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# ACROSS THE GREAT DIVIDE: ANISHINAABEK LEGAL TRADITIONS, TREATY 9, AND HONOURABLE CONSENT

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## I INTRODUCTION

The July 2018 Ontario Superior Court judgment in *Eabametoong First Nation v Minister of Northern Development and Mines*<sup>1</sup> involved an Ojibwa First Nation<sup>2</sup> challenging an exploratory mining permit issued by the Ontario government to Landore Resource Canada Inc (Landore Canada). The judgment ultimately held that the Crown acted dishonourably in

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<sup>1</sup> *Eabametoong First Nation v Minister of Northern Development and Mines*, 2018 ONSC 4316 [Eabametoong].

<sup>2</sup> The Eabametoong First Nation reserve is located 300 kilometres northeast of Thunder Bay. It is accessible only by territory.

abruptly closing consultation with the Eabametoong First Nation (Eabametoong). Moreover, it ruled that Eabametoong being given two weeks to include conditions in the already completed permit undermined the Crown's obligation to engage in ongoing consultations that addressed any potential grievances brought to light by Eabametoong. The judgment entrenched the Crown's reconciliatory obligation to adequately consult with any aggrieved First Nation community prior to making declarations that their traditional lands are open to investment. Nevertheless, this paper argues that in the judgment, reconciliatory obligations were highlighted at the expense of unresolved treaty claims. Acknowledging these unresolved claims could have potentially shifted the Crown's consultative obligation to a much higher threshold than was ultimately held in the judgment.

Reconciling Crown and First Nations interests involves preserving Indigenous and treaty rights as equal to substantive public interest. Judgments like *Eabametoong* reverse the dynamic by holding that reconciliation depends on how well Indigenous and treaty rights can be aligned with public well-being. This was observed in *Eabametoong* when Justice Sachs recognized any substantive Indigenous and treaty claim depended on the extent to which the Eabametoong First Nation could claim title in their territory. Upon judging any title claim to be weak, Justice Sachs held that the Crown did not owe a duty of substantial consultation to Eabametoong. Reconciliatory obligation was purely predicated on upholding Eabametoong's procedural right to adequate consultative engagements that respected their cultural well-being, while substantive rights claims remained unresolved in the judgment. Leaving potential claims unheard ignores long-held treaty obligations and major Supreme Court of Canada jurisprudence that deals with how agreements between the Crown and First Nations are to be upheld.

This paper begins with an analysis of the concepts underlying the Crown's duty to consult as developed in key Supreme Court judgments. It then explains how both the prior Liberal and current Conservative Ontario provincial governments have sought to advance mineral extraction in the northern Ring of Fire region. It also highlights how the Eabametoong First Nation was greatly impacted by these governmental priorities. The paper then analyzes the *Eabametoong* judgment and how it deals with underlying title and reconciliation. Key jurisprudence on treaty interpretation is taken up to highlight the judgment's problematic reliance on reconciliation at the expense of unresolved treaty claims.<sup>3</sup> Generational treaty partnerships developed in relevant agreements like Treaty 9 are noted to show that the Crown's consultative obligation was likely more substantive than initially held in the judgment.<sup>4</sup> Finally, the paper concludes by explaining that, while reconciliation was held as a major priority in the judgment, leaving treaty rights unresolved potentially creates greater enmity between the Crown and aggrieved First Nations communities.

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<sup>3</sup> See Janna Promislow, "Treaties in History and Law" (2014) 47 UBC L Rev 1085 at 1098: "In the jurisprudential context, the Supreme Court uses this language to assert both the legally binding nature of these agreements as well as their permanence. Permanence is a necessary part of the characterization of treaties as constitutional, since constitutions, by their very nature, are built to last."

<sup>4</sup> In regards to resource development in treaty territory, it is equally critical to point out that these interpretive requirements impose a more substantive engagement protocol, in which customary landed interests upheld by the First Nation community need to be respected at every stage of negotiation well beyond being regarded as a mere procedural hurdle.

## II THE DUTY TO CONSULT

The duty to consult serves a major role in upholding Indigenous and treaty rights by establishing key conditions on which Crown activity can be constitutionally approved. For example, the duty stipulates that any Crown-led project that impacts a First Nation's ability to exercise their rights must have the Crown (or a delegated third party) carry out engagements with the aggrieved community. In the event that the potential limit greatly impacts these rights, then the duty to consult and accommodate will be invoked. Conversely, if the harm is judged to be relatively minimal, then engagements of a less substantive nature will be called upon.<sup>5</sup>

In many judgments, the Supreme Court has typically held that consultative requirements depend on the extent to which a proposed project negatively impacts a First Nation's continued potential to preserve their Indigenous and treaty rights as well as rights to title. In judgments like *Haida Nation*, Chief Justice McLachlin points out that evaluations on how the Crown proceeds with the duty take place along a *spectrum*. Chief Justice McLachlin writes "at one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice."<sup>6</sup> Conversely, when the potential impacts to Indigenous and treaty rights are judged to be substantial, the Crown may be obligated to take part in more engaged and ongoing consultative processes, in which accommodation remedies may be in order.

Consultation requirements are more pronounced in judgments when the claim to title or the potential impact to Indigenous and treaty rights is more substantial. When potential impacts are judged to greatly undermine an aggrieved First Nation's rights, the Crown is honourably bound to preserve Indigenous rights<sup>7</sup> as constitutionally upheld in section 35.<sup>8</sup> When the potential to impact the claimed right is judged to be substantive, greater remedies will be required to mitigate the harms. Remedies (including accommodation) may be required to ensure the reconciliatory goals underlying the duty to consult will be adequately met. Reconciliatory objectives require the Crown to adequately weigh and balance the underlying interests observed in the Indigenous and treaty rights claim and the overall substantive public interest.

In the Supreme Court's judgment in *Taku River*, Chief Justice McLachlin writes:

As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by policies in response. The purpose of Section 35 (1) of the *Constitution Act 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with de facto Crown sovereignty.

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<sup>5</sup> See Grace Nosek, "Re-imagining Indigenous Peoples' Role in Natural Resource Decision Making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions" (2017) 50 UBC L Rev 90.

<sup>6</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 43 [*Haida Nation*].

<sup>7</sup> Brenda Gunn "Beyond *Van Der Peet*: Bringing Together International, Indigenous and Constitutional Law" in John Borrows, Larry Chartrand, Oonagh E. Fitzgerald & Risa Schwartz, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019) at 139.

<sup>8</sup> *Constitution Act, 1982*, s 35(1) being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11: "The existing Aboriginal and treaty rights of the Aboriginal people in Canada are hereby recognized and affirmed."

Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.<sup>9</sup>

While the conceptual core inherent in the duty to consult has been clearly established in many judgments, it is constantly debated during conflicts between resource-interested governments and First Nations communities.

