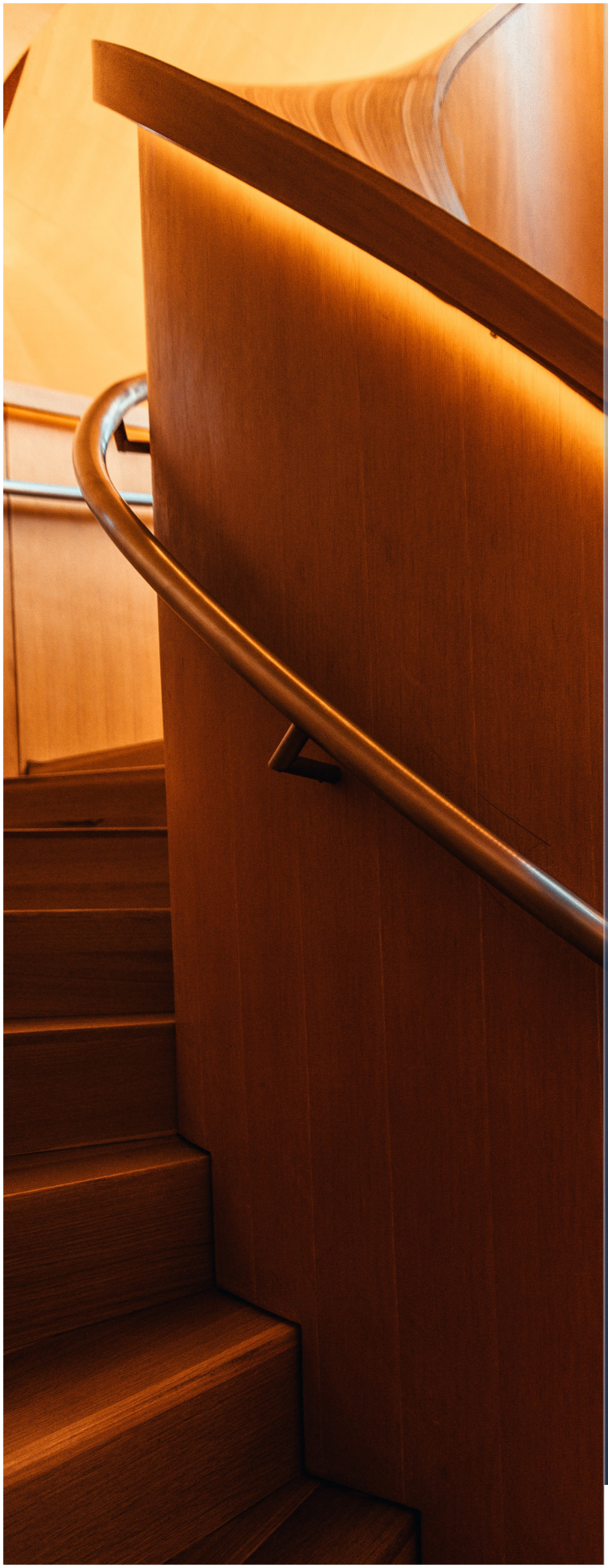

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"LANGUAGES, LAND, AND SOVEREIGNTIES: REVITALIZING INDIGENOUS LEGAL ORDERS" 2023 INDIGENOUS LAW CONFERENCE KEYNOTE ADDRESS

COFFEE AND CONVERSATION WITH THE HONOURABLE MADAM JUSTICE PATRICIA HENNESSY*, HOSTED BY PROFESSOR TENILLE E. BROWN**

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* Madam Justice Patricia Hennessy is a judge at the Ontario Superior Court of Justice, Northeast Region. After an early career in private practice and also working in public institutions she was appointed to the Superior Court of Justice in 1999. She has served on the board and been president of the International Association of Women Judges—Canadian Chapter, on the board of the Superior Court Judges Association of Ontario, the Council of the Canadian Superior Court Judges' Association, and the Education Committee for the Ontario Superior Court. She is actively engaged in local Mock Trials and Colloquium, the professional development conference for lawyers in northeastern Ontario. In 2011 Justice Hennessy received the Chief Justice Award for work in justice education and a doctorate of Laws Honoris Causa from Laurentian University. In 2014/2015 Justice Hennessy was judge in residence at Osgoode Hall Law School during her study leave. As part of her study leave activities, she worked with Anishinaabe students in high schools in Wikwemikong and M'Chigeeng on Manitoulin Island on a project called Exploring Justice/Making Law. Since then she has been involved provincially and nationally in judicial education projects on Indigenous law and legal orders.

** Assistant Professor of Law, Bora Laskin Faculty of Law, Lakehead University. Professor Brown researches and teaches in the areas of property law, Aboriginal law, technology, and geography.

Abstract

Bora Laskin Faculty of Law, together with the Mino-Waabandan Inaakinogewinan Indigenous Law and Justice Institute,[1] hosted its third biennial conference on Indigenous law from January 26–28, 2023. This year's conference theme was "Languages, Land, and Sovereignties." The Indigenous Law Conference is a biannual student-focused conference hosted by the Bora Laskin Faculty of Law, which has the goal of bringing together law students from across Canada to discuss learning, teaching, and practising Indigenous law. At this years' conference, panels included teachings on topics such as practices of land-based learning, Ojibwa language teachings, self-governance, language rights, and the implementation of the United Nations Declaration on Indigenous Peoples.

Our opening keynote speaker for this years' conference was Madam Justice Patricia Hennessy of the Ontario Superior Court of Justice. Justice Hennessy was invited to talk about her work as presiding trial judge on the case *Restoule v Canada*, an Aboriginal treaty rights case. What follows is an edited version of Justice Hennessy's keynote talk, which took the form of a "Coffee and Conversation" hosted by Professor Tenille E. Brown.

I INTRODUCTION

Professor Tenille Brown [TB]: I am honoured to welcome Madam Justice Hennessy to the Bora Laskin Faculty of Law, Lakehead University. Our law school, Bora Laskin Faculty of Law, Lakehead University, is on the Robinson Superior Treaty lands, the traditional lands of Fort William First Nation, and the Ojibwe Odawa and Potawatomi Nations, collectively known as the Three Fires Confederacy. Today we will be talking about *Restoule v Canada*,[2] a Treaty rights case that concerns the Robinson Huron and Robinson Superior Treaties of 1850. Discussing our treaty relationship here in Thunder Bay is an important beginning for the conference. From this introduction centered on Treaty law, an area of law that in the jurisprudence often feels like an uneasy amalgamation of sovereignties, laws, and peoples, it is our hope the conference will move outwards into teachings and discussions about Indigenous laws, languages, and lands. I will begin by summarizing the *Restoule* matter before we move into conversation with Justice Hennessy.

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1. Mino-Waabandan Inaakonigewinan (Seeing Law in a Good Way) Indigenous Law & Justice Institute, online: *Bora Laskin Faculty of Law* <https://www.lakeheadu.ca/programs/departments/law/mino-waabandan-inaakonigewin>.

2. *Restoule v Canada (AG)*, 2018 ONSC 7701 (CanLII). [*Restoule* ONSC].

II CASE SUMMARY: *RESTOULE V CANADA (ATTORNEY GENERAL)*[3]

In 1850, seventeen years before the Dominion of Canada was created, colonial Officer William Benjamin Robinson in the representation of Her Majesty the Queen, concluded treaties number 60 and 61 with the Anishinaabek Nations of Northern Ontario.[4] The so-named "Robinson Treaties" concern vast territories surrounding two of the Great Lakes: Lake Superior and Lake Huron. The Treaty lands stretch in Northern Ontario from Pigeon River just west of Thunder Bay right up to the Quebec border. At the time of signing the Robinson Treaties these lands were important for colonial expansion as settlements began to move across North America. The need for a Treaty became apparent when mining began in the area encroaching on the traditional lands of the Anishinaabek Nations. The Robinson Treaties were concluded on September 9, 1850, in Bawaating (also known as Sault Ste. Marie). The Robinson Treaties contain a host of provisions concerning land, ongoing financial support in the form of an annuity payment, and protection of hunting and fishing rights. The annuity provision is unique among treaties in Canada as it contains language indicating that the amounts paid to the treaty beneficiaries will increase—or be augmented—under certain circumstances. The so-called augmentation clause states:

> [T]hat for and in consideration of the sum of two thousand pounds of good and lawful money of Upper Canada to them in hand; and for the further perpetual annuity of five hundred pounds, the same to be paid and delivered to the said Chiefs and their Tribes . . . [I]n case the territory hereby ceded by the parties . . . shall at any future period produce an amount which will enable the Government of this Province, without incurring loss, to increase the annuity hereby secured to them, then and in that case the same shall be augmented from time to time, provided that the amount paid to each individual shall not exceed the sum of one pound Provincial currency in any one year, or such further sum as Her Majesty may be graciously pleased to order . . .[5]

The annuity amount has not been increased in 150 years. The issue in *Restoule* concerns interpretation of this augmentation clause. The plaintiffs argued that the parties entered into the Robinson Treaties with the common intention of sharing the wealth generated from the

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3. This section of the paper was written by Professor Tenille E. Brown to provide context for Madam Justice's keynote comments. The summary of the case, comments on the importance of the case, and any errors are attributed to Professor Brown alone.
For literature on *Restoule v Canada* broadly, see Tenille E. Brown, "Anishinaabe Law at the Margins: Treaty Law in Northern Ontario, Canada, as Colonial Expansion" (2023) 11:2 *Social Inclusion* 177; Haritha Popuri, "Appeal Watch: Crown Must Increase Annual Payments to Its Anishinaabe Treaty Partners in *Restoule v. Canada*" (December 14, 2021), online: *The Court* <http://www.thecourt.ca/appeal-watch-crown-must-increase-annual-payments-to-its-anishinaabe-treaty-partners-in-restoule-v-canada>.; Darcy Lindberg, "UNDRIP and the Renewed Application of Indigenous Laws in the Common Law" (2022) 55:1 UBC L Rev 51.

