AN ENCOMIUM FOR CONSIDERATION: INDIGENOUS PROJECT SUPPORT AND THE GRASSY MOUNTAIN PUBLIC INTEREST DETERMINATION

Mitchell Folk[*]

CONTENTS

[*] BBA, Okanagan College, JD, University of Calgary. The author wishes to thank Robert Hamilton, the external reviewers and the editors for their insightful feedback and assistance.

ABSTRACT

This paper argues for greater and more courteous consideration of Indigenous concerns, particularly where Indigenous nations express support for a natural resource project, and uses the Grassy Mountain Coal Project as a backdrop for the discussion. I consider whether a duty to consult could apply to a decision not to approve a project and I explore potential rights upon which such a duty could be anchored. I argue that unidirectional application of the duty to consult risks leaving some rights without procedural protections, and, accordingly, a broader application of the duty to consult is warranted. I then discuss the substantive formulation and expression of public interest determinations and make recommendations about how administrative decisionmakers can better communicate their consideration of Indigenous concerns.

I INTRODUCTION

Major extractive natural resource projects require regulatory approvals, which often turn on complex public interest determinations. In Alberta alone, these provisions are featured in legislation governing electric utilities,[1] gas utilities,[2] oilsands extraction and processing,[3] conventional oil production,[4] coal production,[5] and forestry.[6] Decision makers must consider the technical aspects of a project while also being cognizant of the interests of rural and urban citizens; federal, provincial, and municipal governments; non-governmental organizations, corporate proponents, and Indigenous communities. In the process, decision makers reduce the views of stakeholders to a single "public interest." As projects like the Trans Mountain and Coastal GasLink pipelines show, the result is often that these determinations become a battleground for environmental concerns and economic aspirations. Meaningful consideration of Indigenous concerns where government policy and broad public support favour a project has been especially challenging, and decision makers have accommodated Indigenous concerns, with varying levels of success, by carving out concern-specific mitigations. But what is a decision maker to do when the circumstances are reversed—when Indigenous nations favour a project and government policy is ostensibly opposed? Can a duty to consult apply to a decision to *not* approve a project and, if so, on what rights would such a duty be anchored? And how can decision makers communicate their accounting of the unique constitutional characteristics of Indigenous peoples when distilling a single, bottom-line "public interest"?

A recent decision by the Alberta Energy Regulator on the Grassy Mountain Coal Project near Blairmore, Alberta, provides an opportunity to consider these questions.[7] Each Treaty

---

1. *Hydro and Electric Energy Act*, RSA 2000, c H-16, ss 2, 13.1(2), 17(1), 25(2).
2. *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 17(1).
3. *Oil Sands Conservation Act*, RSA 2000, c O-7, ss 2, 10(1)(a), 11(1)(3).
4. *Mines and Minerals Act*, RSA 2000, c M-17, s 85(1).
5. *Coal Conservation Act*, RSA 2000, c C-17, s 8.1(2).
6. *Forests Act*, RSA 2000, c F-22, s 26.
7. Report of the Joint Review Panel Established by the Federal Minister of Environment and Climate Change and the Alberta Energy Regulator, Benga Mining Limited, Grassy Mountain Coal Project, Crowsnest Pass, 17 June 2021, Decision 2021 ABAER 010, online: *Government of Canada* <https://iaac-aeic.gc.ca/050/documents/p80101/139408E.pdf> [*Grassy Mountain*].

7 nation signed agreements with the proponent and indicated their support for the project. The federal and provincial governments, and many citizens, stood opposed. A joint review panel composed of federal and provincial chairpersons found that the project is not in the public interest because of a potential adverse impact to westslope cutthroat trout. Indigenous concerns did not appear to factor materially in the final determination, and the Stoney Nakoda and Piikani Nations subsequently sought and were denied leave to appeal the decision.[8]

This paper provides a blue-sky discussion of how we might realize greater and more courteous consideration of Indigenous support for projects. It imagines ways in which the law may be developed, and it proposes means for Indigenous nations to achieve greater recognition in their support for major projects and, relatedly, for administrative actors to improve their consideration of Indigenous interests.[9] The *Grassy Mountain* decision is an effective platform for this purpose.

However, at the outset, a brief disclaimer is necessary. Several topics are beyond the scope of this paper. For example, this paper does not discuss the interaction of state and Indigenous legal orders when dealing with extractive resource projects. Nor does it discuss what constitutes Indigenous project support or how to resolve internal community disagreements. The author also recognizes that Indigenous concerns are as varied and unique as Indigenous nations themselves and appreciates that, as a case study, the circumstances of the Grassy Mountain Project may not be representative of all public interest determinations. Put simply, this paper is limited to the existing administrative regulatory landscape.

Part II of this paper outlines the Grassy Mountain Coal Project. Part III considers a gap in the procedural application of the duty to consult as applied to Indigenous project support. Part IV discusses a gap in the substantive formulation and expression of public interest determinations and recommends how administrative decision makers might consider such a gap.

II THE GRASSY MOUNTAIN COAL PROJECT

A. The Grassy Mountain Project

Benga Mining Limited, a wholly owned subsidiary of Riversdale Resources Limited, applied to construct, operate, and reclaim an open-pit metallurgical coal mine 7 kilometres north of Blairmore, Alberta, called the Grassy Mountain Coal Project.[10]

On November 15, 2015, Benga submitted an environmental impact assessment for the project to the Alberta Energy Regulator (AER) and the Canadian Environmental Assessment Agency (CEAA). The project required several regulatory filings and approvals under the

---

8. See *Benga Mining Limited v Alberta Energy Regulator*, 2022 ABCA 30.

9. The author does not intend to speak for or on behalf of any Indigenous peoples, and the author appreciates that individual views toward the Grassy Mountain Coal Project vary within the Indigenous nations mentioned. See Tamara Pimentel, "First Nations in Alberta Taking Government's Decision to Shut Down Grassy Mountain Coal Project to Court" (23 July 2012), online: *APTN National News* <https://www.aptnnews.ca/national-news/first-nations-in-alberta-taking-governments-decision-to-shut-down-grassy-mountain-coal-project-to-court/>.

10. *Grassy Mountain*, *supra* note 7.

Environmental Protection and Enhancement Act (Alberta)[11] and the *Canadian Environmental Assessment Act*.[12] On August 16, 2018, the AER and the CEAA announced an agreement to establish a cooperative proceeding through a joint review panel.

The panel was tasked with discharging the responsibilities of its constituent bodies that arise from various regulatory regimes.[13] This required the panel to determine whether the project is in the public interest. This assessment required considering the "potential effects on fish and fish habitat …, aquatic species, … migratory birds … [and] *Species at Risk Act*[14] [SARA]-listed wildlife species and their critical habitat."[15] It also required considering the potential impact on the rights and interests of Indigenous peoples, including the "effects occurring in Canada of any change that may be caused to the environment on health and socioeconomic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes, and any structure, site, or thing that is of historical, archaeological, paleontological or architectural significance."[16]

The project is in Treaty 7 territory, which is also the traditional territory and homeland of several non-Treaty 7 nations. The panel was required to consult with the Káínai First Nation (Treaty 7), Piikani Nation (Treaty 7), Siksika Nation (Treaty 7), Stoney Nakoda Nations (Treaty 7), Tsuut'ina Nation (Treaty 7), Métis Nation of Alberta – Region 3, Ktunaxa Nation, Shuswap Indian Band, Samson Cree Nation (Treaty 6), Louis Bull Tribe (Treaty 6), Ermineskin Cree Nation (Treaty 6), Montana First Nation (Treaty 6), Métis Nation British Columbia, and Foothills Ojibway First Nation. Each Treaty 7 nation and the Métis Nation of Alberta – Region 3 expressed support for the project. Each Treaty 7 nation signed impact benefit agreements with Benga. Discussions with the Ktunaxa Nation and Shuswap Indian Band were ongoing.