### III “UNLOCKING” THE RING OF FIRE

Both the prior and the current Ontario provincial governments have undertaken many attempts to “unlock” the Ring of Fire’s<sup>10</sup> development potential. At the same time, many First Nations communities situated near the Ring of Fire have demanded the province engage in adequate consultative processes that respect the long-standing political, cultural, and economic aspects of Indigenous rights and treaty claims. Ontario’s amended *Mining Act*<sup>11</sup> established new protocols that prospectors and corporations had to comply with when staking a free entry claim to lands and mineral resources.<sup>12</sup> The amended legislation held that an appropriate exploration plan must be included in any staking claim presented to the province. Upon receiving an exploration plan, the relevant minister must provide a copy to aggrieved First Nations communities who, in turn, have three weeks to respond to the plans by submitting written concerns related to their Indigenous and treaty rights. Prior to approval, Karen Drake points out, “the Director may direct the proponent to consult with the Aboriginal community. Before issuing an exploration permit, the Director must be ‘satisfied that appropriate Aboriginal consultation has been carried out.’”<sup>13</sup> The prior Liberal government (2003–2018) built on changes to the *Mining Act* by implementing the *Far North Act*<sup>14</sup> to protect culturally significant areas on reserve lands in the Ring of Fire region.

The *Far North Act* was initially passed into law in 2010, and it served to both respond to First Nations’ concerns related to development while also encouraging corporate investment in the region. In a 2019 *Globe and Mail* piece, Dayna Scott points out the Liberal government also implemented the *Far North Act* to “manage the increasing volume and credibility of claims to Indigenous governance and authority in the region.”<sup>15</sup> These claims were managed by creating requisite conditions on which Indigenous communities in the region could highlight

<sup>9</sup> *Taku River Tlinglit First Nation v British Columbia (Project Assessment Director)*, 2004 3 SCC 74 at 42.

<sup>10</sup> The Ring of Fire is a large chromite mining development project near the James Bay lowlands in Northern Ontario. Nine Ojibwa First Nations are situated on or near these Treaty 9 lands.

<sup>11</sup> *Mining Act*, RSO 1990, c M14.

<sup>12</sup> Rachel Ariss with the collaboration of John Cutfeet, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Halifax: Fernwood Publishing, 2012) at 37 [Ariss and Cutfeet].

<sup>13</sup> Karen Drake, “The Trials and Tribulations of Ontario’s *Mining Act*: The Duty to Consult and Anishinaabek Law” (2015) 11:2 JSDLP at 194–195 [Drake].

<sup>14</sup> *Far North Act*, 2010, SO 2010, c 18.

<sup>15</sup> Dayna Scott, “Doug Ford’s Repeal of the *Far North Act* Won’t Gain the Respect of Indigenous Communities” (25 March 2019), online: *Globe and Mail* <[www.theglobeandmail.com/opinion/article-doug-fords-repeal-of-the-far-north-act-wont-gain-the-respectof](http://www.theglobeandmail.com/opinion/article-doug-fords-repeal-of-the-far-north-act-wont-gain-the-respectof)>.

key cultural and burial sites that would be protected in any consultative engagement with the provincial government or concerned corporation.

First Nations communities like Eabametoong and Neskantaga have argued that the amended *Far North Act* merely placated First Nations in Northern Ontario by providing them incremental gains while ensuring substantial benefits would be procured by the province and whichever corporation staked a claim to the region. Under the *Far North Act*, consultative engagements between the province and the impacted First Nation would preserve culturally valuable sites including “burial sites, fishing areas or traplines, and may designate areas as open for—or closed to—mineral exploration.”<sup>16</sup> Ultimately, however, the exploration plan (including the culturally valuable areas) had to be approved by the relevant minister, who could decide that the selected areas need not be preserved.

Both the Eabametoong and Neskantaga First Nations have also argued that amendments to the provincial *Mining Act* have not adequately addressed their long-held grievances related to consultative engagement. Writing on the *Mining Act*, Drake points out that any claimholder could “engage in any non-prescribed exploration activities—which include low impact activities such as pitting and trenching below a prescribed threshold—without acquiring permission from the Crown and hence without consultation occurring.”<sup>17</sup> Moreover, an overarching concern that brought added publicity to the *Eabametoong* judgment lay in the jurisdictional authority the Ontario government claimed to exert throughout the Ring of Fire region. This leaves consultative engagement with First Nations a mere procedural hurdle to be adequately met, rather than an ongoing reconciliatory process between the Crown and Indigenous communities.

During the campaign leading up to the 2018 Ontario provincial election, Progressive Conservative (PC) leader (and current Premier) Doug Ford claimed that upon being elected “he would jumpstart mining the mineral-rich James Bay Lowlands about 500 kilometres northeast of Thunder Bay—even if it meant driving the bulldozer himself.”<sup>18</sup> The announcement sparked concern among several First Nations situated throughout Treaty 9 territory in northeastern Ontario. These groups argued that increased mining activity would incur major resource depletion while also threatening interdependent communal well-being on reserves throughout the region.<sup>19</sup> In addressing these concerns, several regional Chiefs throughout Ontario countered the province’s assertion of jurisdictional authority in the region. Lucy Scholey, writing in a column for the Aboriginal People’s Television Network, points out “in a post-election letter to Ford, Ontario Regional Chief Isadore Day said the province’s First Nations have the ‘ultimate authority when it comes to resource development.’”<sup>20</sup>

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<sup>16</sup> *Ibid* at para 4.

<sup>17</sup> Drake, *supra* note 12 at 196.

<sup>18</sup> Lucy Scholey, “Doug Ford Can’t Bulldoze through First Nations to Ring of Fire, Say Indigenous Leaders” (15 June 2018), online: *APTN National News* <[aptnnews.ca/2018/06/15/doug-ford-cant-bulldoze-through-first-nations-to-ring-of-fire-say-indigenous-leaders/](http://aptnnews.ca/2018/06/15/doug-ford-cant-bulldoze-through-first-nations-to-ring-of-fire-say-indigenous-leaders/)>.

<sup>19</sup> Concerns surrounding resource development in Treaty 9 areas are especially acute given that many First Nations Chiefs and political leaders have argued that there has been a major lack of transparency on the part of the Ontario government and its proposed plans for extraction in the Ring of Fire region. See Angela Gemmill, “NDP Mining Critic Concerned Ford Government Stalling on Ring of Fire Development” (1 November 2018), online: *CBC News* <[www.cbc.ca/news/canada/sudbury/mantha-ring-of-fire-first-nations-1.4886598](http://www.cbc.ca/news/canada/sudbury/mantha-ring-of-fire-first-nations-1.4886598)>.