4. See the full treaty texts online: "Copy of the Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Huron Conveying Certain Lands to the Crown," online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028984/1581293724401>; "Copy of the Robinson Treaty Made in the Year 1850 with the Ojibewa Indians of Lake Superior Conveying Certain Lands to the Crown," online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028978/1581293296351>.

5. *Ibid*.

natural resource activities in treaty land areas and the annuity clause was to be augmented where economic circumstances allowed.[6] The Crown for both Ontario and Canada argued that the augmentation clause concerned payments up to the sum of four dollars per person and thereafter any increase was discretionary.[7]

The *Restoule* matter has been heard in a trifurcated proceeding, which means that the trial was split into three separate stages. Stage one dealt with interpreting the treaty,[8] and this is the decision that we are going to be talking about today. Stage two considered Crown defences of immunity and limitations.[9] Stage three will focus on remedies and the allocation of liability between Ontario and Canada.[10]

A. SUPERIOR COURT OF JUSTICE: *RESTOULE V CANADA (ATTORNEY GENERAL)*, 2018 ONSC 7701

Stage one considered treaty interpretation. The court applied the principles of treaty interpretation summarized by the Supreme Court of Canada in *R v Marshall*.[11] These principles

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6. *Restoule* ONSC, *supra* note 2 at paras 363, 375.

7. *Restoule* ONSC, *supra* note 2 at paras 385, 390–391.

8. Stage one has been heard at the Superior Court with the decision released in 2018 *(Restoule, supra* note 2), and by the Ontario Court of Appeal with the decision released in 2021 (reported at *Restoule v Canada (AG)*, 2021 ONCA 779 (CanLII) [*Restoule* ONCA]). The Ontario Court of Appeal decision addresses claims in both the first and second stages of the litigation.
On June 23, 2022, the Supreme Court of Canada granted leave to appeal to the Attorney General of Ontario (reported at *Attorney General of Ontario, et al. v Mike Restoule, Patsy Corbiere, Duke Peltier, Peter Recollet, Dean Sayers and Roger Daybutch, on their own behalf and on behalf of all Members of the Ojibewa (Anishinaabe) Nation who are beneficiaries of the Robinson Huron Treaty of 1850, et al.,* (Ontario) (Civil) (By Leave), online: <https://decisions.scc-csc.ca/scc-csc/scc-l-csc-a/en/item/19427/index.do>).

9. *Restoule* ONSC, *supra* note 2.

10. The third stage litigation was set to begin in January 2023. This litigation was paused for settlement negotiations. These are ongoing. See Nick Dunne, "Billions Have Been Made on Robinson Huron Treaty Lands. First Nations Could Finally Get a Share" (March 14, 2023), online: *The Narwhal* <https://thenarwhal.ca/robinson-huron-treaty-explainer/>.

11. *R v Marshall*, [1999] 3 SCR 456 at para 78, per McLachlin CJ; *Restoule* ONSC, *supra* note 2 at paras 395–397.
The nine principles of treaty interpretation are:
1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation . . .
2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories . . .
3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed . . .
4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed . . .
5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties . . .
6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time . . .
7. A technical or contractual interpretation of treaty wording should be avoided . . .

require that efforts be made to understand the historical record and give effect to the parties' intentions, choosing the interpretation that best reconciles the interests of both parties at the time the treaty was signed.[12]

In the course of the decision, Justice Hennessy highlights the importance of the historical and cultural context of the negotiation and signing of the Robinson Treaties. Anishinaabe perspectives guiding treaty signing were and remained principles of respect, responsibility, reciprocity, and renewal. The court found that the circumstances in which the Robinson Treaties were concluded showed that the annuity payment was less compared to annuity payments contained in other treaties contemporaneously signed. This lesser amount, coupled with the augmentation clause, was a strategic choice made by both the Crown and the Anishinaabe to respond to, on the one hand, the limited amount of money that the colonial government had for an annuity payment, and on the other hand, to ensure ongoing relationships with the promises of the treaty and the land.

The court held that the correct interpretation of the augmentation clause is that it states that where it was possible based on resource extraction there is a collective promise to share the revenues from the treaty territory with treaty beneficiaries, and in addition there is an individual annuity promise capped at $4 per person.[13]

B. ONTARIO COURT OF APPEAL: *RESTOULE V CANADA (ATTORNEY GENERAL)*, 2021 ONCA 779

The Ontario government appealed the Superior Court trial decision on treaty interpretation. The federal government did not appeal. On appeal it was unanimously held that the Treaty promise contained in the Robinson Treaties had been neglected for far too long. The majority agreed with Justice Hennessy's interpretation that the annuity payment had both a collective amount that was to be increased when revenue allowed it and, furthermore, this interpretation was based on the principle of the honour of the Crown, which requires there be an increase in the annuity payment.[14]

The minority judgment of the court of appeal is important as well. The minority judgment was written by Chief Justice Strathy, with Justice Brown writing in support. The minority disagreed with the trial court's interpretation of the augmentation clause. They offered an alternative interpretation, which would find that the annuity payment was interpreted correctly to be a $4 soft cap on the per capita annuity amount. Any increase in the annuity payment is at the Crown's discretion.[15] The minority grounded their analysis in the plain reading of the

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8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic . . .
9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core treaty right in its modern context." See *Marshall, ibid* at para 78 per McLachlin J.

12. *Marshall, ibid* at para 78; *Restoule* ONSC, *supra* note 2 at para 397.

13. *Restoule* ONSC, *supra* note 2 at para 459.

14. *Ibid* at para 411.

15. *Ibid* at paras 455–456; *Restoule* ONCA, *supra* note 8 at paras 451–458.

text, and in particular, the language included in the augmentation clause, which states that the augmentation clause is at "her majesty's graciousness."[16]

In [the opinion of Professor Brown], what is important to examine in the Court of Appeal decision is the standard of review for Treaty interpretation. On the standard of review, between correctness on the one hand and palpable and overriding error on the other hand, the minority judgment was joined by a third judge, Justice Lauwers, to form a majority. The majority on this point found that the standard of review is correctness. This distinction is important, because "correctness" is a lower standard of review. If the majority had found the standard of review was a "palpable and overriding error," there would be greater deference to the trial judge's findings in interpreting the Treaty. In [the opinion of Professor Brown], regardless of the outcome of the *Restoule* matter, the majority's holding that the standard of review is one of correctness is a concern for treaty interpretation because the trial record shows that a lengthy, careful, and responsive approach was taken when the trial court was taking evidence. At trial Justice Hennessy sat in community in different locations, heard evidence from many Elders and experts, and the case report shows there was a deep consideration of the handling of the historical record, which we'll hear more about today.

III QUESTIONS AND ANSWERS

TB: *Can you tell me about your experiences working as a judge that led you to presiding over the Restoule matter? Was Aboriginal law part of your judge training? How did you prepare for hearing the Restoule matter?*

Justice Hennessy: First, let me say, *miigwech*, to Tenille and Dean Jula Hughes,[17] and to the law school, it is a great pleasure to be here. I was born and raised in Northern Ontario and I'm thrilled to be at this law school and I think all of you who are students here are very, very lucky. It's great that you can learn about *Restoule*, a trial that began with ceremony on the Fort William First Nation.

From the beginning of my judicial career, I was very interested in working with students. I did a lot of work with high school students, including helping to establish mock trials for high school students in the Greater Sudbury Area to participate in. I noticed that schools on Manitoulin Island did not participate in the Sudbury district competition. So I reached out to one of the high schools, and there was this fantastic teacher who brought his students into the mock trial competition. I later learned that there was another high school on Manitoulin called Wasse-Abin in Wiikwemkoong, and I reached out to them and asked what they might want in terms of experiential learning. We worked together for a number of years on a variety of projects including career events and symposiums on sentencing.