The project is also located in the Oldman River watershed and is bordered by Gold Creek and Blairmore Creek, which contain westslope cutthroat trout, a species listed as threatened under the provincial *Wildlife Act*.[17] On December 2, 2015, two weeks after Benga filed its initial environmental impact assessment for the project, the minister of Fisheries and Oceans issued a critical habitat protection order under SARA designating Gold Creek and its tributaries as critical habitat for the westslope cutthroat trout.[18] Section 58 (1) of SARA provides that "no person shall destroy any part of critical habitat of any listed threatened species," effectively foreclosing industrial development.

---

11. *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

12. *Canadian Environmental Assessment Act,* SC 2012, c 19, s 52.

13. See the *Responsible Energy Development Act*, SA 2012, c R-17.3; *Coal Conservation Act*, *supra* note 5; *Environmental Protection and Enhancement Act*, *supra* note 11; *Water Act*, RSA 2000, c W-3; *Public Lands Act*, RSA 2000, c P-40; *Impact Assessment Act*, SC 2019, c. 28, s.1; and *Fisheries Act*, RSC 1985, c F-14.

14. *Species at Risk Act*, SC 2002, c 29.

15. *Grassy Mountain*, *supra* note 7 at para 13.

16. *Ibid* at para 15.

17. *Ibid* at para 1168.

18. Julie Stewart, "Critical Habitat of the Westslope Cutthroat Trout (*Oncorhynchus clarkii lewisi*) Alberta Population Order" (20 November 2015), online: *Government of Canada* <https://canadagazette.gc.ca/rp-pr/p2/2015/2015-12-02/html/sor-dors241-eng.html>.

B. The Decision of the Joint Review Panel

To approve Benga's applications under the *Coal Conservation Act* (CCA), the panel was required to determine whether the project is in the public interest according to its mandate as the AER. The AER seeks to provide for the "efficient, safe, orderly, and environmentally responsible development of energy resources in Alberta." In hearing CCA applications, the AER must consider "(a) the social and economic effects of the energy resource activity; (b) the effects of the energy resource activity on the environment; and (c) the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located."[19] If the panel granted the CCA application, it would then determine whether related federal applications ought to be granted.

The panel heard submissions from Benga, Indigenous groups, municipalities and local governments, non-governmental organizations, and concerned citizens. The panel provided its decision in a comprehensive 3,071-paragraph, 680-page report that takes into account the environmental and economic aspects of the project, including on Indigenous peoples. The report features considerable attention to the impact of the project on cutthroat trout. Over the course of the approximately 3,000 paragraphs of the report, trout receive 1,890 mentions. The report describes the panel's consideration of the impact of the project on the relevant 14 Indigenous nations over 657 paragraphs. The report contains a comprehensive overview of the relevant nations' Aboriginal and treaty rights and concludes with a well-detailed assessment of the impact of the project on traditional land use, physical and cultural heritage, and health and socioeconomic conditions. The panel agreed that the project would have an overall positive economic impact, but it was unable to assess the socioeconomic impact due to the confidential nature of the impact benefit agreements. The panel also acknowledged that Indigenous groups had resolved their project-specific concerns with Benga and inferred that the Indigenous groups' concerns were adequately addressed.

The panel, in its capacity as the AER, declined to find that the project was in the public interest due to the adverse environmental impact on westslope cutthroat trout and surface water quality. It stated:

> *Overall, we conclude that the project is likely to result in significant adverse environmental effects on westslope cutthroat trout and surface water quality, and these negative impacts outweigh the low to moderate positive economic impacts of the project. Accordingly, we find that the project is not in the public interest.* In making this determination, we understand that this means that the expected employment, related spending, and economic benefits for the region will not be realized. However, even if the positive economic impacts are as great as predicted by Benga, the character and severity of the environmental impacts are such that we must reach the conclusion that approval of the *Coal Conservation Act* applications are not in the public interest.
>
> While we found the project is likely to result in additional significant adverse effects beyond those on surface water quality and westslope cutthroat trout and their habitat, we find that these effects, in and of themselves, would not have been sufficient to determine that the project is not in the public interest.

---

19. *Grassy Mountain*, *supra* note 7 at para 3011.

> *It is the nature and magnitude of effects on surface water quality and westslope cutthroat trout and their habitat that drive our public interest determination*.[20]

The decision was unsurprising to some observers. Professor Fluker noted that the seeds of confrontation were sown following the minister's designation of Gold Creek as critical habitat of cutthroat trout two weeks after Benga's application.[21] Thus, "it was inevitable that the impact on Gold Creek and [westslope cutthroat trout] was going to be a primary issue in the assessment and decision-making process for the Grassy Mountain project."[22] It was also unsurprising given the federal government's policy statement on a prohibition of new thermal coal projects or expansions,[23] Alberta's long-standing 1976 moratorium on mountaintop coal mining,[24] or perceived bias in the panel.[25] However, the lack of Indigenous consideration *is* surprising, especially given the express inclusion of Indigenous interests. At paragraph 9, the panel notes that "as part of our consideration of the applications made to the AER, we must consider the potential impacts of the project on the rights and interests of Indigenous peoples."[26] The panel then discusses the impact on Indigenous peoples in fine detail over 657 paragraphs. At the end of the report, the panel affirms that it "considered impacts on constitutionally protected Aboriginal and treaty rights, which are a unique component of the public interest determination."[27] and affirms that it "respect[s] the ability and right of Indigenous groups to determine for themselves how best to balance the positive and negative impacts of the project on their use of the land, their cultural practices, and the practice of their rights."[28] Yet the entire Indigenous interest consideration is refined to five paragraphs in the public interest calculation, which neither discuss the desire of the Indigenous groups to see the project proceed nor their economic stake in such. And in the end, the panel confirms that "[i] t is the nature and magnitude of effects on surface water quality and westslope cutthroat trout and their habitat that drive our public interest determination."[29]

---

20. *Grassy Mountain*, *supra* note 7 at paras 3048–3049 (emphasis added).

21. Shaun Fluker, "Justice for the Westslope Cutthroat Trout at Grassy Mountain" *ABlawg* (19 July 2021), online: <https://ablawg.ca/2021/07/19/justice-for-the-westslope-cutthroat-trout-at-grassy-mountain/>.

22. *Ibid*.

23. Environment and Climate Change Canada, "Government of Canada Releases Policy Statement on Future Thermal Coal Mining Projects and Project Expansions" (11 June 2021), online: <https://www.canada.ca/en/environment-climate-change/news/2021/06/government-of-canada-releases-policy-statement-on-future-thermal-coal-mining-projects-and-project-expansions.html>.

24. Government of Alberta, "Reinstatement of the 1976 Coal Policy," online: <https://www.alberta.ca/coal-policy-guidelines.aspx>.

25. Bob Weber, "Alberta Coal Policy Panel Accused of Bias, U.S. Influence in Letters to Government" (18 November 2021), online: *Global News* <https://globalnews.ca/news/8383900/alberta-coal-policy-panel-criticism/>.

26. *Grassy Mountain*, *supra* note 7 at para 9.

27. *Ibid* at para 3016.

28. *Ibid* at para 3021.

29. *Ibid* at para 3049.