<sup>20</sup> Scholey, *supra* note 17 at para 6.

The incoming PC majority government subsequently scrapped the *Far North Act* and guaranteed that mining the abundant resources lying in the James Bay Lowlands would ensure economic prosperity among First Nations communities in the region. They pointed out that rather than being overburdened with bureaucratic dead ends,<sup>21</sup> they would be creating coalition-based, revenue-sharing partnerships with First Nations communities interested in building winter roads near mining areas. In a 2019 column for *Northern Ontario Business*, Ian Ross writes that “(Indigenous Affairs and Energy Minister) Greg Rickford talked about forming a ‘coalition’ of willing partners among First Nation communities and municipalities who support the construction of an access road as a ‘practical and pragmatic exercise’ that will create jobs, generate revenue, incentivize business and connect isolated Northern reserves.”<sup>22</sup> The Marten Falls First Nation and the Webequie First Nation have long pledged to build access roads linking their reserve lands to the Ring of Fire area.<sup>23</sup> Ross points out that “[Rickford] praised Marten Falls and Webequie First Nations, which have shown ‘extraordinary leadership’ in leading the environmental assessment for the proposed North-South road.”<sup>24</sup> Amending the *Far North Act* may remove bureaucratic red tape, but it hardly assuages aggrieved communities like the Eabametoong and Neskantaga First Nations who have long held that both the prior Liberal and current PC governments are “playing favourites” with interested communities like Marten Falls and Webequie while ignoring those who do not see any immediate benefits in revenue sharing.

Concerns about the prior Liberal government’s *Far North Act* remain salient given current PC policy in the Ring of Fire region. This is especially the case given both governments’ readiness to engage with interested First Nations alone, while summarily ignoring the demands advanced by communities not deemed “development ready.” In a report on consultative engagement in the region, Matt Prokopchuk pointed out “they [Eabametoong and Neskantaga] slammed the Wynne [Liberal] government for how the regional talks were moving ahead, calling them unreasonable and unfair and accusing the province of engaging with ‘closed-door’ processes with respect to environmental assessments undertaken by other communities.”<sup>25</sup> Building on allegations that the newly elected PC government was playing favourites with development-ready communities, Bob Rae, a lead negotiator for the First Nations in the region, said in a memo that “the new government would likely favour striking deals with individual member First Nations to get a road built into the chromite, gold and vanadium-rich region that has an estimated value of about \$60 billion.”<sup>26</sup> The *Eabametoong* judgment thus had a major

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<sup>21</sup> *Haida Nation*, *supra* note 6.

<sup>22</sup> Ian Ross “Rickford Promises Progress in the Ring of Fire” (24 January 2019), online: *Northern Ontario Business* <<https://www.northernontariobusiness.com/industry-news/mining/rickford-promises-progress-in-the-ring-of-fire-1211033>>.

<sup>23</sup> See “Marten Falls, Webequie Deny ‘Closed Door’ Approach in All-Weather Road Agreements” (4 June 2018), online: *CBC News* <<https://www.cbc.ca/news/canada/thunder-bay/marten-falls-webequie-ring-of-fire-1.4687794>>.

<sup>24</sup> *Far North Act*, *supra* note 13 at para 9.

<sup>25</sup> Matt Prokopchuk, “First Nations Near Ring of Fire Press Indigenous Affairs Minister over Consultation” (25 November 2018), online: *CBC News* <<https://www.cbc.ca/news/canada/thunder-bay/chiefs-of-ontario-assembly-ring-of-fire-1.4916764>>.

<sup>26</sup> Jorge Barrera, “Ontario Playing Favourites with First Nations on Ring of Fire, Say Chiefs” (23 November 2018), online: *CBC News* <<https://www.cbc.ca/news/indigenous/ontario-ring-of-fire-mining-matawa-first-nations-1.4917040>>.

residual impact on how government action (especially relating to Ontario's duty to consult) would be carried out in the Ring of Fire region in the coming years.

#### IV *EABAMETOONG FIRST NATION V MINISTER OF NORTHERN DEVELOPMENT AND MINES*

*Eabametoong First Nation* was a 2018 Ontario Superior Court judgment that involved a Northern Ontario Ojibwa First Nation challenging an exploration permit that the former provincial minister of Northern Development and Mines granted to the corporation Landore Resource Canada. The permit granted Landore Canada the ability to engage in exploratory drilling in the traditional territory of the Eabametoong First Nation. The permit was challenged on the grounds that the Crown improperly upheld its obligation to consult the aggrieved First Nation. In the judgments, Justice Sachs points out “the parties agree that the Crown had a constitutional duty to consult Eabametoong but disagree as to whether it was discharged. The parties [also] disagree as to the remedy that should be imposed if this court were to find that the [Minister’s] decision that the duty was properly discharged is an unreasonable one.”<sup>27</sup> While the judgment obviously held great impact in relation to the parties directly involved, it was especially prescient given the newly elected PC government’s desire to mine the rich mineral deposits held in the Ring of Fire located in Treaty 9 territory (the treaty that also governs Crown activity in traditional Eabametoong territory).

Treaty 9 (along with many other numbered treaties) contain “Take Up clauses.” The Treaty 9 clause reads as follows:

First Nations communities surrender certain lands, subject to the right to “pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered,” subject further to the government’s right to take up certain tracts of the surrendered lands for certain purposes, one of which is mining. Thus the lands in question are surrendered lands that the government has the right to ‘take up.’<sup>28</sup>

The Take Up clause implies that underlying Crown title is predicated on two conditional factors. The initial condition stipulates that in exchanging their jurisdictional title, the impacted First Nations communities can preserve rights to cultural and subsistence-related activity. The second condition upholds that these rights can be curtailed whenever the Crown requires the land to advance certain purposes. A key purpose on which governments curtail these rights is typically related to resource extraction and development. Shin Imai adds that “provinces have relied on the ‘tracts taken up’ clause, coupled with the ‘surrender’ of the lands in the documents to exploit natural resources in the traditional territory of First Nations.”<sup>29</sup> Justice Sachs immediately shows that the judgment does not deal with any jurisdictional disputes between the Ontario government and the Eabametoong First Nation. The judgment instead deals with whether or not the Crown discharged its underlying jurisdictional authority honourably when

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<sup>27</sup> *Eabametoong*, *supra* note 1 at para 2.

<sup>28</sup> *Ibid* at para 5

<sup>29</sup> Shin Imai, “Treaty Lands and Crown Obligations: The Tracts Taken Up Provision” (2001) 27:1 *Queens LJ* at 5 [Imai].

it took part in consultative engagements with Eabametoong prior to granting an exploration permit to Landore Canada.