I started to find that I wanted to put more time into these projects. But I have a trial schedule that takes precedence so I didn't actually have that much time to work with students. I also found that I was learning quite a bit from the students about their views of and their experience with the justice system. Ultimately, I wanted to spend more time with these students.

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16. *Restoule* ONSC, *supra* note 2 at para 460 [emphasis in original].

17. Dr. Jula Hughes, dean, Bora Laskin Faculty of Law, Lakehead University.

So, I applied for a study leave. During a judicial study leave, a judge works with a law school. What I wanted to do and what I believed was valuable work was to work with students from Wiikemkoong and M'Chigeeng.

I became a judge in residence at Osgoode Hall Law School. The Dean had one request for me. He wanted me to involve Osgoode students in my work on Manitoulin Island. So I did, and during one of the coldest Januarys in the history of the world, I brought the six law students to Manitoulin Island. It was an extraordinary experience from them. Neil Debassige and Alan Corbiere[18] were among the many who hosted us. We listened to stories at the Ojibwe Cultural Centre and at the school in M'Chigeeng. Neil suggested that we bring the Toronto law students ice fishing. We went in the dark before he went to work. We crossed Lake Mindemoya on four-by-fours. The wind was ripping our faces off. It was the beginning of a series of excellent cross-cultural experiences over three days. We visited the Art Gallery where acclaimed artist Leland Bell spoke about his work. The high school students from Wiikemkoong and M'Chigeeng [both on Manitoulin Island] were fantastic.

I also had a very formative experience at Osgoode itself during the leave. The school offered a three day Anishinaabe Law Camp.[19] Professor John Borrows and a number of his colleagues ran this land-based learning camp. Approximately forty Osgoode students and about five faculty members participated. The students slept on the floor of that community centre. I was billeted by a member of the community. It was three days of land-based teaching. It really was experiential learning on so many different levels. I continue to learn from my reflections on those experiences. I must admit that I did not succeed at most of what I thought I could accomplish in my study leave. But I learned more than I could ever imagine learning.

When I came back to work in 2015 from the study leave the Regional Senior Judge said, "Oh, we just received a letter from a lawyer, who wants a judge to case manage what he says is a Treaty case—do you want to take this file?" It was the *Restoule* case. So that's how it all began.

TB: *May I ask a follow-up question? When you're experiencing land-based teachings, what is the learning experience like?*

Justice Hennessy: Well, I start from the life of spending most of my leisure time in "the bush." I have spent my summers paddling, hiking, and kayaking around Northern Ontario. I have been in more lakes and rivers and hills than you can count. I have paddled on both Lake Huron and Lake Superior. So for me being outside is a place that makes me enormously comfortable and being in community with people who could also consider the water and the bush as sacred spaces, creating, teaching, and learning experiences was a very rich experience.

TB: *Thank you for taking that question. Land-based learning activities are a core aspect of the Bora Laskin Law School and I think it's a really enriching and important part of our work in this law school.*

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18. Dr. Alan Corbiere, assistant professor, Canada Research Chair in Indigenous History of North America, York University. Dr. Corbiere acted as an expert witness for the *Restoule* plaintiffs.

19. Anishinaabe Law Camp, online: *Osgoode Hall Law School* <https://www.osgoode.yorku.ca/programs/juris-doctor/experiential-education/anishinaabe-law-camp/>. On land-based learning generally, see John Borrows, "Outsider Education: Indigenous Law and Land-Based Learning" (2017) 15 YB of NZ Jur 15.

The second question brings us to the Restoule matter. You heard the matter as a trifurcated proceeding; where the issues were split up in three separate stages. The trial decision, stage one, dealt with treaty interpretation. Stage two dealt with issues of limitations and Crown liability. Both stages one and two have been appealed and are ongoing. Could you tell us about the current status of legal proceedings in the Restoule matter?

Justice Hennessy: As has been said, I'm currently sitting on stage three of this trial and therefore, I cannot speak about matters that are currently before me. So stage one was the interpretation stage. There was a long trial and it was appealed. Stage two was very technical. It was the defences', and it was also appealed. Stage three deals with the claim for compensation and Crown allocation. The compensation claim is very complex. It involves, first, competing economic theories and will likely require determinations of which revenues and which expenses are relevant to any calculation. It also includes the issue of what interest rate to apply to unpaid annuities. This third stage has been delayed for many different reasons, most significantly because of the pandemic lockdowns, which stopped it in its tracks. A lot of research was necessary, and the research is painstakingly done at the Canada and Ontario archives. Archive research was shut down during COVID lockdowns. Finally, we were to start two weeks ago and there was a request by the parties that we adjourn for a couple of weeks, while they attempted to reach a mediated resolution.[20]

TB: *There were occasions when Anishinaabe ceremony came into the courtroom and the court process through witness*

es, counsel, and members of the host First Nation. This could not have happened without cooperation from all persons involved in the case. In the decision you write about the Firekeepers, who tended sacred fires throughout the hearings, the importance of centrality of Elders, and the protocols and ceremonies that they brought to the courtroom. At conclusion in the decision you give special thanks to these contributions to the Restoule trial:

> To the many firekeepers who tended sacred fires throughout the hearing process from September to June in the full range of Northern Ontario weather, and to Elder Leroy Bennett of Sagamok Anishnawbek First Nation who conducted Smudge, Eagle Staff, and Pipe ceremonies and offered teachings to those who asked.[21]
>
> . . .
>
> The First Nations were warm and generous hosts when the court convened in their communities. As a court party, we participated in Sweat Lodge ceremonies, Pipe ceremonies, Sacred Fire teachings, Smudge ceremonies, Eagle Staff and Eagle Feather presentations, and Feasts. During the ceremonies, there were often teachings, sometimes centered on *bimaadiziwin*—how to lead a good life. Often teachings were more specific (e.g. on the role of the sacred fire, the role of sacred medicines, or the meaning and significance of the ceremonies). The entire court party expressed their gratitude for the generosity of the many knowledge keepers who provided the teachings. I believe I speak

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20. *Restoule* ONCA, *supra* note 8.

21. *Restoule* ONSC, *supra* note 2 at para 608.

> for the counsel teams when I say that the teachings and the hospitality gave us an appreciation of the modern exercise of ancient practices.[22]

So, my question is, how did Indigenous traditions get incorporated into and guide the court in hearing Restoule?

Justice Hennessy: This question raises huge issues for judges and for lawyers. What we did was pretty new and responsive to the situation which presented itself. As we prepared for the stage one hearing to start in Thunder Bay, the plaintiffs' counsel invited us to participate with them in ceremonies on the Fort William First Nation. We discussed this invitation in a case conference. All of the lawyers agreed to accept the invitation. Once it was known that both Crown and plaintiff lawyers would attend, I also accepted the invitation. It was the beginning of a practice that continued from time to time throughout the trial. The First Nation also made an arrangement to host a fire at all times. All trial participants were welcome at the fire at any time. What happened to make this trial experience so rich could not have happened without the full cooperation of the Crown and First Nation counsel teams, the communities, and the leadership of those communities. As the judge, we never knows what goes on behind the scenes in a legal hearing. But these things could not have happened without real intentional decision making that Anishinaabe protocol, Anishinaabe ways of interacting, and Anishinaabe hospitality were going to be offered throughout the *Restoule* trial.

We heard evidence at the trial that the Treaty negotiations were a cross-cultural event which took place around a Treaty fire. The Anishinaabe plaintiffs created an opportunity for trial participants, witnesses, lawyers, court staff, and the judge to also appreciate a cross-cultural experience during this proceeding that focused on Treaty making. The Anishinaabe plaintiffs had been in contact with European settlers and colonial officials for some time. They were dealing with encroachments on their territory and were demanding that the colonial government respond to their complaints. From the colonial governments side, the officials brought their understanding of the common law and their understanding of the Royal Proclamation to a meeting with Chiefs and principal men. There was evidence that the two groups met around a Treaty fire or council fire.[23] The main colonial official, Mr. Robinson,[24] was well regarded by the Anishinaabe. He had been involved in the fur trade, he had learned some of the languages, and he was comfortable with the protocols. He was comfortable with ceremony and Anishinaabe protocol. He had travelled in the territory as a highly respected member of the colonial government. He was on the Executive Council, which was like the cabinet. He was a decorated military man, and his brother, became the first Chief Justice of Ontario, Beverly Robinson. He was known amongst the Anishinaabe leaders in the territory.

The evidence before me at trial was that the Treaty negotiations were a cross-cultural process. Some people could speak both English and Anishinaabemowin, plus there were respected interpreters. The colonial officials understood that the Chiefs met in lodges, and they also understood that the fire was important. They understood that Chiefs speak with their councils before they could make decisions. The colonial officials respected Anishinaabe protocols and ceremonies. At the same time as this historical evidence was bring heard, the

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22. *Restoule* ONSC, *supra* note 2 at para 610 [emphasis in original].