C. The Decision of the Court of Appeal of Alberta

Benga, the Stoney Nakoda Nations, and the Piikani Nation sought leave to appeal the decision of the panel. Justice Ho issued reasons denying leave on January 28, 2022.[30]

Justice Ho noted that the concerns of the Stoney Nakoda, Piikani, and Benga could be concentrated to three key themes:

> The first theme relates to the Panel's consideration, or lack of consideration, of positive benefits that would have accrued to Stoney Nakoda and Piikani in relation to the Project in the context of the public interest test and in the context of the honour of the Crown and reconciliation. The second theme relates to the Panel's responsibilities or obligations once it considered not approving the Project. In particular, it was argued that the Panel should have asked Stoney Nakoda and Piikani for further information or should have requested that Her Majesty the Queen in Right of Alberta engage further with Stoney Nakoda and Piikani regarding implications of not approving the Project. The third theme relates to the language of the [terms of reference], which Stoney Nakoda and Piikani in particular submit gave rise to the Panel's error or errors.[31]

Justice Ho found there was no arguable merit to the submissions of the appellants. With respect to the first theme, the court noted that the appellant Indigenous nations were presented full participation rights, and while the appellants were not asked what they would lose without the projects, they were also not limited in their ability to participate in the approval process or to provide information. On the second theme, the court found that, because of the full participation rights, the appellant nations were aware of the possible outcomes and the panel thus had no obligation to seek further information from the appellant nations once it reached the point in its deliberations that non-approval was a possibility. On the third theme, the court rejected that the terms of reference, which specifically directed the panel to consider adverse effects of the project, fettered its discretion. On the contrary, the court noted that the panel did consider positive socioeconomic impacts.

III THE CONSULTATION GAP

The reasons of the panel demonstrate a gap in the duty to consult. The duty was seemingly considered only from the perspective of impacts to Indigenous interests by the project proceeding. While the panel recognized that some benefits would be forgone without the project, as Ho J noted in her reasons denying leave, "[t]he record is clear that neither Stoney Nakoda nor Piikani [nor other nations] were asked an explicit question about what they would lose if the Project did not proceed."[32] This fails to "accommodate the reality that often Aboriginal peoples are involved in exploiting the resource."[33] The reasons that follow argue

---

30. *Benga Mining Ltd v Alberta Energy Regulator*, 2022 ABCA 30.

31. *Ibid* at para 83.

32. *Ibid* at para 119.

33. *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 34, [2010] 2 SCR 650 [*Rio Tinto*].

that the duty must apply with equal force when considering whether *not* to proceed with a project, and as such, decision makers must consider what adverse impacts arise from a project not proceeding.

A. The *Haida Nation* Framework

Indigenous peoples in Canada possess a unique constitutional status that arises from the fact that, prior to European occupation of North America, "Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries."[34] Section 35 of the *Constitution Act, 1982* provides that "[t]he existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."[35] Since its inception, courts have relied on section 35 to ground several Indigenous legal doctrines, such as Aboriginal rights, the honour of the Crown, the duty to consult and accommodate, and the imperative of reconciliation. In *Sparrow*, the Supreme Court provided interpretative guidance for section 35. The provision must be construed in a purposive, generous, and liberal way, and "any doubtful expressions must be resolved in favour of [Indigenous peoples]."[36] Further, with the protection of section 35, Aboriginal rights can no longer be extinguished, only infringed. (Although, one sometimes struggles to appreciate the distinction.) Courts have supplied the necessary guidance to facilitate the protection offered by section 35 rights with different doctrines to govern the procedural and substantive aspects of Aboriginal rights.

The pre-eminent framework that governs procedural matters was enunciated by the Supreme Court of Canada through then-Chief Justice McLachlin in *Haida Nation*.[37] This framework has become the principal tool used to review administrative decisions that affect Indigenous peoples. Its basic precepts are simple. The honour of the Crown requires it to consult and, where appropriate, accommodate Indigenous interests and to engage in negotiation about such.[38] This duty to consult arises when the Crown has real or constructive knowledge of a potential right that might be adversely affected by Crown conduct.[39] The content of the duty to consult varies with the circumstances and is proportionate to the strength of the claim of the asserted right.[40] The *Haida Nation* test is deeply contextual and easily triggered. Accordingly, it has become an important—perhaps the most important—tool for protecting Indigenous rights and interests.

However, the *Haida Nation* framework, as described in that case, envisions exploitation of lands or resources in spite of Indigenous interests. For example, the court writes that "[t]o unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource."[41] When discussing the problems with limiting reconciliatory

---

34. *R v Van der Peet*, [1996] 2 S.C.R 507 at para 30, 137 DLR (4th) 289.

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

36. *R v Sparrow*, [1990] 1 SCR 1075 at paras 56–57.

37. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*].

38. *Ibid* at para 25.

39. *Ibid* at para 35.

40. *Ibid* at para 39.

41. *Ibid* at para 27.

processes to the post-proof sphere of rights, the court finds that "[w]hen the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded."[42] In either case, the court envisions Indigenous people as disadvantaged by the loss of a resource. And that is an appropriate framing in most instances.

However, admittedly, the test fits awkwardly when applied to facts where Indigenous nations benefit from the exploitation of a resource, as illustrated in the *Grassy Mountain* case. Courts have rarely considered the duty to consult in that circumstance. Consequently, an Indigenous nation arguing the duty to consult to advance project support has serious theoretical and doctrinal hurdles to overcome. Is it even possible for the duty to expand to protect positive rights? And if so, what possible rights could the duty be anchored in?

B. The Duty to Consult Must Apply Necessarily

The duty to consult must apply when Indigenous nations are in favour of development and government policy is ostensibly opposed to the project. This can be implied from the jurisprudence, and most importantly, to head off a potential application of the duty to consult at a threshold stage risks leaving potential Indigenous rights and interests unprotected.

The duty to consult was not established to allow "Indigenous peoples to 'blow off steam' before the Crown proceeds to do what it always intended to do."[43] That is inconsistent with the honour of the Crown. Instead, the honour of the Crown and the process of reconciliation seeks to facilitate negotiation, and negotiation is rendered meaningless if one party can unilaterally determine the circumstances in which negotiation is not required.[44] The court in *Squamish Nation* encapsulated this idea in its comment that "[t]he purpose of consultation is to listen to and consider the concerns of the First Nations whose rights and title may be adversely impacted by a decision. The Crown cannot avoid the duty to consult by unilaterally deciding that the land should be conserved in its current state."[45] The court in *Ermineskin Cree*, citing *Squamish Nation*, held in its matter that "the Crown cannot avoid the duty to consult by unilaterally deciding Ermineskin's 2019 [Impact Benefit Agreement] is of no worth, or wishing it away."[46] The Crown cannot limit the duty to consult by upholding the *status quo*.[47] It must consult and accommodate wherever its duty arises.

---

42. *Ibid* at para 33.

43. *Tsleil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153 at para 499 [*Tsleil-Waututh Nation*], citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 54 [*Mikisew Cree First Nation*].

44. *Haida Nation*, *supra* note 37 at para 38.

45. *Squamish Nation v British Columbia (Community, Sport and Cultural Development)*, 2014 BCSC 991 at para 151.

46. *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 at para 119 [*Ermineskin Cree Nation*].

47. *Da'naxda'xw/Awaetlala First Nation v British Columbia (Environment)*, 2011 BCSC 620 at para 139 [*DAFN*].

C. A Unidirectional Duty to Consult Leaves Rights Unprotected

More than that, the Crown must consult and accommodate when Indigenous nations support a project because failing to apply the duty to consult would leave some rights without the procedural protections guaranteed by section 35. Indigenous nations, in framing their support, and administrative decision makers, in considering such, must keep three basic principles in mind when considering Indigenous interests.