## A. Underlying Title And Treaty Rights

Underlying Crown sovereignty is a title that regards any claim to territory as being acquired by a settling nation. Establishing title through consistent occupation is presumed to serve as the bedrock on which the settler nation can gain sovereign authority in “undiscovered” territory. For instance, in the *Guerin* judgment Chief Justice Dickson holds:

The principle of Discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians’ rights in the land were obviously diminished; but their rights of occupancy and possession remain unaffected.<sup>30</sup>

Kent McNeil argues that throughout Canada, Crown title “is presumed to have been acquired by settlement, which is the British imperial law equivalent of effective occupation in international law.”<sup>31</sup> With the Crown believed to have properly established sovereignty through “discovery,” Indigenous communities were able only to retain the right to occupy and take up territory so as to preserve their cultural and physical well-being. These rights to usage were extinguished when lands were sold to the settling country alone.<sup>32</sup>

While it became impossible to extinguish Indigenous and treaty rights after the repatriation of the *Constitution Act* in 1982, underlying title is additionally consequential when evaluating what remains among First Nations’ legal traditions and governing systems. John Borrows points out that establishing sovereignty through “discovery” and occupation only “heralds the diminishment of another’s possessions.”<sup>33</sup> These concerns were (and remain) especially prescient in situations where Indigenous rights and title were held in a relatively subordinate position to underlying Crown title. Treaty agreements, while not being predicated on discovery alone, can potentially allocate an underlying authority to the Crown in claiming title to lands. Conversely, Indigenous communities are typically left only to exercise a right to preserve their physical and cultural well-being in these agreements.

Agreements like Treaty 9 were negotiated to have the Crown serve a protectorate role in relation to the signatory First Nations communities.<sup>34</sup> Conversely, the First Nations that agreed to the treaties ensured that their rights to preserve their cultural and physical well-being would remain intact. The Crown serving a protectorate and trusteeship role implies that it must strive to preserve Indigenous rights in relation to matters like hunting, fishing, and trapping. In exchange for preserving these rights, it is typically believed that provinces can uphold

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<sup>30</sup> *Guerin v The Queen*, 1984 2 SCC 335 at p 378.

<sup>31</sup> Kent McNeil, “The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies” (2016) 53:2 Osgoode Hall LJ at 715.

<sup>32</sup> See Robert J Miller & Micheline D’Angelis, “Brazil, Indigenous Peoples, and the International Law of Discovery” (2011) 37:1 Brook J Intl L at 7.

<sup>33</sup> John Borrows, “Sovereignty’s Alchemy: An Analysis of *Delgamuukw v British Columbia*” (1999) 37:3 Osgoode Hall LJ at 562.

<sup>34</sup> See James Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58:3 Sask L Rev at 246 [Henderson, “Empowering”].

jurisdictional authority over the treaty lands at issue because the conditions on which lands are taken up lie within their constitutional purview. Imai points out that provinces usually advance two arguments in relation to their underlying authority to take up treaty lands: “The first is that the treaties themselves give the provinces authority to ‘take up’ lands. The second is the opposite, namely that the treaties do not give provinces power, but rather describe the geographical extent of hunting, trapping and fishing rights *after* the province has chosen to ‘take up’ lands.”<sup>35</sup> These are the conceptual foundations on which Justice Sachs held the dispute in *Eabametoong* to rest on.

## B. The Judgment

The judgment in *Eabametoong* ultimately held that the Crown inadequately discharged its duty to consult because it summarily closed avenues to consultative engagement between the Eabametoong First Nation and Landore Canada. While parties representing Eabametoong and Landore Canada took part in two meetings between 2014 and 2015, the First Nation’s requests to continue consultation went unheard by the province by early 2016. By February of that year the province issued a letter to Eabametoong indicating that a judgment on whether or not to award a permit would be reached by the end of the month.<sup>36</sup>

Upon receiving the advisory letter, Eabametoong immediately notified Landore Canada representatives and requested a meeting. Landore Canada replied “that it had waited long enough, had held two meetings and was not prepared to have another one. No reason was given for the sudden urgency.”<sup>37</sup> A month later, the ministry wrote an additional letter to Eabametoong stating that it would award the permit to Landore Canada and they would be given a week to respond to the proposed conditions it had set in the permit.<sup>38</sup> A week later “Eabametoong’s legal counsel responded, indicating how and why the proposed permit conditions did not address most of the concerns raised by the Eabametoong in relation to the permit; registering its view that a deadline of five business days to respond to proposed conditions was unreasonable.”<sup>39</sup> The province did not respond to Eabametoong and awarded Landore Canada the permit on March 31, 2016.<sup>40</sup> Eabametoong quickly sought judicial review after the permit was granted.

Eabametoong counsel argued the Crown and Landore Canada engaged in sharp dealing (i.e., unethical negotiation) throughout the consultation process. According to Eabametoong, the Crown acted dishonourably by abruptly ignoring requests to take part in later consultation without providing a clear and adequate reasons why. The Crown additionally placed unrealistic and sudden demands on Eabametoong by giving them a week to add new conditions to a permit that was already approved.<sup>41</sup> These procedural oversights are believed to undermine the Crown’s honour in relation to First Nations. This is because in discharging its duty to consult, the Crown is always obligated to engage First Nations’ concerns on an equitable basis. James

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<sup>35</sup> Imai, *supra* note 28 at 20.

<sup>36</sup> *Eabametoong*, *supra* note 1 at para 65.

<sup>37</sup> *Ibid* at para 67.

<sup>38</sup> *Ibid* at para 70.

<sup>39</sup> *Ibid* at para 71.

<sup>40</sup> *Ibid* at paras 72–73.

<sup>41</sup> *Ibid* at para 78.

Youngblood Henderson points out “in construing the intent of the Crown, the courts have prohibited any attribution of sharp dealing or dishonourable conduct by the Crown, acting under the aegis of ministers of the Crown, toward Aboriginal nations.”<sup>42</sup> This guarantees that consultation serves a reconciliatory purpose where the Crown and the concerned First Nation both participate in an ongoing dialogue where each parties’ underlying interests are respected. Acting honourably implies that certain procedural requirements are upheld when engaging in any consultative endeavour with an Indigenous community.

Ultimately, Justice Sachs held the reconciliatory imperative inherent in consultation was undermined given that both the Crown and Landore Canada dishonourably engaged in sharp dealing during its negotiations with Eabametoong. Justice Sachs added that by denying any later consultations it was “clear that from Eabametoong’s perspective it is reasonable for them to have felt that their expectations regarding the consultation processes that they understood was going to take place were abruptly terminated.”<sup>43</sup> It was held that the Crown and Landore Canada ignored this imperative as soon as they believed their consultative requirements were adequately met. Abruptly ending any opportunity to engage in additional consultation subsequently dismissed any later grievances Eabametoong may have had. Justice Sachs points out that adequate consultation deals with the mutual interests shared by both parties through ongoing relations.<sup>44</sup> The reconciliatory goals underlying consultation imply that engagements need to adequately take into account ongoing concerns that the aggrieved community has brought up throughout the negotiations. Justice Sachs held that by denying any additional requests for consultation, the Crown and Landore Canada summarily ignored these crucial requirements.