23. For more information about the importance of treaty fire as a governance tool see Heidi Bohaker, *Doodem and Council Fire: Anishinaabe Governance Through Alliance* (Toronto: University of Toronto Press, 2020).

24. This is a reference to William Benjamin Robinson, the treaty commissioner tasked with signing the treaties now bearing his name.

plaintiffs' lawyers and their clients intentionally brought Anishinaabe protocol and ceremony. I understood that they were recreating council fire from the time of the Treaty signing. They were saying, if that's how the Treaty was made in the first place, and this court is where we come to figure out what that Treaty said today, then we can provide some of the same culturally significant protocols to the participants.

There is another way to interpret the incorporation of Anishinaabe traditions into the trial. And the other way to interpret it through the lens of hospitality. The first four weeks of the trial were scheduled to be heard in Thunder Bay. We had many, many, many case conferences to prepare for the enormity of the trial. There were tens of thousands of pages of historical documents. There were huge teams of lawyers, and there were all kinds of logistical and technical things that we had to figure out. As we were working out those details we received the invitation that I referred to earlier to attend ceremony at Fort William First Nation. I don't know about the lawyers involved in the trial, but I had never been invited to any full day of ceremony before this. When I got there with my colleagues, there were about thirty Chiefs and representatives from First Nations from both the Lake Huron territory and the Lake Superior territory. The lawyers and I all went into a sweat lodge, then we went to a spectacular feast, which was, to me, unbelievably generous. As guests we had brought no gifts, but we all went home with a gift and with teachings. There was drumming and singing and displays of regalia and sacred bundles. At the time, it was the beginning of the trial. Along with the legal teams, I just accepted all of this as a magnificent show of hospitality. I had no other way to interpret what this could be.

As the trial went on, the Huron plaintiffs had assigned a Knowledge Keeper and firekeepers to be at the trial all the time. There was always a teepee, and there was always a fire. That fire was there every day that the trial went on, and there were medicines at the fire, which was not unusual. If I went to the fire at lunch, there would be a Crown lawyer, defence lawyers, court reporter, witnesses, and members of the public. Anyone could go in the mornings and during court breaks. Through this we developed comfort with the Knowledge Keeper. One day, counsel asked if the Knowledge Keeper could bring his drum into the courtroom to sing a travelling song when we took a break in the proceedings. Then on our return he sang a welcome song. Another time counsel asked if a new pipe that had been made for the trial could be passed around the fire and we were all invited to the pipe ceremony. As the months went by, the Knowledge Keeper arrived with an Eagle Staff, and he said, this Eagle Staff has been made for this trial, and is it possible to put it behind the dais. At each stage and at each request counsel were asked their views. Every new step along the way only happened with the consent of all counsel.

All of the lawyers and witness' came from out of town, many from long distances. This was a nine month trial, we were all in this together. The counsel teams, from my perspective, developed a very healthy respect for one another. There was a sense of collegiality. So when we were invited in the middle of the winter to attend a Sweatlodge we all went. And there was a feast afterward. When we got invited to a pipe ceremony, we all went, and the witnesses who were around that day were also invited. From my perch as a Judge, it seemed like it was happening organically, but I now, of course, know that it was unfolding with intention and respect for the proper roles and boundaries. Maybe one day after I am retired, I will learn more about the perspectives of the different counsel to all these experiences.

TB: *That's wonderful. How long were you sitting for? How long was the trial?*

Justice Hennessy: The stage one trial phase started in September in Thunder Bay, where we spent the first month. Then we moved to two communities, first to Garden River, then Little Current. We spent the final months in Sudbury. When we were on Manitoulin, in Little Current and Garden River, the Elders from the near-by First Nations gave their testimony. Many other Elders and community members were able to attend the proceedings. In Garden River, we had the spectacular opportunity of listening to a 95-year-old woman, Elder Irene Stevens, who sadly has passed into the spirit world only this year. She struggled to understand the questions. Occasionally, her answers were responsive to the questions, but sometimes she recounted stories of her life in the community. She was absolutely charming. Elder Stevens told her beautiful stories and the most significant thing she said was, whenever someone said the treaty was signed in Sault Ste. Marie, she would remind us that in fact the Treaty had been signed in "*Bawaating*," which was the name that she had been taught. In the days that followed, when if someone said Sault Ste. Marie, she would remind us forcefully, "*Bawaating.*"

TB: *I just wanted to say that the Elder testimonies were recorded and they are archived online. All open access.*[25] *It's a really important collection of Anishinaabe law. The importance of protocols, ceremony and the records that have been created around Anishnaabe law are not directly captured in a typical case report. I think those pieces are really important parts of the Restoule decision.*

Justice Hennessy: Well, I might just comment on one thing, because, of course, you're all going to be lawyers soon enough and I want to tell you about how one lawyer approached his job. His job was to cross-examine the Elders on behalf of Canada. This lawyer was a very experienced Crown lawyer. He had been engaged in Aboriginal and Indigenous law cases since he was called to the bar. He had very deep experience in First Nation communities, and he held enormous respect for Elders. He was one of the lawyers who told the court that when we were about to have the Elders start as witnesses that he would like to follow the Federal Court protocol[26] and have the opportunity to meet with the Elders before they gave evidence. We made arrangements for this to happen. Therefore, the lawyer met most of the Elders for coffee and biscuits beforehand. On one particular day, an Elder from Manitoba was going to be speaking and giving evidence, and the night before the Garden River community held a feast for us. In the morning, we were back in our court in the community hall, and the Elder took the stand and started out by thanking the Crown lawyer for giving him tobacco. The Elder then asked the Crown lawyer to explain why he had done that. So here's the lawyer for Canada, being asked to explain himself before the evidence proceeds. So, the lawyer for the Minister of Justice explained,

> I offered tobacco to Elder Kelly. I live in southwestern Ontario. I went to Six Nations First Nations and I spoke to the Chief, and I explained to the Chief what I would be doing in the coming weeks. I asked him if I could bring some tobacco from his reserve community and bring it up to the Elder. Last night,

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25. The testimonies given at trial are all archived online: *Livestream* <https://livestream.com/firsttel/events/7857882>.

26. "Practice Guidelines for Aboriginal Law Proceedings," September 2021 (4th ed), online: *Federal Court* <https://www.fct-cf.gc.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20Sept-2021%20(ENG)%20FINAL.pdf>.

> during the feast, I quietly offered him this gift of tobacco from Six Nations and asked him if he would take questions from me today.[27]

I found this anecdote extraordinary, absolutely extraordinary. It was nothing the court did and it was nothing that the plaintiff's lawyers had planned. What we watched was a lawyer with certain experiences and teachings who decided how he would and should show respect to an Elder. He had done it quietly; no one had seen him, and no one else had known about it. That would have been exactly how he wished it to happen, but the Elder realized the significance of the offer of tobacco and wanted to bring teaching into court and into the record. And now this is part of the archival record.

TB: *That anecdote shows the importance of acting personally in how we practise law, which I don't think we speak enough about in law school; personal action and personal relations are a part of the practice of law.*

On a similar personal note, I wonder about what you see as the significance of this case for you, for your work, and for the legal community broadly. What would you like the conference participants here with us, the legal community, the teachers, and the students, to take away from the case?

Justice Hennessy: What's the importance of it? There are so many things. As I said at the outset, I have deep roots in Northern Ontario. I was born in Sudbury and grew up in Northern Ontario. I've lived and loved it here for a long time. We have what we call a family camp, a log cabin, built by my ancestors, in a Treaty territory that is so sacred to us as a family. This is where our extended family planted its roots, nourished three generations and where we continue to gather. I always knew that there was a reserve on the other side of the lake but we were not connected to anyone there. I didn't know anything about the community. Now I realize that I am connected to a history that is so much bigger, deeper, richer and more complicated than I ever knew. I thought my history was my French and the Irish ancestors travelling up the St. Lawrence—poor, desperately looking for jobs and ending up in Northern Ontario in the late 1800s, and that's as much as I knew. It's shocking to imagine that I had no conception of the European–Anishinaabe experience and how the territory developed and evolved during that time. I remember once asking about Crown land, asking "well, how did the Crown get Crown land? Who named it Crown land?" So this trial was a full graduate program in Northern Ontario history. I was humbled to have learned a history during the trial that was largely unknown to me beforehand, even though it was a history very closely connected in time and place to my own ancestors.

One of the things I appreciated was that this trial created an opportunity to put together the most comprehensive historical record of the Anishinaabe–settler meeting for Northern Ontario.[28] My understanding is that the documentary record collected for this trial had never before been all in one place. There were handwritten notes that were found for the first time, and there were discoveries of some documents that had been lost. For instance, the Chief's speeches at the Treaty council. There were many, many things found that are now collected and put together in one place. There will be no excuse for someone like me to say, "I don't know anything about how this came to be." That cannot happen anymore. No educational institution, no government, no professional association, no bar, no one can ever say, "Well, how

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27. This recollection is a paraphrase and not a direct quote.