First, as mentioned, the *Haida Nation* test protects potential Aboriginal rights or interests. These have often been conceptualized as physical things that can be taken from Indigenous people. For example, the right to hunt becomes an examination of game numbers, the right to fish becomes an assessment of fish population, and the right to gather plants becomes an inquiry of the diversity and quantum of forest flora. Indeed, this approach is illustrated in a recent appeal factum challenging a lower court's application of the duty to consult. Canada argued that the Aboriginal rights asserted in that case relate to "right to hunt, fish, trap and gather on all unoccupied Crown lands and on any other lands to which they may have a right of access."[48] This is illustrated as well in the *Grassy Mountain* report. The AER provided each Treaty 7 nation with a detailed consideration of the effects of the project on hunting, fishing, plant gathering, health, and physical and cultural heritage. Put otherwise, the AER considered only adverse impacts to rights that subside in physical things. But rights are not just *things*.[49] The Supreme Court writes in *Rio Tinto* that "[a]dverse impacts extend to *any effect* that may prejudice a pending Aboriginal claim or right."[50] "The time when Aboriginal activities consisted only in hunting, fishing, trapping, and selling artisanal products has passed," and an administrative decision maker must be alive to such.[51]

Second, administrative decision makers must also know that they are required to discharge their responsibilities with reconciliation in mind. Their consideration of rights claimed by Indigenous peoples must be sensitive and generous. As McLachlin CJ writes:

> What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society . . . It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.[52]

Third, administrative decision makers must be aware that the duty to consult is easily triggered. Constructive knowledge of an Aboriginal right is sufficient to substantiate a duty to consult and accommodate, and such arises when the Crown has knowledge of a *potential* claim or impact on an Aboriginal right.[53] While the claim must be credible, it is not required that the claim be successful. Consequently, administrative decision makers ought to take a proactive,

---

48. *Ermineskin Cree Nation*, *supra* note 46 at para 68.

49. *Ehattesaht First Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 849 at para 60, citing *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at para 47 [*Ehattesaht First Nation*].

50. *Rio Tinto*, *supra* note 33 at para 47.

51. *Council of the Innu of Ekuanitshit v Canada (Fisheries and Oceans)*, 2015 FC 1298 at para 176.

52. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 23 [*Tsilhqot'in Nation*].

53. *Rio Tinto*, *supra* note 33 at para 40.

eyes-high approach to consultation and accommodation, if not for the sake of reconciliation, then to at least mitigate wasteful, Jarndyce-like post-hoc litigation.

Now, assuming that an Indigenous nation has convinced a decision maker to a novel application of the duty to consult, to what rights can the *Haida Nation* framework be anchored? A right to self-determination, economic, or mineral rights may offer potential substratum.

1. The Right to Self-Determination

Indigenous peoples possess a right to self-determination, and increased judicial recognition of the right to self-determination offers a significant positive and justified refinement of the existing legal structure. A broader recognition of Indigenous self-determination, coupled with the *Haida Nation* protections, offers a path for Indigenous nations to transform project support to tangible outcomes. Yet self-determination has been challenging to implement because it exposes a tension between conceptions of Crown sovereignty and the recognition of reconciliation as a societal and constitutional imperative. And traditionally, these conceptions of Crown sovereignty have led courts to be skeptical of potentially unbounded Aboriginal rights. And in many ways, the experience of those who have argued for the recognition of self-determination rights illustrates the most significant ongoing challenge of using the duty to consult to advance project support consideration. Consider the point of Barsh and Henderson:

> If all the hurdles announced by *Sparrow*, *Van der Peet* and *Gladstone* are assembled, they form a formidable and intimidating barrier: the Aboriginal practice at issue must be shown to be preexisting and central; it must be shown never to have been extinguished by the Crown prior to 1982; it must have been infringed by government action after 1982; the government action must be shown to have lacked adequate justification; and it must be shown to go beyond the reasonable discretion enjoyed by the Crown as a "fiduciary" to determine whether the Aboriginal community concerned has been given an adequate "priority" in the enjoyment of the resources it has traditionally utilized. All of this translates into a heavier evidentiary burden at trial, more expense, and greater risk of an adverse ruling, amounting to a present-day extinguishment of the rights asserted.[54]

The *Van der Peet* trilogy, as Professor Nichols sees it, creates a framework that recognizes rights that are internally limited by the timeframe and cultural analysis requirements, such as the right to hunt for sustenance and ceremonial purposes, or the right to a "moderate" livelihood. These rights fit easily into the current regulatory apparatus.[55] Yet in the 20 years of case law following *Van der Peet*, Aboriginal rights litigation has yet to produce cases that meaningfully recognize an Indigenous right to participate in the governance of their traditional territories.[56]

---

54. Russel L Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993 at 1004.

55. Joshua Ben David Nichols, "Of Spectrums and Foundations: An Investigation into the Limitations of Aboriginal Rights" in *Wise Practices: Exploring Indigenous Economic Justice and Self-Determination* (Toronto: University of Toronto Press, 2021) at 118.

56. *Ibid* at 119.

The Supreme Court demonstrated the ill-fit of self-determination within the Aboriginal rights framework in *Pamajewon*.[57] There, the defendant appellants operated a gaming house on a reserve. The appellants argued the issue as one about the bands' right to regulate on-reserve activities and brought evidence of gaming in the history of the Ojibwa people. The Supreme Court found such a characterization would "cast the Court's inquiry at a level of excessive generality."[58] Instead, it whittled the right to self-governance to a narrow and granular right to regulate high-stakes gaming, allowing it to fit within existing regulatory structures. The Supreme Court held that "commercial lotteries such as bingo are a twentieth century phenomena and nothing of the kind existed amongst Aboriginal peoples and was never part of the means by which these societies were traditionally sustained or socialized,"[59] and thus the right to regulate on-reserve gaming was not within the scope of protected Aboriginal rights.

That said, attitudes toward Indigenous rights are changing. The chorus of court judgments demanding reconciliation are hard to ignore, and a refrain by society at large echoes the sentiment. Courts now recognize that reconciliation is "a primary consideration where constitutionally protected interests are potentially at stake."[60] The Supreme Court has found that the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35."[61] The process is becoming as much prospective as retrospective. While it is forward looking, it "must nonetheless begin by looking back and developing a deep understanding of the centuries of neglect and disrespect toward Indigenous peoples."[62]

That history reveals a paternalist approach to Indigenous self-determination. In the early days of European–Indigenous contact in North America, Indigenous peoples were seen as attractive allies and commercial partners, and winning their favour was critical to securing their interests from one another. Indigenous nations, conversely, were concerned with the taking up of their lands by a growing American nation. These conditions led to the British Royal Proclamation of 1763, which provided:

> And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds . . .[63]

---

57. *R v Pamajewon*, [1996] 2 SCR 821.

58. *Ibid* at para 27.

59. *Ibid* at para 29.

60. *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 at para 115 [*AltaLink*].

61. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 10.

62. *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34 at para 48, citing Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: The Commission, 1996); Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Commission, 2015).

63. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 109.

The Honourable Justice LaForme observes in his academic writing that "[t]he language of the document illustrates these dual purposes by assuring Aboriginal peoples that they would be protected from unscrupulous settlers, while couching such an assurance in language that assumed jurisdiction and protective power over them."[64] Those two elements of early Crown colonial policy—the assumption of jurisdiction over and responsibility for Indigenous peoples—continued for centuries and culminated in the numbered treaties in the late nineteenth century. It would not be until *Calder,* 210 years later, that six justices of the Supreme Court would agree that Aboriginal title existed at common law, albeit with Martland J, Judson J, and Ritchie J holding that Crown sovereignty was nonetheless inconsistent with a conflicting interest such as Aboriginal title.[65]

The history also reveals that the legal doctrines developed in the pre-section 35 era were predicated on racial superiority. Courts justified sovereignty through the doctrine of discovery, which envisioned the land as being empty and unimproved and therefore open for settlement. According to Taschereau J in *St Catherines Milling*:

> *There is no doubt of the correctness of the proposition laid down by the Supreme Court of Louisiana, in Breaux v. Johns, citing Fletcher v. Pecks, and Johnson v. McIntosh, "that on the discovery of the American continent the principle was asserted or acknowledged by all European nations, that discovery followed by actual possession gave title to the soil to the Government by whose subjects, or by whose authority, it was made, not only against other European Governments but against the natives themselves*. While the different nations of Europe respected the rights (I would say the claims) of the natives as occupants, they all asserted the ultimate dominion and title to the soil to be in themselves.
>
> . . .
>
> The necessary deduction from such a doctrine would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some of the writers cited by the appellants, influenced by sentimental and philanthrophic [*sic*] considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The *Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands* that they have received in the past, but, as in the past, it will *not be because of any legal obligation* to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.[66]

That ideology, which manifest itself throughout Crown–Indigenous relations for centuries, and of which the *Indian Act* and residential schools were a product, gave way, even if only slightly, during the post-war human and civil rights zeitgeist. In 1969, the Pierre Elliott Trudeau

---

64. Hon Harry LaForme & Claire Truesdale, "Section 25 of the Charter; Section 35 of the Constitution Act, 1982: Aboriginal and Treaty Rights—30 Years of Recognition and Affirmation" (2013) 62 SCLR (2d) 687 at para 15.