Justice Sachs additionally held the reconciliatory goals inherent in any consultative engagement require one party to immediately notify another of any changes in the process. It was pointed out that while the Crown and Landore Canada may have had plausible reasons as to why they abruptly closed any later attempts at consultation, the obligation to explain why the cancellations took place remained unmet.<sup>45</sup> Moreover, it was ruled that not quickly notifying Eabametoong on the permit undermined the Crown’s honourable obligation to not engage in sharp dealing. This is observed in how Landore Canada was granted the permit, while Eabametoong was given a limited amount of time to add any new conditions to it. Justice Sachs added this does “not reflect a genuine desire to engage in real, straightforward and honest consultation. Rather, they appear to be notifications that a decision had basically been made and if Eabametoong has anything to say they should do so within a very short time frame.”<sup>46</sup> It was ultimately concluded that the permit would be set aside and another permit would be granted only when adequate consultation had taken place with Eabametoong.<sup>47</sup>

The judgment in *Eabametoong* was hailed as a victory against the newly elected PC government and its attempts to “unlock” the development potential in the Ring of Fire. Any attempts to do so would require adequate and ongoing consultation at every step. In a 2018

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<sup>42</sup> James Youngblood Henderson, “Interpreting *Sui Generis* Treaties” (1997) 36:1 *Alta L Rev* at 80 [Henderson, “Interpreting”].

<sup>43</sup> *Eabametoong*, *supra* note 1 at para 109.

<sup>44</sup> *Ibid* at para 92.

<sup>45</sup> *Ibid* at para 111.

<sup>46</sup> *Ibid* at para 120.

<sup>47</sup> *Ibid* at para 128.

*CBC News* report released shortly after the judgment, Jorge Barrera writes “[former] Eabametoong First Nation Chief Elizabeth Atlookan said the ruling makes clear the Ontario government needs to change the way it deals with First Nations on resource development and consultation.”<sup>48</sup> In a later 2019 *Northern Ontario Business* report, Ian Ross points out that the (current) Eabametoong Chief Harvey Yesno held that Eabametoong does not have a vested interest in ensuring that access roads to the Ring of Fire are built. This is especially evident when considering that while the community was not deemed “developer ready,” area projects were still being proposed by corporations.<sup>49</sup> More specifically, “whereas Webequie and Marten Falls now have a vested interest in seeing the Ring of Fire become reality, Yesno would rather focus on the needs and priorities of his community.”<sup>50</sup> Initially threatening to appeal the judgment, the provincial government ultimately chose not to do so.

The *Eabametoong* judgment created hope that the Ontario government would adequately respond to First Nations’ grievances prior to engaging in any resource extraction. Nevertheless, a major conceptual shortcoming is observed in Justice Sachs’ judgment, especially in evaluating the appropriate scope at which consultation is believed to be adequately discharged in the region. This is a case where the reconciliatory imperative was highlighted *in spite of* Justice Sachs writing that the Crown’s obligations to Eabametoong were on the lower end of the consultative spectrum.

Justice Sachs concluded that the Crown’s consultative duty lay on the lower end of the spectrum because traditional Eabametoong territory was summarily “surrendered” in Treaty 9. As mentioned above, the agreement stipulated that the Crown reserves the right to take up surrendered territories for the purposes of mineral exploration. It was then held that any claim to title on Eabametoong territory would be a weak one.<sup>51</sup> Moreover, while the proposed project may have had some residual impacts on Eabametoong’s cultural and physical well-being, it was held that “the effect on the lands was considerably less than other mining activities.”<sup>52</sup> It was ultimately held that, while the consultative demand was relatively minor, the Crown’s reconciliatory imperative to respect Eabametoong’s procedural right to adequate consultation was left unmet. This judgment is problematic given that it appears Justice Sachs needlessly exaggerates Eabametoong’s title claim and, upon dismissing it, promptly advances the reconciliatory imperative that balances First Nations’ concerns with underlying public interests. This approach is problematic because, in dealing with reconciliatory concerns, it does not give due credence to potential Indigenous rights and treaty claims that can shift the Crown’s consultative obligation toward the higher end of the spectrum.

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<sup>48</sup> Jorge Barrera, “Ontario Court Quashes Gold Mining Permit over Lack of Meaningful Consultation with First Nation” (17 July 2018), online: *CBC News* <[www.cbc.ca/news/indigenous/eabametoong-ring-of-fire-landore-permit-1.4750681](http://www.cbc.ca/news/indigenous/eabametoong-ring-of-fire-landore-permit-1.4750681)>.

<sup>49</sup> Ian Ross, “First Nations Need to Take the Lead on Far North Development: Yesno” (12 September 2019), online: *Northern Ontario Business* at para 20 <[www.northernontariobusiness.com/industry-news/aboriginal-businesses/first-nations-need-to-take-the-lead-on-far-north-development-yesno-1688888](http://www.northernontariobusiness.com/industry-news/aboriginal-businesses/first-nations-need-to-take-the-lead-on-far-north-development-yesno-1688888)>.

<sup>50</sup> *Ibid* at para 31.

<sup>51</sup> *Eabametoong*, *supra* note 1 at para 91.

<sup>52</sup> *Ibid* at para 91.

## V RECONCILIATION AND UNRESOLVED TREATY RIGHTS

Upholding reconciliatory obligations while ignoring underlying Indigenous and treaty rights is troublesome because it places too much focus on placating public interests while leaving potential rights claims unresolved. This approach also advances problematic assertions that First Nations' concerns are always amenable to substantive public interests. Constance MacIntosh argues that accepting this approach "would mean that reconciliation is premised on requiring Aboriginal peoples to accept diminished rights from the start, unless it is somehow 'critical' that their true legal entitlements be recognized. It is hard to see how this is a practice of reconciliation."<sup>53</sup> In the *Eabametoong* judgment, the opportunity to advance a reconciliatory objective was evident as soon as the *Eabametoong* title claim was judged to be weak. Narrowly restricting the analysis to the title claim summarily set aside any potential arguments that Indigenous and treaty rights were unduly impacted by Landore Canada's proposed project.

Justice Sachs problematically bound together treaty rights and underlying rights to title by holding that the low-level consultative obligation was strongly based on the "weak" title claim. Irrespective of any title claims on treaty lands, acknowledging treaty rights may imply a more substantive consultative obligation than a "clear and timely notice of the project under consideration in sufficient form and detail."<sup>54</sup> This is especially true because, while treaty rights create a legal outlet on which the Crown can settle on Indigenous territory, it also creates an enduring Crown obligation to respect the cultural, political, and economic values preserved by the Indigenous and treaty rights held in these agreements.