28. *Supra* note 25.

would we know this?" This story is documented in all its complexity and richness. It is there to be heard through the witness testimony, through the documentary record that was found, and through the anthropological and historical witnesses who brought the record into one place. So that's one small thing out of this trial.

Another aspect of the trial was the openness to conduct the trial in a more open and inclusive manner, creating the full historical record. We cannot conduct every trial like this because it would cost a fortune in time and money. As a system, as a profession, we learned a lot. Our experience will give, not just judges, but give lawyers who are acting for communities, possibly some courage to be open to a way of interacting with the common law system.

I just want to be clear that the lawyers acting for the plaintiffs did not ever ask the court to apply Indigenous law or Anishinaabe law. I put that question to them in their submissions. Instead, they were asking for Aboriginal law of Canada to be applied to this case. Counsel submitted that that Anishinaabe law would have animated the minds of those people who were entering into a Treaty relationship with the colonial officials who were trained and operating in the common law tradition. This means the court was applying the common law to an interpretation of the Treaty, knowing that there may be a case down the line, and maybe one of you will be arguing it, where a court will be asked to apply not the common law, but Indigenous law for the interpretation of a treaty.

As you students now take Indigenous law courses you will be having interesting discussion with your clients and colleagues on how it will be part of the future legal proceedings. Bi-jural and multi-jural legal orders will likely form part of future considerations for processes inside and outside courtrooms. The profession will have to be ready to operate in multi-jural processes. I think that one could look at our process and say, we can do something that we haven't done before and the sky won't fall.

TB: *Thank you. I do read the case as being a roadmap for a path forward concerning treaty interpretation and working toward a truly plural legal context. Really, thank you so much for coming and for sharing your thoughts with us.*

I understand that you might be prepared to answer a few questions from our attendees.

Student Question 1: *Are you able to speak about your decision to adopt a special procedure for taking Elder evidence in the Restoule case? Why were the procedures adopted?*

Justice Hennessy: Thank you. So yes, yes. We adopted in our trial a procedure for taking Elder evidence. This was done by order of the court.[29] This procedure was based on the "Practice Guidelines for Aboriginal Law Proceedings" developed by the Federal Court.[30] The Federal Court does a lot of work in First Nations communities across the country, and they have developed a protocol for how to receive evidence from Elders. We adopted it, but we modified it for our use, and had we not had access to that protocol, we would have spent a huge amount of time inventing it. The protocol, as I understand it, was developed by a user committee at the Federal Court, which included Elders and community leaders. The Federal Court is a Superior Court constitutionally and it makes a huge amount of sense for other Superior Courts to adopt it. It means that when Courts receive Elder testimony, they have something that they can refer to and rely on.

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29. *Restoule v Canada (AG)*, ORDER (Procedure for Taking Elder Evidence), No. 2001–0673.

30. *Supra* note 26.

Student Question 2: *With the passage of so much time since Treaties were made, coupled with pressure on Indigenous communities to abandon their traditional practices, there's an enormous reliance on Elders to fill gaps in knowledge. As time passes, what can we do to continue to address gaps in knowledge?*

Justice Hennessy: Well, I'm not an expert in that, but I can tell you what I have observed, and what I have observed is so inspiring. Your generation is expressing a great deal of interest in Elders and Knowledge Keepers, and spending time learning and trying to be apprentices. I have encountered very, very generous Knowledge Keepers. As I said, we had a Knowledge Keeper with us throughout the entire *Restoule* trial. This was Leroy Bennett from Sagamok First Nation. He was with us the whole time, and he gave us important teachings within the various ceremonies. Sometimes he would just be at the fire, and there would be a teaching or an explanation. Recently we had a sweat and then a sunrise ceremony for the opening of stage three. We were introduced to another Elder, Elder Martina Osawamick. Knowledge keeper Leroy Bennett thought it important we include a woman amongst the Elders. Somehow, those two have connected, an older woman and a younger woman, and the younger woman is learning from an Elder. At that sunrise ceremony, there was a teaching on water and a teaching on strawberries and those were both performed by the women.

What I see is very encouraging—that there is a generation coming up who wants to learn, and they are doing their best to put themselves in a position with Elders and Knowledge Keepers to try and learn as much as they can. I see this also in efforts to learn the language, and language is the vehicle for learning meaning and culture.

Student Question 3: *Thank you for being with us. I think it's really cool that in the midst of a case that has so much application, you still have the time to speak to us.*

There's been a lot of discussion about developing better cultural competencies in the bar and judiciary. Could you give us a sense of whether and how that seems important to you, given your experience in Restoule, and where do you think we need to go next as a profession?

Justice Hennessy: That is such a good question. First of all, I want to say that I am very influenced, and have been for a long time, by a paper written by former Chief Justice of British Columbia, Justice Lance Finch. He wrote a paper addressed to judges called, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice."[31] In this paper Justice Finch talks about the duty to learn about our Indigenous neighbours. I have really taken that seriously. We cannot go around saying, "Well, I don't know anything about the Anishinaabe. I don't know anything about settler–Indigenous contact, or about the *Indian Act*." We have a duty to learn, and that duty never ends. It does not end when you leave law school. If you are a member of this profession, it does not end when you have already decided that you are going to specialize in a specific area of law. And it certainly does not end when you get appointed as a judge.

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31. Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice," delivered at the "Indigenous Legal Orders and the Common Law" (British Columbia Continuing Legal Education Conference in Vancouver, November 2012) at 7, online: *British Columbia Continuing Legal Education* <http://www.cle.bc.ca/onlinestore/productdetails.aspx?cid=648>.

What I also have in my hand is a copy of a speech given by the Chief Justice of Canada, Chief Justice Wagner, and he was speaking on the cultural competence of judges.[32] Chief Justice Wagner framed the requirement of cultural competence as an ethical principle. He said,

> Judges have a duty to continue their professional development. And this includes expanding our knowledge and understanding of social context issues that affect the administration of justice. Cultural competence is critical to access to justice and the rule of law; judges are encouraged to take advantage of opportunities to engage with and learn from the wider public, including communities with which they have little or no life experience.[33]

Chief Justice Wagner is saying that those communities or people with whom one has no experience are the communities one must engage with and learn from. To be a judge of this great country we call Canada—you cannot have it any other way. You cannot take—and I believe this—I cannot take that spectacularly beautiful, wonderful culture that I was brought up in, where my mother and father taught me French, Canadian and Irish tradition, history and culture and live with only that as my knowledge base as a judge. A judge needs to know from and about the communities that we serve, and I would say that there is the same duty on members of the bar. If there is going to be access to justice, every person should be able to walk into your office and seek advice. You might not be a specialist in any particular area or culture, but you understand something about their way of being in the world, their culture, where they come from. Now in Northern Ontario, that involves a lot of meeting and learning from our Indigenous neighbours. But it also means, as you well know, if you live in Thunder Bay, the newcomers to Canada, from Ukraine, Syria and Pakistan. If you live in Brampton, your neighbours are a whole different set of new Canadians. But that duty is seriously imposed on the profession at large by our ethical principles that we must go out of our way to take advantage of opportunities to engage with and learn from communities with which we have little or no life experience. In the case of our First Nations neighbours, that is an extra and added extraordinary duty.

Student Question 4: *Thank you so much. I'm wondering, how does it feel to be working through such a big decision? And what are you thinking as you're working through it?*

Justice Hennessy: Well, I had to write at the end of stage one. That stage of the trial was long, it ran from September until June. So, I will approach this stage similarly. I will focus on the questions as defined by the lawyers as they arise from the evidence, the submissions and the directions of the Court of Appeal.

What you are learning in law school is a set of skills that will take you through to do the biggest, most complex things in your legal career. You just keep working on the same skills. It is the discipline of law. It is the discipline of staying on top of things, organizing your materials, listening, of being humble enough to review, review, and review the evidence and the law. Usually, the case law will give you some directions on how to proceed. I am not saying it is easy, but it is not much more complicated as a system than doing the work you do. Now, it's bigger, but it's the same discipline.

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32. Remarks by the Right Honourable Richard Wagner, PC Chief Justice of Canada, "Ethical Principles and Cultural Competence: A Duty to Learn" (May 6, 2021), online: *Supreme Court of Canada* <https://www.scc-csc.ca/judges-juges/spe-dis/rw-2021-05-06-eng.aspx?pedisable=true>.

33. *Ibid.*

As in every case, the judge's work is to apply the law to the facts. So, first I must make findings of fact, and then following the submissions, figure out how to apply the facts to the law. Stage one of *Restoule* was a very big project for me. In many ways it demanded what every big work assignment demands, put one foot in front of the other and keep going until you get it done.