65. *Calder v British Columbia (AG)*, [1973] SCR 313.

66. *St Catharines Milling and Lumber Co v Ontario (AG)*, (1887), 13 SCR 577 at 643, 649 (emphasis added).

government published the White Paper (as it remains known today), which aimed to "lead to the full, free and non-discriminatory participation of the Indian people in Canadian society."[67] The White Paper claimed that "[s]uch a goal requires a break with the past. It requires that the Indian people's role of dependence be replaced by a role of equal status, opportunity and responsibility, a role they can share with all other Canadians"[68] and that "[t]rue equality presupposes that the Indian people have the right to full and equal participation in the cultural, social, economic and political life of Canada."[69] Despite its ostensible promise of racial equality, many Indigenous people had a visceral negative reaction to the White Paper, which they felt continued a policy of assimilation and the exclusion of their histories from those of Canada as a nation.[70] The White Paper reaction, together with the reasons in *Calder*, served as a catalyst to greater Indigenous recognition by Prime Minister Trudeau and his government.[71] In 1982, during another Trudeau government, the British Parliament patriated a Canadian constitution that contained section 35, which, as mentioned, is understood now to be buoyed by the principle of reconciliation.

It is hard given this history to imagine reconciliation progressing without greater recognition of Indigenous self-determination. Crown policy from its earliest inception was paternalistic. It was predicated on the idea that European governments knew better than Indigenous peoples what was in their best interest and the Crown therefore claimed dominion over them and responsibility for them. Societies that had managed and thrived on the resources of rugged landscapes for thousands of years became wards of the embryonic colonial state. Therefore, calls for greater Indigenous self-determination, especially as envisioned in a meaningful partnership in managing the land, will continue to come so long as reconciliation is understood as a process that takes account of the past with an eye for shaping the future. It is an obvious next step.

More than that, Canada and the provinces are increasingly incorporating a right to self-determination as found in international law. Article 3 of the United Nation's *Declaration of the Rights of Indigenous Peoples* (*UNDRIP*) states that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[72] Article 19 instructs that "[s]tates 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."[73] And Article 20 provides that "Indigenous peoples have the right to maintain

---

67. Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (Ottawa: Queen's Printer, 1969) at 3.

68. *Ibid*.

69. *Ibid* at 7.

70. Hamar Foster, Heather Raven & Jeremy Webber, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2003) at 4; Faculty of First Nations and Indigenous Studies, University of British Columbia, "The White Paper 1969," online: *Indigenous Foundations* <https://indigenousfoundations.arts.ubc.ca/the_white_paper_1969/>.

71. *Ibid* at 6.

72. *United Nations Declaration on the Rights of Indigenous Peoples*, 1998, UN Doc A/61/295, at 8 [*UNDRIP*].

73. *Ibid* at 16.

and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."[74] Both Canada and British Columbia have passed legislation affirming the application of *UNDRIP* to their respective jurisdictions and binding them to "take all measures necessary to ensure the laws of [Canada or British Columbia] are consistent with the Declaration."[75] The Federal *Act* also provides preambular affirmations that the Government of Canada "rejects all forms of colonialism" and "recognizes that all relations with Indigenous peoples must be based on the recognition and implementation of the inherent right to self-determination" and that "the Declaration emphasizes the urgent need to respect and promote the inherent rights of Indigenous peoples . . . especially their rights to their lands, territories and resources."[76] Further yet, courts have confirmed that administrative actors may consider *UNDRIP* in their determinations to "inform a fuller understanding of reconciliation."[77] The adoption of this international law strengthens the likelihood of judicial recognition to a right of self-determination.

Now consider its treatment in *Grassy Mountain*. To its credit, the panel in *Grassy Mountain* does claim to "respect the ability and right of Indigenous groups to determine for themselves how best to balance the positive and negative impacts of the project on their use of the land, their cultural practices, and the practice of their rights."[78] The panel evidently understands that self-determination exists, whether that comes intuitively or with direction from superiors, but it fails to give any weight to such direction. Recall also that the trigger for a duty to consult is a *potential* right, following which the Crown must provide meaningful consultation in accordance with the *Haida Nation* spectrum. As such, there is a potential right to self-determination that flows from judicial recognition of reconciliation and the history of Crown extinguishment of Indigenous self-determination, and the incorporation of international authority that supports a right to self-determination. Administrative actors should give weight to the right to self-determination even when it acts in favour of a project and to avoid the trap displayed in *Grassy Mountain*—that is, alerting the reader of their recognition of a right but then failing to consider it. An administrative decision maker must afford a potential right consideration, especially when it is notionally accepted in their reasons.

2. Economic Rights

Indigenous nations might find something that resembles self-determination through the recognition of economic rights. Economic rights provide a similar practical outcome, and administrative decision makers should be cognizant of the presence of economic rights. Several recent cases confirm that Indigenous peoples have economic rights that require meaningful consultation, and that a duty to consult and accommodate arises when Indigenous economic interests are closely related to an Aboriginal right or title or to an underlying territorial right.

---

74. *Ibid* at art 20.

75. *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, ss 4–5; *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, ss 2–3.

76. *United Nations Declaration on the Rights of Indigenous Peoples Act*, *ibid* at Preamble, paras 10–12.

77. *AltaLink*, *supra* note 60 at para 123.

78. *Grassy Mountain*, *supra* note 7 at para 3021.

Consider the *Ermineskin Cree Nation* case.[79] The facts of the case were strikingly similar to those in *Grassy Mountain*. The Ermineskin Cree Nation holds impact benefit agreements (IBAs) with Coalspur Mines, which provide economic, social, and community benefits to the Ermineskin Cree Nation. The nation entered into additional agreements as the mine proposed expanding. The minister initially declined to designate the project under the *Impact Assessment Act* (IAA) but did an about-face following pressure from environmental groups and designated the project expansion under the IAA without consulting the Ermineskin Cree Nation. The designation immediately halted work on the mine expansion. Ermineskin argued that the work stoppage would lessen, delay, or eliminate the benefits of the IBAs. The minister argued that it was not bound by a duty to consult Ermineskin Cree Nation. Federal Court Justice Brown rejected the minister's argument, finding it to be an "ungenerous approach to the duty to consult; it is too narrow."[80] Instead, Brown J found that the economic rights were closely related to and derived from Aboriginal rights such that they established a duty to consult as "the evidence is uncontroverted that 2019 IBA is designed 'to compensate' Ermineskin Cree Nation for the loss of its Aboriginal and Treaty rights including the taking up of some of its land."[81]

Consider also the *Ehattesaht First Nation* case.[82] The Ehattesaht First Nation of Vancouver Island held revenue-sharing agreements with the province of British Columbia for timber harvested in the territory in which they hold Aboriginal rights. The Ehattesaht also operated their own forestry venture. A commercial enterprise held a tree farm licence in Ehattesaht territory and left considerable harvestable timber uncut at the expiry of the prescribed cut period. The commercial enterprise expressed concern to the province about the challenges of harvesting the undercut timber. The province decided, without consultation, to return 75 per cent of the volume of the uncut timber to the tree farm licence inventory, leaving 25 per cent of the undercut timber volume for potential harvest by other third parties, including the Ehattesaht. BC Supreme Court Justice Ehrcke held that an economic right that originated in the harvest of timber from traditional territory established a duty to consult. Ehrcke J rejected the province's argument that no duty arose because the Ehattesaht raised an economic interest instead of an Aboriginal right and quashed the decision of the province.