The Crown has an honourable obligation to work toward reconciliatory goals and ensure that consultative engagements are not done dishonourably. Honour must be established in all its relationships with Indigenous communities. That includes the substantive priority that upholding treaties is equal to any residual public interest. Henderson argues that treaty relationships "produced a distinctive Federalism that protects the worldview, languages and political autonomy of the Aboriginal nations."<sup>55</sup> Upholding treaties guarantees that rights or promises inherent in these agreements will be adequately dealt with in any attempt to reconcile them with public interests. In a paper on Treaty 8, Rachel Gutman argues that evaluating treaty agreements through Henderson's shared jurisdictional approach implies that treaties "have simply affirmed the continuation of the existing Aboriginal rights of First Nations signatories in the light of assertions of Crown sovereignty."<sup>56</sup> This is especially the case when evaluating agreements like Treaty 9.

Dismissing the apparently weak title claim in *Eabametoong* does not in any way imply that additional treaty rights can be ignored altogether. Nevertheless, reconciliatory objectives may weigh heavily on judges looking to turn Indigenous communities and the Crown toward negotiation rather than protracted court disputes. For instance, MacIntosh argues that in

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<sup>53</sup> Constance MacIntosh, "Tsilhqot'In Nation v BC: Reconfiguring Aboriginal Title in the Name of Reconciliation" (2014) 47:2 UBCL Rev at 208 [MacIntosh].

<sup>54</sup> *Eabametoong*, *supra* note 1 at para 80.

<sup>55</sup> Henderson, "Empowering," *supra* note 33 at 50.

<sup>56</sup> Rachel Gutman, "The Stories We Tell: Site-C, Treaty 8, and the Duty to Consult and Accommodate" (2018) 23:3 Appeal at 67 [Gutman].

the BC Supreme Court judgment of *Tsilhqot'in Nation*,<sup>57</sup> Justice Vickers only made a non-binding title judgment largely because “it forced him to choose between applying the rule of law and enabling reconciliation, and he chose reconciliation.”<sup>58</sup> With the *Eabametoong* title argument judged as weak, Justice Sachs similarly looked to reconcile substantive public interest in holding that the Crown only had a low-level obligation to ensure a procedural right to appropriate consultation. Advancing reconciliation is a laudable objective, especially given its prominent role in consultative engagement. Nevertheless, treaty rights extend well beyond bare procedural guarantees established in consultative engagement. These rights preserve long-held community values and governing traditions.

## A. Treaty Interpretation

As mentioned above, Justice Sachs held in the *Eabametoong* judgment that the *Eabametoong* title claim was weak. This is because the “Take Up” clause in Treaty 9 stipulated underlying title was only to be held by the Crown. In exchange, the *Eabametoong* community was entitled to preserve customary rights to cultural activities and also to retain traditional hunting, trapping, and fishing rights. These rights are not absolute because the Crown could declare at any time that certain land tracts could be taken up for many purposes, including mining. A key Treaty 9 provision stipulates the following:

And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.<sup>59</sup>

Singularly relying on written stipulations in Treaty 9 greatly diminished the consultative obligation the Crown owed to *Eabametoong*. This is because binding together potential Indigenous and treaty rights in the title claim (then promptly dismissing the title claim altogether) only left Justice Sachs to reconcile procedural consultative rights with the underlying Crown title established in Treaty 9.

Many judgments have typically held that treaties are to be *liberally* interpreted. This implies that any ambiguities in the treaty text are to be resolved in favour of the aggrieved First Nation community in a dispute. This is largely done to remedy potential imbalances between First Nations communities and the Crown. These imbalances reflect inequality in the original

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<sup>57</sup>. *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700.

<sup>58</sup>. MacIntosh, *supra* note 52 at 177.

<sup>59</sup>. The James Bay Treaty—Treaty No. 9 (made in 1905 and 1906 and adhesions made in 1929 and 1930), online: *Government of Canada* <[www.aadnc-aandc.gc.ca/eng/1100100028863/1100100028864](http://www.aadnc-aandc.gc.ca/eng/1100100028863/1100100028864)> [Treaty 9] at 2.

treaty negotiation.<sup>60</sup> For instance, the numbered treaties (including Treaty 9) were agreements that were orally negotiated with the drafted treaty texts already prepared by the Crown prior to negotiation.<sup>61</sup> These written treaty texts are problematic because they do not adequately reflect the collective dynamics that went into the oral negotiations. Henderson adds, “when a court discovers that a government official drafted the written treaty prior to concluding the treaty meeting and ceremonies with the Aboriginal nation, the court is particularly wary. In such situations, courts have found the text of the treaty be irrelevant.”<sup>62</sup> Courts also bring up the Crown’s honour when looking into the oral negotiations and related contexts that come with the written treaty text.<sup>63</sup> This obligation is alluded to in the *Marshall* judgment, where Justice Binnie writes:

If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.<sup>64</sup>

Treaty rights are also impacted by the Crown’s consultative obligation. In the Supreme Court’s *Mikisew Cree* judgment, it was held that the Crown’s consultative obligation reflects the extent to which governmental activity impacts treaty rights. Treaty texts clearly specify obligations the Crown owes to the relevant First Nation community. In the judgment, Justice Binnie adds “in the case of a treaty, the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult.”<sup>65</sup> As explained below, the long-held treaty values upheld by the Eabametoong First Nation imply that the consultative obligation owed was more substantial than originally held in the judgment.

## B. Treaty Values

Literal treaty interpretation is deeply problematic given it potentially ignores the prominent role First Nations communities played in negotiating the agreements. Specifically, restricting

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<sup>60</sup> Concerns surrounding contrasting approaches to treaty interpretation have been mentioned as well. Gwen Westerman, in writing on treaty agreements between the Dakota and the United States government, points out the consequences that emerge in privileging a singular Crown or government viewpoint on treaty obligation, especially given the power dynamics at work in treaty negotiations. She writes: “A look at (Missionary Stephen) Riggs’ translation of the treaty into Dakota raises the question of whether the Dakota, hearing the treaty read out loud at Traverse des Sioux, could have fully understood that they would be forced from the land of their creation, given the expression of deep kinship with the land found in our (Dakota) language” (at 308–309).

<sup>61</sup> *Supra* note 4.

<sup>62</sup> Henderson, “Interpreting,” *supra* note 41 at 86.

<sup>63</sup> The disjuncture between oral negotiation and the written Treaty 9 text was prevalent because many Anishinaabek and Cree envoys were never actually given the opportunity to read the written agreement and were only told that the guarantees in the oral negotiations were subsequently upheld in the written treaty. On many occasions, Chiefs were only told to mark an X on the written agreement.