THE CONTINUING APPLICATION OF *GLADUE* PRINCIPLES IN THE PROFESSIONAL DISCIPLINE OF INDIGENOUS LAWYERS: A COMMENT ON *LAW SOCIETY OF ONTARIO V McCULLOUGH*

*Andrew Flavelle Martin**

CONTENTS

Abstract

While *Gladue* principles have previously been applied in the professional discipline of Indigenous lawyers, the recent decision by the Law Society Tribunal in *Law Society of Ontario v McCullough* affirms and applies those precedents in new and powerful ways. In this case comment, I explain the ways in which *McCullough* is important in its application of *Gladue* principles and consider what questions remain to be settled in future decisions. In particular, *McCullough* affirms the limited case law holding that *Gladue* principles are applicable to the professional discipline of Indigenous lawyers; demonstrates the potential power of *Gladue* principles in affecting penalty determination, and more specifically displacing powerful presumptions as to penalty; includes in the penalty order an unprecedented condition intended to assist the lawyer; relies on a *Gladue* report commissioned specifically for the disciplinary proceedings; and softens the application of the presumption of revocation for misconduct involving dishonesty.

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I INTRODUCTION

It has been almost a decade since *Gladue* principles were first applied to the professional discipline of Indigenous lawyers in *Law Society of Upper Canada v Terence John Robinson*.[1] The recent matter of *Law Society of Ontario v McCullough* demonstrates the development and maturation of *Gladue* principles, in both power and nuance, in that context.[2] While *Gladue* principles have been applied by both legislatures and judges to many different areas of law beyond their statutory basis in criminal law sentencing,[3] professional discipline of Indigenous lawyers is one of the contexts in which they have been most commonly applied by administrative decision makers.[4] *McCullough* constitutes a milestone in, and potentially even the culmination of, *Gladue* principles in this context. In this case comment I revisit my analysis of the application of *Gladue* principles to the professional discipline of Indigenous lawyers.[5]

While there is no widely adopted definition of *Gladue* principles, I have previously defined them as "a recognition of the legal implications of the unique circumstances of Indigenous persons, past and present, particularly their alienation from the criminal justice system, and the impact of discrimination, cultural genocide, dislocation, and poor social and economic conditions."[6] In the absence of competing definitions, I use that same definition here.

In this case comment, I identify and discuss the facts and reasoning in *McCullough* and consider their potential impact on the application of *Gladue* principles moving forward. I emphasize that *McCullough* comprises the most powerful reported application of *Gladue* principles in lawyer discipline to date: displacing the presumptive penalty of revocation for misappropriation in favour of a mere suspension. I further argue that the reasons in *McCullough* indicate that both the Law Society Tribunal and the Law Society of Ontario disciplinary counsel recognize an acceptance of *Gladue* principles—and indeed

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1. *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*]; *Law Society of Upper Canada v Terence John Robinson*, 2013 ONLSAP 18, [2013] 4 CNLR 129 [*Robinson*], var'g 2012 ONLSHP 115, [2012] LSDD No 130.

2. *Law Society of Ontario v McCullough*, 2022 ONLSTH 63 [*McCullough*].

3. See e.g. Andrew Flavelle Martin, "Creative and Responsive Advocacy for Reconciliation: The Application of *Gladue* Principles in Administrative Law" (2020) 66:2 McGill LJ 337 at 342 (citations omitted) [Martin, "Creative"]: "decisions of courts in contexts ranging from extradition to civil contempt, the exclusion of evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms* . . . the stay of charges under section 24(1) of the *Charter*, the voluntariness of admissions to police, the withdrawal of a guilty plea, and relief from notice periods in tort claims." See also *ibid* at 341 footnotes 13 (sentencing under the *Code of Service Discipline*, being Part III of the *National Defence Act*, RSC 1985, c N-5), 14 (bail), and 15–16 (parole).

4. See generally Martin, "Creative," *ibid,* especially at 360. As to the more recent application of *Gladue* principles in administrative law, contrast *Decision No: 2022-0556*, 2023 CanLII 2952 (AB WCAC) at paras 92–93, where the Appeals Commission for the Workers Compensation Board of Alberta declined to apply *Gladue* principles both because of their origin in criminal law and because they are absent from the relevant statute that sets out the jurisdiction of the commission—despite recognizing that *Gladue* principles are part of the common law. See also, on the application of *Gladue* principles by provincial review boards under Part XX.I of the *Criminal Code*, RSC 1985, c C-46, Michael Michel, "The Application of *Gladue* Principles During NCRMD and Fitness Disposition Hearings" (2022) 45:5 Manitoba LJ 138.

5. Andrew Flavelle Martin, "*Gladue* at Twenty: *Gladue* Principles in the Professional Discipline of Indigenous Lawyers" (2020) 4:1 Lakehead LJ 20 [Martin, "*Gladue*"]. For further background on *Gladue* principles and professional discipline, see *ibid* at 24–33.

6. Martin, "Creative," *supra* note 3 at 346.

of reconciliation itself—by the general public. While I focus on professional discipline of Indigenous lawyers, these developments may also be applied to the discipline of Indigenous members of other professions.

Before proceeding, however, I emphasize that the panel reached the result in *McCullough* by applying both *Gladue* principles and the expressed commitment to reconciliation by the Law Society of Ontario.[7] It is unclear from the reasons of the panel in *McCullough* whether *Gladue* principles would have had the same impact on penalty in the absence of such an explicit commitment.

II *LAW SOCIETY OF ONTARIO V McCULLOUGH*

In this part, I canvass the facts and reasoning in *McCullough*.

The misconduct at issue in *McCullough* was quite serious but by no means unique in the sense of being unprecedented. The lawyer in *McCullough* cumulatively misappropriated $116,902, across 99 separate withdrawals, from her firm's trust account to meet the firm's financial obligations.[8] She returned the money to the trust account in each instance, "typically within days or weeks of the withdrawal."[9] The firm's records, including trust reconciliations as well as client identification, billing, fees, and disbursements records, were not properly kept and updated.[10] Moreover, bank fees were paid out of the trust account.[11] The lawyer was honest throughout the initial spot audit and, by the time of the hearing, had remedied the records issues.[12]

What was "unique"—indeed, "truly extraordinary and compelling," in the view of the panel—in *McCullough* were the circumstances and background of the lawyer, leading to the unusual penalty of a suspension instead of the presumptive penalty of revocation for misappropriation.[13] These circumstances included "cultural displacement,"[14] "experiences of hardship, disadvantage, and violence,"[15] her adoption of four nieces and nephews (who would otherwise have went into child protection),[16] the "significant stress"—financial and otherwise—of supporting family members,[17] and her largely Indigenous clientele.[18] Indeed, the

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7. *McCullough*, *supra* note 2 at paras 29-31.

8. *Ibid* at para 12.

9. *Ibid*.

10. *Ibid* at para 13.

11. *Ibid*.

12. *Ibid* at para 14.

13. *Ibid* at para 75. On the presumption, see e.g. *Law Society of Upper Canada v Mucha*, 2008 ONLSAP 5 at para 23, as discussed in *McCullough*, especially at paras 19–20.

14. *Ibid* at para 74. See also paras 40, 42 (born and initially raised in Australia with little connection to Indigenous heritage; loss of status due to marriage).

15. *Ibid*. See also paras 44, 52, 56 (drug history, violence; murder of the lawyers' daughter and subsequent trial; depression).

16. *Ibid*. See also para 54 (raising her infant grandchild because of her daughter's addiction).

17. *Ibid*.

18. *Ibid*. See also Martin, "*Gladue*," *supra* note 5 at 30–32.

panel held that "supporting Indigenous licensees is an important aspect of reconciliation" and that "the Lawyer's ongoing role serving a client base made up in part of Indigenous persons, with a documented history of being ignored and belittled by the justice system, is relevant to our determination of the appropriate penalty."[19] Importantly, both parties recognized that a suspension was appropriate, although they disagreed on the duration of that suspension.[20]

The panel emphasized that *Gladue* principles alone will not displace the presumption of revocation where there has been misappropriation or other dishonesty by an Indigenous lawyer. In other words, while *Gladue* principles may make it possible to rebut the presumption of revocation, specific evidence ("remarkable, extraordinary personal circumstances of the wrongdoer") will be required for that possibility to be engaged.[21] More specifically, those circumstances must "rise to the level where it would be obvious to other members of the profession, and to the public, that the underlying circumstances of this individual clearly obviate the need to provide reassurance to them of the integrity of the profession."[22] The panel characterized the displacement of the presumptive penalty of revocation as an exercise of "compassion and mercy."[23] The panel also emphasized the importance of the lawyer's remorse and restitution. Restitution was considered in that all the funds were returned, often soon after they were misappropriated. The panel noted that "no client actually lost money and nor was tangibly deprived of any money."[24] Concerning remorse, it is worth repeating the words of the panel: "[s]he is deeply remorseful and admits that after 30 years of "an unblemished practice" she misused her trust account instead of applying for a line of credit. Each day she regrets those actions . . . [T]he Lawyer spoke briefly at the hearing, apologized for her misconduct and expressed remorse."[25] At the same time, the panel noted that those factors of restitution and remorse do not constitute exceptional circumstances in themselves.[26]

While the panel emphasized the role of *Gladue* principles in themselves, it also linked them to "institutional commitments to reconciliation for Indigenous people."[27] With respect, however, the specific nature of that link is unclear from the panel's reasons.[28] In other words, while it seems clear that *Gladue* principles are closely connected to a commitment to reconciliation, it is unclear whether *Gladue* principles would have the same impact in the absence of such institutional commitments to reconciliation.[29] Neither is it obvious from the panel's reasons that *Gladue* principles are required by, or necessarily follow from, such an

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19. *Ibid* at para 36.