Finally, consider the *Da'naxda'xw/Awaetlala First Nation* case.[83] The Da'naxda'xw/Awaetlala First Nation (DAFN) sought a judicial review of the minister's refusal to recommend changes to the boundary of the Upper Klinaklini Conservancy, which exists in its traditional territory. The boundary amendment would allow for an environmental assessment of a proposed hydroelectric powerplant. The DAFN held impact benefit agreements with the project proponent. The DAFN, like the Ermineskin Cree Nation most recently, argued that a duty to consult was present because the minister's decision to prevent the project from being potentially realized adversely impacted the DAFN's ability to secure the economic and social well-being of its citizens. Justice Fisher, also of the BC Supreme Court, agreed and ordered the minister to consult with the DAFN.

---

79. *Ermineskin Cree Nation*, *supra* note 46.

80. *Ibid* at para 104.

81. *Ibid* at para 105.

82. *Ehattesaht First Nation*, *supra* note 49.

83. *DAFN*, *supra* note 47.

Older cases implicitly recognized economic rights as well. Justice Fisher says in the *DAFN* decision, "I do not interpret *Haida Nation* as establishing a duty to consult only for the purpose of preserving land from development. I agree with Mr. Elwood's submission that there was an economic component to the Haida's claim to the lands and forests of their traditional territory, and another aspect of the Crown's conduct in issue was the exclusion of the Haida from the benefits of the forest resource."[84] In the seminal case of *Delgamuukw*, then-Chief Justice Lamer acknowledged that land has an "inescapably economic aspect."[85] These decisions reflect our collective, intuitive understanding that the value of land flows from its use, not only its existence. Chief Justice Lamer, for the majority, accepted that members of the Heiltsuk Band have a right to sell herring spawn in *Gladstone*.[86]

The recognition of economic rights may be expanded, not only in areas of Indigenous traditional territory land claims but in numbered treaty areas as well. Reconciliation, in any conception of the term, requires one to recognize the socioeconomic conditions of Indigenous peoples in Canada because of colonial imposition. Impact benefit agreements and other forms of economic prosperity that draw from the extraction of natural resources provide Indigenous nations with temporary sources of employment and capacity building.[87] Reconciliation similarly requires one to understand that, without economic resources, Indigenous peoples are left without a meaningful say in their future. Economic rights offer a bridge to a better future, and they permit Indigenous peoples to actualize their vision of their culture and lifestyle on their own terms. And that is an aim the law should support.

3. Mineral Rights

Like economic rights, the recognition of mineral rights, in practice, provides Indigenous nations with something that may resemble self-determination. And concomitantly, administrative decision makers may give effect to self-determination through their consideration of Indigenous mineral rights. In some instances, mineral rights are apparent, like on Aboriginal title lands. The courts in *Delgamuukw* and *Ross River* note this expressly.[88] Aboriginal title confers a fee-simple-like interest. Titleholders have exclusive dominion over the land provided the proposed use is consistent with the nature of the group's interest and future generations' right to enjoy the land, and subject only to justified infringement.[89] Reservation lands are another instance. Indeed, the Supreme Court in *Delgamuukw* looks to the presumption of Indigenous mineral rights in the *Indian Oil and Gas Act* to support its aforementioned holding regarding title lands.[90] However, Indigenous peoples may also hold mineral rights to treaty lands the Crown acquired *de facto* sovereignty over through treaty.

---

84. *Ibid* at para 139.

85. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 166, 169 [*Delgamuukw*].

86. *R v Gladstone*, [1996] 2 SCR 723.

87. Robert Hamilton, Ryan Beaton and Joshua Ben David Nichols, "Economic Justice in Practice" in Robert Hamilton, John Borrows, Brent Mainprize, Ryan Beaton and Joshua Ben David Nichols, eds, *Wise Practices: Exploring Indigenous Economic Justice and Self-Determination* (Toronto: University of Toronto Press, 2021) at 99.

88. *Delgamuukw*, *supra* note 85 at para 122; *Ross River Dena Council v Government of Yukon*, 2012 YKCA 14 at para 32.

89. *Tsilhqot'in Nation*, *supra* note 52 at para 88.

90. *Delgamuukw*, *supra* note 85 at para 122.

Oral histories from elders in several numbered treaty areas describe a collective Indigenous understanding that land was to be shared, not ceded. In his comprehensive history entitled *No Surrender: The Land Remains Indigenous*, Sheldon Krasowski explains that negotiators for Canada, frustrated with frictions arising from land surrender negotiations in Treaty One, resolved in subsequent treaties to sell the treaty benefits and save land surrender discussions to the end, or not at all.[91] In Treaty 3 territory, a recorded oral history describes Anishinaabe Chief Pow-wa-sang and another drawing a dissected circle on the ground, a representation of each party sharing one half of a sweat lodge, which was a metaphor for the land.[92] The chiefs communicated through the sweat lodge–sharing metaphor that they were not relinquishing their relationship to the land but merely allowing newcomers to live alongside them, just as they were not selling one half of the sweat lodge but allowing others to join them.[93] The result was an understanding that all the land was to be shared and only reserve lands were to be exclusive. In Treaty 4 territory, Elder Oakes recalls the Cree and Saulteaux agreeing to share the land to the depth of a plow tip.[94] In Treaty 6 territory, Elder John Buffalo of the Ermineskin Cree Nation recalls his grandmother describing the commissioner's promise that "anything that cannot be used agriculturally will be yours."[95] Elder Margaret Labatak recalls a similar understanding that "the Indians agreed to share the land to a depth of a plow, the trees for the building of homes, and the grass to feed the animals."[96] Elder Charlie Blackman of the Cold Lake First Nation likewise recalls that the commissioner "wanted only six inches of land, the timber and the grass—nothing else."[97] Mountains, including those containing bituminous coal, were not mentioned.[98] Neither were minerals.

The Supreme Court has held that oral histories such as these must be accepted as evidence of Aboriginal rights or title provided it is useful and reliable, and Indigenous evidence, whether oral or documentary, must be evaluated from the Indigenous perspective and in a manner that is sensitive and generous to establishing Aboriginal rights.[99] It is conceivable that a duty to consult about mineral rights on non-reserve treaty lands may arise in light of the oral and documentary history cited by Krasowski and the low threshold for triggering a duty to consult.

From the foregoing, it seems that a duty to consult must apply even when the shoe is on the other foot—when it is Indigenous nations that support project approval. To hold otherwise would allow the Crown to dictate the terms in which negotiation is required—the Crown would be required to negotiate in some instances but permitted to stonewall or overlook Indigenous support in others. Second, if the duty to consult does not have universal application, some Indigenous interests would be left without protection. Economic rights, mineral rights, and the right to self-determination would be left vulnerable in instances of

---

91. See generally Sheldon Krasowski, *No Surrender: The Land Remains Indigenous* (Regina: University of Regina Press, 2019).

92. *Ibid* at 95.

93. *Ibid*.

94. *Ibid* at 158.

95. *Ibid* at 214.

96. *Ibid*.

97. *Ibid*.

98. *Ibid*.

99. *R v Marshall*, 2005 SCC 43 at paras 68–69.

Indigenous project support. In the Grassy Mountain Project, that appeared to be precisely the outcome. Established section 35 rights received fulsome consideration, but the right to self-determination, for example, received comparatively little examination by the panel, except to say that they are aware that such a right exists.