<sup>64</sup> *R v Marshall*, [1999] 3 SCR 456 at para 43.

<sup>65</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] SCR 388 at para 34.

analysis to the written treaties undermines the Crown's protectorate obligation to respect the relevant First Nations' cultural, political, and economic jurisdiction. Gutman highlights these obligations by arguing "the Crown's treaty right to take up land is constrained by treaty promises to First Nations signatories guaranteeing the continuity of their culture and way of life. The Crown cannot take up lands if doing so will undermine the ability of a Treaty Nation to hunt, fish and trap."<sup>66</sup> These treaty rights are not relevant merely because they are written in a treaty agreement. Their relevance is predicated on the values that make common activities like hunting, fishing, and trapping crucial enough to be included in the agreement to begin with.<sup>67</sup> Russel Barsh points out that the cultural and political value First Nations communities vest in their traditional activities is observed in "songs, stories, dances, symbols, and ecological knowledge, [which] are all indispensable for the maintenance of appropriate human relationships with place and its non human inhabitants."<sup>68</sup> Many Ojibwa and Cree communities who have lived throughout the centuries on Treaty 9 territory certainly regard their treaty rights as being predicated on the continued well-being of their customary territories.

The Crown's protectorate obligation requires it to substantially evaluate how its conduct not only impacts hunting, fishing, and trapping as a subsistence activity, but also how these activities preserve cultural and political vitality in First Nations communities.<sup>69</sup> The importance of the rights to hunting, fishing, and trapping build upon the values attached to these practices throughout the generations. Joe Sheridan and Haudenosaunne Elder Dan Longboat point out these values reflect "an epistemology embedded in the wisdom of cultural practice and familial relationships to Creation."<sup>70</sup> The First Nations communities who have inhabited the Ring of Fire region throughout the centuries also exist in constant interrelationships with non-human and spiritual existence. Rachel Ariss and John Cutfeet add "the land provides because of how it *is*—as a holistic, interconnected system in which every part plays a vital role towards the survival of the people. This is why maintaining a good relationship with the land and all its inhabitants is so important."<sup>71</sup> It is especially crucial to uphold the treaty rights to hunt, fish, and trap through these lenses.

Ojibwa and Cree peoples traditionally residing in Treaty 9 territory throughout the millennia have upheld their rights to hunting, fishing, and trapping as co-extensive with

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<sup>66</sup> Gutman, *supra* note 55 at 22.

<sup>67</sup> This challenges the idea that treaty rights usually emanate through the Crown willingly bestowing rights on First Nations' signatories with the caveat that rights can be abrogated when Crown interest is judged to be more important than upholding rights.

<sup>68</sup> Russel L. Barsh, "Grounded Visions: Native American Conceptions of Landscapes and Ceremony" (2000) 13:1 St Thomas L Rev 127 at 131.

<sup>69</sup> For more see John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795; Aaron Mills, "Driving the Gift Home" (2016) 33:1 Windsor YB Access Just 167; Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847; Lindsay Borrows, "*Dabaadendiziwin*: Practices of Humility in a Multi-Juridical Landscape" (2016) 33:1 Windsor YB Access Just 149; Heidi Kiiwetinepinesiik Stark, "Nenabozho's Smart Berries: Rethinking Tribal Sovereignty and Accountability" (2013) 2013:2 Mich St L Rev 339.

<sup>70</sup> Joe Sheridan and Rononiakewen "He Clears the Sky" Dan Longboat, "Walking Back into Creation: Environmental Apartheid and the Eternal—Initiating an Indigenous Mind Claim" (2014) 17:3 Space and Culture 308 at 310.

<sup>71</sup> Ariss and Cutfeet, *supra* note 11 at 45.

their larger relationships with non-human and spiritual existence.<sup>72</sup> Preserving appropriate relationships between human, non-human, and spiritual existence ensures all creation is to be valued. Proper relationships preserve an appropriate balance throughout existence and ensure well-being throughout the generations. Anishinaabek Elder Bessie Mainville points out these relationships are observed through listening to all existence. This is because “listening is calming and opens your heart. Be kind, do not talk about or make fun of your friends or relatives, because you do not know what you are going to be like.”<sup>73</sup> Relationships across existence show that one’s relatives include non-human and spiritual existence. These underlying relationships are what remain at stake when treaty rights are held in the balance in conflicts with the Crown.

Upholding treaty rights preserves underlying values that uphold relationships across existence. Preserving them means more than merely allowing the aggrieved First Nation community some semblance of customary activity or bare procedural rights while the Crown takes up territory at will. Regarding traditional fishing rights, for example, John Borrows recounted a teaching shared by Anishinaabek Elder Basil Johnston in which “he spoke about how whitefish had been central to our society for generations. He referred to these fish by their Anishinaabek name, *adigmeg*, which translated means ‘caribou of the sea.’”<sup>74</sup> Relational values like these were especially observed in the oral negotiations that culminated in the Treaty 9 agreement:

This oral agreement continues to shape the community’s understanding of the relationship between the [Anishinaabek] and Canada—a relationship of sharing between equal partners, neither an extinguishment of their title, nor an ending of their relationship of protection and responsibility to the land. The treaty was to last as long as the sun shines, the grass grows and the rivers flow.<sup>75</sup>

Diminishing treaty rights and these underlying relational values hugely impacts collective well-being between human, non-human, and spiritual existence.<sup>76</sup>

## VI RECONCILIATORY TREATY OBLIGATION

The imperative to satisfy both Crown and First Nations’ concerns in treaty judgments builds on the reconciliatory imperative. Nevertheless, this obligation does not uphold reconciliation as somehow above treaty rights. Reconciliatory obligations preserve treaty rights in accordance with the Crown’s underlying obligations. These rights develop and specify the reconciliatory demand. Rachel Ariss, Clara Fraser, and Diba Somani have pointed out that

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<sup>72</sup> See Patrick Macklem “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997).

<sup>73</sup> Bessie Mainville, “Traditional Native Culture and Spirituality: A Way of Life That Governs Us” (2010) 8:1 *Indigenous LJ* at 4.

<sup>74</sup> John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 31.

<sup>75</sup> Ariss and Cutfeet, *supra* note 11 at 45.

<sup>76</sup> See Aaron Mills (Wapshkaa Ma’ingan), “Aki, Anishinaabek, Kay Tahsh Crown” (2010) 9:1 *Indigenous LJ* at 16.

taking up reconciliatory obligations in a way that undermines Indigenous and treaty rights ensures that “reconciliation emphasizes ideas of ‘balance’ and the needs of Canadian society, rather than upholding Aboriginal rights and supporting a nation-to-nation relationship.”<sup>77</sup> The approach privileges substantive public interests and diminishes the true strength to which these rights claims can be developed. This is because reconciliation stipulates that treaty claims are only to be evaluated by the extent to which they can be reconciled with substantive public interests.