20. *Ibid* at paras 7–8 ("we take some comfort from the fact that the regulator accepts that the circumstances of this licensee are so extraordinary as to justify a disposition that is short of termination of licence" at para 8).

21. *Ibid* at para 75.

22. *Ibid*.

23. *Ibid* at para 76.

24. *Ibid*.

25. *Ibid* at paras 70, 72.

26. *Ibid* at para 24. When this paragraph is read in combination with para 76, it would appear that remorse and restitution are necessary but not sufficient to displace the presumption of revocation.

27. *Ibid* at para 1. See also paras 5, 29–37.

28. *Ibid* at paras 29–37.

29. *Ibid* at para 1.

institutional commitment. In contrast, the panel was explicit that service of an Indigenous clientele as a mitigating factor follows directly from a commitment to reconciliation.[30]

III DISCUSSION

Against this backdrop, I now consider the importance and potential impact of *McCullough* in future discipline of Indigenous lawyers. *McCullough* is important in at least five respects: (1) the applicability of *Gladue* principles to lawyer discipline; (2) the potential impact of *Gladue* principles on penalty determination in lawyer discipline; (3) the potential impact of *Gladue* principles in creative orders alongside penalty; (4) the pioneering use of *Gladue* reports in lawyer discipline matters; and (5) a broader potential for mercy and compassion tempering the presumption of revocation in misappropriation in lawyer discipline matters.

First, *McCullough* is important because it reaffirms the limited case law holding that *Gladue* principles are applicable to the professional discipline of Indigenous lawyers. Before *McCullough*, there were only two lawyer disciplinary decisions post-*Robinson* in which *Gladue* principles were applied: *Law Society of Upper Canada v Batstone (No 1)* and *Law Society of Upper Canada v Batstone (No 2)*.[31] While the hearing panel in *McCullough* was bound by the holding of the appeal panel in *Robinson*, what is important is that the hearing panel in *McCullough* did not attempt to distinguish or narrow *Robinson* or even express concerns about *Robinson* so as to suggest that the appeal panel should reconsider it. Nor did disciplinary counsel argue that the panel should do any of these things.

I have argued elsewhere that two post-*Robinson* decisions by the Supreme Court of Canada, *R v Kokopenace* and *R v Anderson*, can potentially be read as implicitly questioning *Gladue* principles as an aspect of Canadian common law—or at least suggesting a reticence to expand *Gladue* principles to aspects of the criminal justice system other than sentencing.[32] These two decisions can also be read narrowly as to the application of *Gladue* principles on the specific reasoning of the individual decisions.[33] In my view, *Kokopenace* and *Anderson* provided a plausible basis for disciplinary counsel to argue that the precedential value of *Robinson* and the *Batstone* cases has been weakened such that *Gladue* principles do not necessarily apply to

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30. *Ibid* at paras 30, 36.

31. *Law Society of Upper Canada v Batstone*, 2015 ONLSTH 214, [2015] LSDD No 263 [*Batstone (No 1)*]; *Law Society of Upper Canada v Batstone*, 2017 ONLSTH 34, [2017] LSDD No 39 [*Batstone (No 2)*]. Note that the panel in *Law Society of Ontario v Loder*, 2021 ONLSTH 66 at para 56, held that while *Gladue* principles could apply, there was insufficient evidence to do so in that case. See similarly *Law Society of Alberta v Willier*, 2018 ABLS 22 at para 35, [2018] LSDD No 244 [*Willier*].

32. *R v Kokopenace*, 2015 SCC 28; *R v Anderson*, 2014 SCC 41; cited in Martin, "*Gladue*," *supra* note 5 at 39–43. See also Alexandra Hebert, "Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice" (2017) 43:1 Queen's LJ 149 at 173 ("the Supreme Court has been reluctant to apply *Gladue* principles beyond the sentencing stage"), cited in Martin, "*Gladue*," *supra* note 5 at 39. On Kokopenace specifically, see more recently Jon Peters, "Beyond *Gladue*: Addressing Indigenous Alienation from the Justice System in Civil Litigation" (2023) 28 Appeal 119 at 141-143.

33. While the decision in *Anderson* can be understood as merely applying the broad protection of prosecutorial discretion—although several commentators have taken issue with that decision (see Martin, "*Gladue*," *supra* note 5 at 42)—the rejection of *Gladue* principles in *Kokopenace* was more conclusory and lacked a similarly identifiable and justifiable basis (see Martin, "*Gladue*," *supra* note 5 at 40–41). See also *Peters*, *ibid* at 142.

the discipline of Indigenous lawyers (or, for that matter, to other administrative law contexts). On this basis, disciplinary counsel could have argued that the panel in *McCullough* should have determined for itself whether *Gladue* principles properly applied or should have expressed unease or doubt as to whether *Robinson* remained good law. It is thus noteworthy that both disciplinary counsel and the panel in *McCullough* did not interpret *Kokopenace* or *Anderson* as weakening the applicability of *Gladue* principles in the context of professional discipline of Indigenous lawyers. Instead, the *McCullough* panel applied *Gladue* principles as they had been applied prior to those cases.

Given that Law Society disciplinary counsel in *McCullough* accepted that *Gladue* principles apply to the discipline of Indigenous lawyers, it seems unlikely that this same question of law will come before an appeal panel of the Law Society Tribunal or before the Divisional Court on judicial review in the future. Indeed, it is comforting and encouraging that my concern about the potential impact of *Anderson* and *Kokopenace* may have been overstated. In fairness, however, it is in jurisdictions where *Robinson* is merely persuasive and not binding that *Anderson* and *Kokopenace* might influence decision makers to question *Robinson* or even reject it outright.

Second, *McCullough* demonstrates the potential power of *Gladue* principles in affecting penalty determination, and more specifically displacing powerful presumptions as to penalty. While the specific impact of *Gladue* principles will depend on the circumstances of the individual matter, the impact of those principles in *McCullough* is greater than in any of the three previous Law Society discipline decisions applying *Gladue* principles. In other words, *McCullough* reveals that *Gladue* principles *can*—though not always *will*—have a larger impact on penalty determination than has previously been demonstrated.[34] In *Robinson*, where the lawyer had asked a client to assist in assaulting a non-client who was harassing the lawyer, the appeal panel halved the suspension imposed by the hearing panel, from two years to one.[35] In the first *Batstone* matter, the panel imposed a reprimand for practising while suspended, although the "typical" penalty for such misconduct is a further suspension.[36] In the second *Batstone* matter, the panel imposed a fine of $3,500 for the serious failure to maintain proper records, but would have instead imposed a suspension in the absence of both *Gladue* principles and information about the lawyer's medical history.[37] *McCullough* demonstrates arguably the most powerful impact yet of *Gladue* principles in displacing the presumption of revocation for misappropriation in favour of a suspension—revocation being the most serious penalty

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34. I note that this greater impact of *Gladue* principles in a misappropriation matter (being one of the most serious kinds of lawyer misconduct) contrasts with the observation in *Gladue*, *supra* note 1 at para 79 that "the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing"—although this observation was de-emphasized and reinterpreted by the Supreme Court of Canada in *R v Ipeelee*, 2012 SCC 13 at paras 84–87, as discussed e.g. in *R v Hansen*, 2019 SKCA 60 at para 13; *R v Moyan*, 2017 BCCA 227 at paras 19–21.

35. *Robinson*, *supra* note 1 at paras 1, 80. See also paras 50–51 on the seriousness of the misconduct: "The conduct here was very serious . . . To state the obvious, the act of enlisting a client to break the law, and to do so violently, is contrary to everything that our profession stands for . . . In some circumstances, this kind of conduct might well compel the revocation of a lawyer's licence. However, there is much to be said in mitigation."

36. *Batstone (No 1)*, *supra* note 31 at paras 10–14.

