Cameco Corporation, “Aboriginal Peoples Engagement” (2014), online: *Cameco Sustainable Development Report* <https://www.cameco.com/sustainable_development/2014/supportive-communities/aboriginal-peoples-engagement/>.

¹¹⁰ *Collaboration Agreement Between the Northern Village of Pinehouse and Kineepik Metis Local Inc and Cameco Corporation and Areva Resources Canada Inc*, 12 December 2012, online (pdf): Pinehouse.info <<http://pinehouse.info/wp-content/uploads/2016/06/Collaboration-Agreement-final.pdf>>.

¹¹¹ UNDRIP, *supra* note 84 at 8 [emphasis added].

also with industry. It is wrapped in concepts of sovereignty, and has been widely debated by Indigenous leadership in Canada, with many proponents who see it as a way of building a platform for self-governance, insofar as self-governance requires dialogue with outside actors.¹¹²

Free, prior, and informed consent (FPIC) has also been offered as a way of remedying the lack of language surrounding consent in the duty to consult.¹¹³ Sarah Morales proposes that FPIC can be implemented alongside the duty to consult, with the duty to consult creating a framework for when FPIC can be implemented, and FPIC outlining a normative process informed by respect and consensus building. Morales notes that successfully achieving the implementation of FPIC requires a careful braiding of international, Indigenous, and Canadian law with the overall goals of reconciliation and Indigenous self-determination.¹¹⁴

Whether FPIC needs to be braided with Canadian and Indigenous law to achieve a version of self-determination that can engage industry is another question. The implementation of FPIC through a consensus with the Canadian state would appear to create another layer of complexity to the application of Indigenous sovereignty insofar as it applies to private corporations. It is intuitive that Indigenous sovereignty would go hand in hand with Indigenous laws and that private corporations would be obligated to follow Indigenous laws if they were a precondition to doing business. FPIC in that sense could become an obstacle to Indigenous sovereignty, as it presents yet another involvement of the Crown in what could otherwise be direct dialogue between industry and nation.

FPIC has been seen by others as an important step toward reducing litigation by fostering dialogue between industry and Indigenous peoples and encouraging agreements through negotiation. Underpinning these dialogues is the mutual acknowledgement that the industry actors, be they pipeline proponents or mining corporations, acknowledge that consent is needed to proceed with development. This is the solution advocated by Robert Hamilton in his comments on *Tsleil-Waututh Nation v Canada (AG)*, the case that shut down the Trans Mountain Pipeline.

Hamilton notes that the duty to consult, as seen by the Federal Court of Appeal, is a high standard, highly fact dependent, and prone to encouraging “endless litigation.” In this way, Hamilton argues that the duty to consult breeds uncertainty for all parties, and that no matter how clear the process is, there appears to always be another court battle to be fought over the result. In Hamilton’s eyes, the solution is likely negotiation and consent—industry and Indigenous peoples working together to build relationships and reach agreement—a much sought-after certainty instead of perpetual frustrations.¹¹⁵

¹¹² Joshua Gladstone & Rachel Singleton-Polster, “Moving Forward with the Right to Free, Prior & Informed Consent,” N Pub Aff 4:2 (3 May 2016), online: <<http://www.northernpublicaffairs.ca/index/letter-from-the-editor-moving-forward-with-the-right-to-free-prior-and-informed-consent/>>.

¹¹³ Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in Centre for International Governance Innovation, “UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws—Special Report” (Waterloo: CIGI, 2017) 63 at 65.

¹¹⁴ *Ibid* at 77.

¹¹⁵ Robert Hamilton, “Uncertainty and Indigenous Consent: What the Trans-Mountain Decision Tells Us about the Current State of the Duty to Consult” (10 September 2018), online: ABlawg.ca <<https://ablawg.ca/2018/09/10/uncertainty-and-indigenous-consent-what-the-trans-mountain-decision-tells-us-about-the-current-state-of-the-duty-to-consult/>>.

IV CONCLUSION

A greater recognition of Indigenous land rights and governance structures has the potential to reduce economic uncertainty for industry and Indigenous groups alike. Currently, the duty to consult does not provide an adequate means of providing confidence to industry actors or self-determination to Indigenous groups. Recognizing 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 Indigenous control over developments within their territories, which the current paradigm does not provide.

Many in industry are already prepared to 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, and by necessity will require courage from our elected representatives to step beyond the current norm.

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