D. A Note on the Duty of Fairness

Although plausible, the foregoing revisions to the duty to consult remain far off. The reality is that even a sympathetic and motivated jurist would have to write against decades of jurisprudence characterizing Aboriginal rights as narrow and frozen. The "formidable barrier" formed by the Aboriginal rights trilogy cases will continue to restrain progress absent serious structural change in the test for Aboriginal rights. But in the short term, the duty of procedural fairness may offer Indigenous nations a stopgap that may be used to draw decision makers' attention to self-determination or other rights.

The duty of procedural fairness may be a valuable pathway to rights consideration because of its nature and flexibility. Both the duty to consult and the duty of procedural fairness rely on natural justice notions and participatory rights. Consider L'Heureux-Dubé J's classic explanation of procedural fairness in *Baker*, in which she noted that procedural fairness is flexible and variable, and emphasized that

> underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.[100]

Justice L'Heureux-Dubé continued to set out the factors that inform analysis of whether a party has received the appropriate degree of procedural fairness: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates"; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedures made by the agency itself.[101] Importantly, this list is non-exhaustive.[102]

Further, the Supreme Court in *Suresh* demonstrated that where constitutionally protected interests are at stake, not only *can* the duty of procedural fairness accommodate this, but instead that the procedural protections *must* meet the required constitutional standards.[103] Mr. Suresh was a Sri Lankan refugee at risk of torture if deported, and in considering Mr. Suresh's section 7 rights the court commented that

> [w]e therefore find it appropriate to look to the factors discussed in *Baker* in determining not only whether the common law duty of fairness has

---

100. *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para 22.

101. *Ibid* at paras 23–27.

102. *Ibid* at para 28.

103. *Suresh v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1.

> been met, but also in deciding whether the safeguards provided satisfy the demands of s. 7 In saying this, we emphasize that, as is the case for the substantive aspects of s. 7 in connection with deportation to torture, we look to the common law factors not as an end in themselves, but to inform the s. 7 procedural analysis.[104]

For an Indigenous nation advancing a novel application of the duty to consult, perhaps the elements of their argument may similarly fit into the duty of procedural fairness. This is especially so when, at base, it is the desire to be heard, or the principle of *audi alteram partem*, which is the heart of the Indigenous nation's participation in the project approval process.

In the *Grassy Mountain* case, at first blush, the first, third, and fourth factors militate in favour in elevated participatory rights. The nature of the decision made is one that serves as a threshold determination of the viability of the project. Without approval, the project dies on the page. The project is valuable as a tool to generate economic benefits and as an expression of self-determination. There are legitimate expectations that arise from the federal government's commitments under *UNDRIP*, which includes at article 19 a requirement to cooperate in good faith when implementing administrative measures that affect Indigenous peoples. And each of these factors are undergirded by a constitutional imperative of reconciliation and the unique constitutional status of Indigenous peoples.

In *Grassy Mountain*, greater procedural fairness may have ameliorated some of the concerns that surfaced in the court of appeal's decision to deny leave. For example, the court noted that nothing constrained the participation of Indigenous nations and accepted that Indigenous nations simply did not provide sufficient information. But that point fails to recognize the social context in which Indigenous nations, especially in resource-rich areas, struggle from consultation fatigue and limited resources.[105] The court of appeal also noted that the panel did not ask the explicit question of "what would you lose if this project did not proceed?" Arguments seeking specific procedural fairness remedies, for example, through a bifurcated report and decision process or the invitation of targeted further economic submissions once the panel had determined the information to be lacking, may have been an important arrow in the quiver. Especially given that, as the court in *Abrametz* confirmed, the chosen procedure may be subject to appellate standards of review for fairness rather than a reasonableness standard for matters related to consultation.[106]

IV THE DETERMINATION GAP

Yet even where an Indigenous nation raises a credible right that demands consideration and militates in favour of project approval, the administrative decision makers must still be armed with the tools to incorporate such perspectives into their deliberations.

---

104. *Ibid* at para 114.

105. Minister of Environment and Climate Change, *Building Common Ground: A New Vision for Impact Assessment in Canada*, Expert Panel Report (Ottawa: 2017) at 93, online (pdf): <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html >

106. *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29 at para 27; *Gitxaala Nation v Canada*, 2016 FCA at para 185 [*Gitxaala*].

The panel's reasons given in *Grassy Mountain* also show that administrative actors may falter in their multivariate final calculation of the public interest. This is foreseeable. These determinations are complex, and as the panel identified, there is "[n]o step-by-step guidance . . . available to evaluate the public interest."[107] However, "there is widespread general understanding that evaluating the public interest involves comparing and weighing the potential positive and negative impacts that a project might cause across economic, environmental, and social domains. Evaluating the public interest also requires considering the distribution of these positive and negative impacts among the various individuals and groups that constitute 'the public.'"[108] Still, the panel provides only five short paragraphs considering Indigenous interests, and reconciliation is absent entirely. More is required. Administrative decision makers must consider reconciliation in their determinations and must conclude a meaningful consultation with sufficient reasons.

A. Reconciliation is a Required Public Interest Consideration

In *AltaLink*, the Alberta Court of Appeal provides guidance for administrative actors. There, AltaLink operated electrical transmission lines that crossed the reserve lands of the Káinai and Piikani nations. The nations agreed to the construction of the lines in exchange for an ownership option. The nations exercised their ownership option to acquire a 51 per cent interest in the transmission lines two years after their construction. The Alberta Utilities Commission approved the sale, finding the transfer to be in the public interest, provided that the nations' bear the costs of the external auditor and hearings. The costs could not be passed on to the public. Justices Watson and Wakeling, forming the majority, allowed the appeal on administrative law grounds but nonetheless provided some helpful comments. The majority took notice that employment and educational opportunities transform the quality of life of those on the reservation, which generally experience extreme unemployment. Meaningful employment keeps families together and thriving, and the presence of skilled workers benefits the community both through their homecoming and the inspiration of future generations to seek a fulfilling life. Hence, "[p]rojects that increase the likelihood of economic activity on a reserve ought to be encouraged. They are in the public interest."[109]

However, Feehan JA's concurrence is most germane to administrative actors. The parties sought direction about "the Commission's obligations respecting the principle of honour of the Crown and the imperative of reconciliation."[110] Feehan JA responded that "the Commission, in exercising its statutory powers and responsibilities, must consider the honour of the Crown and reconciliation whenever the Commission engages with Indigenous collectives or their governance entities, and include in its decisions an analysis of the impact of such principles upon the orders made, when raised by the parties and relevant to the public interest."[111]

Justice Feehan's analysis acknowledges reconciliation as an iterative, ongoing work-in-progress that seeks to rebuild the relationship between Indigenous peoples and the state. He finds that reconciliation has a constitutional character and is a "a primary consideration

---

107. *Grassy Mountain*, supra note 7 at para 3013.

108. *Ibid*.

109. *AltaLink, supra* note 60 at paras 59–75.

110. *Ibid* at para 82.

111. *Ibid* at para 84.

where constitutionally protected interests are potentially at stake"[112] as it "underlies the honour of the Crown and section 35 rights."[113] Justice Feehan cites *Mikisew Cree*[114] to find that reconciliation is the "fundamental objective" of modern Aboriginal and treaty rights law, and concludes, with the support of *Taku River*,[115] that "[t]he controlling question in *all situations* is what is required to effect reconciliation with respect to the interests at stake in an attempt to harmonize conflicting interests, and achieve balance and compromise."[116] Therefore, "[a]ny consideration of public goals or public interest must 'further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.'"[117] As all government actors must consider reconciliation as a constitutional principle, "[a]n administrative tribunal with a broad public interest mandate . . . must address reconciliation as a social concept of rebuilding the relationship between Indigenous peoples and the Crown by considering the concerns and interests of Indigenous collectives. This includes consideration of the interests of Indigenous peoples in participating freely in the economy and having sufficient resources to self-govern effectively."[118]

This statement from an appellate court leaves little doubt about whether reconciliation and the interests of Indigenous peoples must be included in a public interest calculation. They do, and bodies like the panel in *Grassy Mountain* must account for it, particularly if the decision cuts against rights like those discussed above. But even then, how is a decision maker to give effect to those considerations?