Diminishing treaty rights by placing them beneath reconciliatory obligations ironically undermines adequate relationships between the Crown and First Nations. As mentioned above, upholding proper relations between the Crown and First Nations communities depends on respectfully attending to both parties’ interests in any dispute. The reconciliatory obligation was undermined in the *Eabametoong* judgment when Justice Sachs held together any potential treaty rights as linked to the underlying title claim. The title claim was judged to be “weak” simply because a literal analysis of Treaty 9 dictated that underlying title was “surrendered” to the Crown through the “Take Up” clause. The values inherent in the Treaty 9 oral negotiations were not believed to be substantive enough to impact the Crown’s consultative obligation beyond a minimal level. Reconciliatory obligations diminished Indigenous and treaty rights to keep them aligned with public interests by limiting them to bare procedural rights to consultation.

Reconciliatory engagement implies that disputing interests, values, and concerns voiced by the Crown and the relevant First Nation community in a dispute must be respectfully attended to. Reconciliation is believed to go a long way in responding to the centuries-long power discrepancy between the Crown and First Nations. Relationships are created and preserved through the Crown’s honourable obligation to adequately respect the First Nations’ interests inherent in any underlying Indigenous and treaty right claim. Ariss, Fraser, and Somani write that reconciliation “is not about exercising absolute Crown sovereignty over Indigenous peoples, but rebuilding the kinds of relationships envisaged in the Royal Proclamation of 1763 and in the post-Confederation treaties.”<sup>78</sup> The *Eabametoong* judgment hardly preserved the relational values that animated these agreements. This is because, upon judging the title claim to be weak, Indigenous and treaty rights only then existed to *accommodate* substantive public interests by being reconciled unto them.

This was achieved by leaving the *Eabametoong* with bare procedural rights to decent consultative engagement. MacIntosh aptly points out “this reflects a failure to acknowledge that the cooperative process of Aboriginal peoples and state parties working through how Aboriginal legal entitlements will be exercised, and addressing how conflicting interests may or may not be accommodated, is itself part of the reconciliation process.”<sup>79</sup> In *Eabametoong*, substantive public interests were not adequately reconciled with Indigenous and treaty rights because not enough was done to highlight their relevance to potential engagements with the Crown.

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<sup>77</sup> Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, “Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?” (2017) 13:1 McGill J Sust Dev L at 14.

<sup>78</sup> *Ibid* at 16.

<sup>79</sup> MacIntosh, *supra* note 52 at 209.

It is beyond this case analysis to adequately evaluate the consultative obligation owed to Eabametoong in the event that treaty rights were observed in the judgment. Nevertheless, it is appropriate to believe that the consultative obligation would extend well beyond providing mere notice that a project would take place. Entrenched relationships in agreements like Treaty 9 guarantee that the Crown is always obligated to respect and protect Indigenous and treaty rights. Treaty partnerships imply that the Crown also needs to respect and protect the underlying values that preserve treaty rights. Upholding these values also goes well beyond engaging in occasional and delegated consultative engagements with aggrieved First Nations communities. Treaty obligations to preserve Indigenous well-being at the very least imply engaged and ongoing consultation that builds upon the values that brought the Crown and the relevant First Nations communities together to negotiate agreements to begin with. Consultative obligations guarantee that treaty rights are to be respected whenever they are unduly engaged in any Crown activity. Reconciliatory objectives cannot be invoked in ways that undermine these relational priorities.

Reconciliation implies that Indigenous and treaty rights will be viewed as equal to any substantive public interest that may be invoked when justifying Crown activity. In judgments like *Eabametoong*, Crown authority may be slightly limited, but it is only limited to the extent that First Nations' grievances are dealt with through "appropriate" consultation. Robert Hamilton and Joshua Nichols write that approaches like these are "not built to support the existence of equal partners in a diverse Federalism, but to extinguish Aboriginal rights to secure legal certainty in accessing lands and resources."<sup>80</sup> The *Eabametoong* judgment is problematic because while it may supposedly reconcile Crown and First Nation interests, it leaves open the potential to place treaty rights beneath those interests.

## VII CONCLUSION

The *Eabametoong First Nation v Minister of Northern Development and Mines* judgment greatly impacts how the Ontario government is to engage in consultation with concerned First Nations communities whenever their well-being remains at stake in any dispute. The judgment ensures that reconciling the Crown's and First Nations' well-being implies engaging in ongoing consultation where both parties' underlying interests are respected. Nevertheless, Justice Sachs' judgment does not adequately evaluate the extent to which treaty rights are inherent in the Crown's consultative obligation. Justice Sachs held that the Crown's consultative duty to Eabametoong was minimal because the proposed project was judged to have a relatively limited impact on the disputed territory. It was also held that underlying title and authority to the territory was ceded to the Crown in the Treaty 9 agreement. Judging the Indigenous title claim to be weak also undermined the extent to which the Eabametoong First Nation could assert how long-held treaty values in relation to their territories were impacted by the proposed activity. Justice Sachs bracketed these concerns to advance reconciliatory objectives between Eabametoong and the Crown. This left Eabametoong with only a simple procedural right to consultation. This approach is problematic because it situates First Nations' concerns as subordinate to the public interest and leaves potential Indigenous and treaty rights claims

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<sup>80</sup> Robert Hamilton and Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 *Alta L Rev* at 756.

unresolved. Moreover, adequately engaging with treaty rights in the judgment would likely move the Crown's consultative obligation to a higher threshold.

This paper argues that dealing with treaty rights moves well beyond Justice Sachs' literalist Treaty 9 reading. It resolves ambiguities in favour of First Nations' interests by attending to the substantive oral negotiations and cultural values that were brought to bear in treaty agreements. Treaties ensured the Crown could settle on Indigenous territory while honourably obligating it to respect and protect Indigenous and treaty rights throughout the generations. Henderson writes that "from the beginning of treaties . . . the European Crowns recognized the sovereignty of the First Nations; however, from a First Nations' perspective, the European Crowns recognized the inherent self-determination of Aboriginal peoples."<sup>81</sup> With these principles at work, the reconciliatory obligation implies that substantive public interests be reconciled with unresolved Indigenous and treaty rights. Judgments like *Eabametoong* only reconcile Indigenous and treaty rights to the public interest, leaving them completely malleable to public well-being. While claiming to promote reconciliation, the judgment actually undermines it by creating added enmity between the Crown and communities like the Eabametoong First Nation.

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<sup>81</sup> Henderson, "Empowering," *supra* note 33.