First, the decision maker must be cognizant of the fact that Indigenous nations have a unique constitutional status among those being considered in the public interest determination, and accordingly their interests must carry significant weight. Among those giving submissions, they should not be considered just another stakeholder but rather the principal stakeholder. Decision makers should consider projects with an intention to animate Indigenous aspirations if at all possible. This requires decision makers to start from a question of what does reconciliation demand and then consider whether that outcome is overtaken by other, non-constitutionally protected interests.

Second, it requires taking Indigenous support or opposition to a project at its highest and without a paternalistic weighing analysis to determine whether a particular Indigenous nation's perspective is justified. In the *Grassy Mountain* case, both the panel and the court of appeal noted that the panel was left without detailed information about the economic impact of the project to the reserve, and ultimately it concluded that the economic benefit was low to moderate. Effectively, what the panel communicated and the court of appeal implicitly endorsed is that it was unable to determine, from its perspective, whether the support of Indigenous nations was justified. And in so doing, the panel ignored the impact and importance of even a moderate benefit to Indigenous nations that struggle with extreme unemployment and rarely see local opportunities to ameliorate that problem. And, as mentioned above,

---

112. *Ibid* at para 115.

113. *Ibid* at para 114.

114. *Ibid* at para 115, citing *Mikisew Cree First Nation*, *supra* note 43 at paras 1, 63.

115. *Ibid* at para 115, citing *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 2.

116. *Ibid* at para 115, citing *Mikisew Cree First Nation*, *supra* note 43 at para 62.

117. *Ibid* at para 118, citing *Tsilhqot'in Nation*, *supra* note 52 at para 82.

118. *Ibid* at paras 119, 121.

requiring additional information to evaluate the veracity of the Indigenous perspective put forward ignores that compiling that information demands human and financial resources from Indigenous nations that often have precious little of either. The impact on public interest determinations of the right of self-determination and the imperative of reconciliation is that we should accept that Indigenous nations are able to determine for themselves if the opportunities outweigh the risks, and decision makers should take the answer to that question at its highest.

B. Meaningful Consultation Demands an Accounting of Competing Considerations

Beyond identifying the proper factors of a decision, the decision maker must also properly employ those factors and communicate their conclusion. Case law about meaningful consultation addresses how administrative actors must consider Indigenous interests. The administrative decision maker must be alive to requirements of *meaningful* consultation, as "a project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest."[119]

Public interest determinations are the culmination of a consultation and accommodation process, and thus are infused with the principles flowing from the *Haida Nation* case and others. The two do not act in conflict, but rather, "[a]s a constitutional imperative, the duty to consult gives rise to a special public interest that supersedes other concerns commonly considered by tribunals tasked with assessing the public interest."[120] The consultation and accommodation process requires a balancing of interests, as the *Grassy Mountain* panel understood intuitively about public interest determinations generally, and it must be meaningful.[121] This requires decision makers to test the submissions, be prepared to amend policy proposals, and provide feedback.[122] This also requires that decision makers seriously consider the position of Indigenous peoples and issue written reasons where deep consultation is required.[123] Where the Crown must balance competing interests, like in public interest determinations, "a safeguard requiring the Crown to explain in written reasons the impacts of Indigenous concerns on decision-making becomes more important. In the absence of this safeguard, other issues may overshadow or displace the issue of impacts on Indigenous rights."[124] Reasons are lynchpins of democracy that "foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed" and they are "a sign of respect [that] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation."[125] They "shield against arbitrariness as well as

---

119. *Tsleil-Waututh Nation, supra* note 43 at para 507, citing *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 40 [*Clyde River*].

120. *Tsleil-Waututh Nation*, *supra* note 43 at para 507.

121. *Ibid* at para 494.

122. *Ibid* at para 501.

123. *Ibid*.

124. *Ibid* at para 502, citing *Gitxaala*, *supra* note 106 at para 315.

125. *Clyde River*, *supra* note 119 at para 41, citing *Haida Nation*, *supra* note 37 at para 44 and *Kainaiwa/Blood Tribe v Alberta*, 2017 ABQB 107 at para 117.

the perception of arbitrariness in the exercise of public power."[126] Not only might reasons be legally required, but they encourage "administrative decisionmakers to more carefully examine their own thinking and to better articulate their analysis in the process."[127]

How are administrative actors to craft reasons that achieve these aims? One can look to *Vavilov*.[128] The methodological principles at play in drafting reasons are the same whether the parties are Indigenous or non-Indigenous—only the stakes are higher with the former because, as Hamilton and Kislowicz describe, *Vavilov* suggests a broad application of appellate standards to the duty to consult.[129] Put otherwise, the administrative actor's reasoning must be correct, and their reasons must be justified, transparent, and intelligible.[130] While a decision maker need not respond to every argument or explicitly issue a finding on each constituent element of its decision, it must grapple with the central arguments raised by parties to show that it was alert and sensitive to the matter before it.[131]

The reasons in *Grassy Mountain* demonstrate why reasons are so important, as they exhibit the exact overshadowing or displacement of Indigenous issues the Supreme Court warns us about. Bear in mind that trout received nearly as many mentions as paragraphs in the report, whereas Indigenous concerns were summed up in just five. The reasons in *Grassy Mountain* also fail with respect to transparency and justifiability. It was apparent years in advance of the final decision that trout would be the determinative issue and that government policy was decidedly against coal development, irrespective of whether it be metallurgical or thermal. Under those conditions especially, the panel ought to have spoken directly to the Indigenous nations in their reasons. Why do trout matter more that the socioeconomic betterment of Treaty 7 nations? At what point would Indigenous nations' desires and potential mitigation measures have outweighed trout and tipped the public interest scale toward approval? How was reconciliation contemplated given its complete absence from the report? Each of these questions converge to answer a single, fundamental one: How was self-determination considered, not just in the submission of evidence, but in the final conclusion? Administrative decision makers must answer this question expressly and without equivocation if justice is to be both done and seen to be done.

V CONCLUSION

Major extractive natural resource projects will continue to be proposed, and we depend on a fair process to have the right projects built. However, the right projects cannot receive a correct and constitutionally compliant public interest determination without Indigenous interests at the forefront, irrespective of whether they stand for or against a project.

---

126. *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at paras 79 [*Vavilov*], citing *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine (Village)*, 2004 SCC 48 at paras 12–13.

127. *Ibid* at para 80, citing *Baker*, *supra* note 100 at para 39.

128. *Ibid* at paras 73–135.

129. Robert Hamilton and Howard Kislowicz, "The Standard of Review and the Duty to Consult and Accommodate Indigenous Peoples: What Is the Impact of Vavilov?" (2021) 59 Alta L Rev 41.

130. *Vavilov*, *supra* note 126 at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13.

131. *Ibid* at para 128, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16.

Accordingly, the duty to consult must expand to protect rights that weigh in favour of project support, such as a right to self-determination or economic or mineral rights. Second, administrative actors must pay respectful attention to Indigenous nations that raise self-determination rights or economic or mineral rights in an impact assessment process. The body must take Indigenous concerns at their highest and then demonstrate to Indigenous nations how their concerns and reconciliation were considered in the project, especially where a decision is disinclined to those concerns. These principles, collectively, provide opportunities for Indigenous nations and administrative bodies alike to attain just and fair public interest determinations.