37. *Batstone (No 2)*, *supra* note 31 at paras 23–24, 26. The panel does not elaborate on this medical history. The panel in *Batstone (No 1)* referred vaguely to "disabilities": *Batstone (No 1)*, *supra* note 31 at para 2.

that can be imposed, and misappropriation being one of the most serious kinds of misconduct, hence the presumption.[38] As the panel emphasized, while the presumption of revocation has sometimes been displaced in favour of permission to surrender, *McCullough* is the only reported decision in which the presumption of revocation has been displaced—in the words of the panel, "dislodged"[39]—in favour of a suspension.[40]

Third, the panel in *McCullough* invoked *Gladue* principles not only to reduce the penalty, but also to impose a condition that, to my knowledge, has never before been imposed in a reported lawyer discipline decision: that the lawyer meet with "an Elder or Traditional Knowledge Holder."[41] The Law Society would have limited involvement in how this condition was implemented: the Elder or other person was to be selected not by the panel or the Law Society, but by Aboriginal Legal Services; the Elder or other person would determine the parameters and requirements of those meetings; and the lawyer would not be required to disclose information about these meetings to the Law Society (other than the name of the Elder or other person).[42] These particulars support the panel's statement that these meetings were meant to "assis[t]" the lawyer.[43] Thus *McCullough* demonstrates that *Gladue* principles are not limited to reduction in penalty, but can also catalyze additional creative orders that further the purposes of lawyer discipline.

Fourth, in *McCullough* a *Gladue* report was filed by the lawyer and relied on by the panel. Of the previous decisions in which *Gladue* principles were invoked, the closest thing to reliance on a *Gladue* report was an abandoned ground of appeal by the lawyer in *Robinson* that the hearing panel should have ordered a *Gladue* report.[44] Indeed, the appeal panel in *Robinson* explicitly declined to address the obligations of a hearing panel to do so.[45] The use of a *Gladue* report prepared specifically for lawyer disciplinary proceedings, as opposed to merely reusing a *Gladue* report if one had been prepared for prior criminal proceedings regarding the same underlying conduct, is a significant development.[46] Given the panel's reliance on the discipline-specific *Gladue* report, this innovation may serve as a precedent for counsel in

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38. *McCullough*, *supra* note 2 at paras 76–93. See especially para 76: "The presumption of revocation as the appropriate penalty for dishonesty is strong. It will not be dislodged easily."

39. *Ibid* at para 76.

40. *Ibid* at para 4. See also paras 26–28. See also *Law Society of Ontario v Suzor*, 2022 ONLSTH 18 at para 58 [*Suzor*]: "permission to surrender, which terminates a licensee's right to practice, is very different from all other penalties down the ladder from revocation."

41. *Ibid* at paras 83, 85.

42. *Ibid* at para 85: "The Licensee is not required to share any details regarding their meetings with the Elder or Traditional Knowledge Holder with Regulatory Compliance."

43. *Ibid* ("in keeping with *Gladue* principles, we believe that the Lawyer would be assisted by consultation with an Elder or Traditional Teacher during the term of her suspension" at para 83).

44. *Robinson*, *supra* note 1 at para 74, note 8: "In oral submissions, counsel for the appellant conceded that all relevant information was before the hearing panel. He abandoned the ground of appeal that the hearing panel erred in not ordering a *Gladue* report."

45. *Ibid* at para 74, note 8: "We do not intend to address whether a hearing panel has the same obligation as a sentencing judge to proactively seek information about a licensee's Aboriginal background and circumstances."

46. For an example of the re-use of a *Gladue* report prepared for criminal proceedings, see *Ontario College of Teachers v Lamure*, 2022 ONOCT 71 at para 16 (although note that the panel did not make any substantive reference to the *Gladue* report and did not invoke *Gladue* principles).

disciplinary proceedings involving Indigenous lawyers—although the panel in *McCullough*, like the appeal panel in *Robinson*, did not specify whether a *Gladue* report *must* be ordered in such proceedings.

Finally, and more broadly, *McCullough* is the second decision of the Law Society Tribunal in 2022 in which a hearing panel appeared to soften the application of the presumption of revocation for misconduct involving dishonesty. While the appeal panel in *Law Society of Ontario v Wilkins* held that that presumption "is inherently unforgiving,"[47] the hearing panel in *McCullough* quoted with approval from the reasons of the hearing panel in *Suzor* that the presumption "is not devoid of mercy."[48] This invocation of mercy, alongside compassion,[49] suggests that the Law Society Tribunal may be more willing to displace the presumption of revocation in future decisions.

IV REFLECTIONS AND CONCLUSION

Integral to an understanding of the result in *McCullough* is an appreciation of the severity of the specific circumstances facing the lawyer, as well as the lawyer's restitution and remorse. As the panel emphasized, *McCullough* does not hold that the penalty for any Indigenous lawyer who misappropriated client funds will be less than revocation.[50] *Gladue* principles make a lesser penalty possible, but "extraordinary" circumstances specific to the lawyer are required for such a lesser penalty to be imposed. The panel in *McCullough* put this more eloquently:

> *Gladue* principles may unlock the door to considering the possibility of departing from presumptive penalty of revocation/surrender—allowing for suspension as an appropriate penalty. However, it is only remarkable, extraordinary personal circumstances of the wrongdoer that can elicit compassion and mercy which may allow them to walk through the now unlocked door and achieve a departure from the standard.[51]

Indeed, the panel's characterization of the lawyer's circumstances as "unique and . . . truly extraordinary and compelling,"[52] in combination with its emphasis that *Gladue* principles do not necessarily displace the presumption of revocation in misappropriation and other cases of dishonesty, suggests that the precedential value and impact of *McCullough* will vary from case to case depending on how closely the facts mirror those in *McCullough*. Moreover, the panel's characterization of these facts as "unique" and "truly extraordinary" suggests that such facts have not commonly arisen in previous cases and will presumably not commonly arise in future cases.[53]

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47. *Law Society of Ontario v Wilkins*, 2021 ONLSTA 15 at para 179.

48. *Suzor*, *supra* note 40 at para 58, quoted in *McCullough*, *supra* note 2 at para 22. See also in 2021 *Law Society of Ontario v Manilla*, 2021 ONLSTA 25 at para 62: "False representation [in documents] alone is not sufficient to trigger presumptive revocation." Thanks to a reviewer for bringing *Manilla* to my attention.

49. *McCullough*, *supra* note 2 at para 76.

50. *Ibid* at para 75.

51. *Ibid* at para 76.

52. *Ibid* at para 75.

53. *Ibid*.

At the same time, *McCullough* suggests a maturation of both the manner in which the Law Society of Ontario exercises its disciplinary powers and the Law Society's understanding of an apparent public consensus on reconciliation. Here I draw on Harry Arthurs' concept of "ethical economy": "[T]he profession's treatment of discipline reflects a tendency to allocate its scarce resources of staff time, public credibility and internal political consensus to those disciplinary problems whose resolution provides the highest returns to the profession with the least risk of adverse consequences," with returns and risk measured in terms of "public goodwill or professional solidarity."[54] Arthurs uses this model to explain that the vast majority of disbarments are imposed for "misappropriation of clients' funds or other financial wrongdoing" because such violations exhibit "a high degree of consensus over ethical standards, and little risk of political repercussions."[55] This model explains the precedents prior to *McCullough* establishing the presumptive penalty of revocation for misappropriation.

However, Arthurs' model can also explain why that presumptive penalty was not imposed in *McCullough*. The panel recognized both that "[a] fundamental purpose of discipline penalty orders at the Tribunal is maintaining public confidence in the legal profession" and that "[t]his purpose can be informed and enriched by reconciliation."[56] Thus, while "[g]eneral deterrence requires a significant sanction to anyone found to have committed misappropriation" and "[p]ublic confidence in the profession demands it,"[57] the panel in *McCullough* determined that the penalty imposed would not decrease—and indeed would increase—the confidence in the legal profession of the general public. Presumably, the penalty would be sufficient to maintain the confidence of the wronged clients, as members of the general public, in the profession.[58]

Thus, while reconciliation generally and *Gladue* principles more specifically may remain controversial in some corners of the public and the media,[59] the disposition suggests that the Law Society Tribunal and Law Society disciplinary counsel believe that those principles should be, and indeed are, now accepted by the public at large, as is the importance and appropriateness of "compassion and mercy":[60]

> A fundamental purpose of discipline penalty orders at the Tribunal is maintaining public confidence in the legal profession. This purpose can be informed and enriched by reconciliation . . . Most importantly, they [the factors related to *Gladue* principles] rise to the level where it would be obvious to other members of the profession, and to the public, that the underlying

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54. Harry Arthurs, "Why Canadian Law Schools Do Not Teach Legal Ethics" in Kim Economides, ed, *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart, 1998) 105 at 112 [Arthurs in Economides], as quoted and discussed e.g. in Alice Woolley, "Regulation in Practice: The 'Ethical Economy' of Lawyer Regulation in Canada and a Case Study in Lawyer Deviance" (2012) 15:2 Legal Ethics 243 at 243 [Woolley] (now Justice Woolley of the Alberta Court of King's Bench). Thank you to Adam Dodek for commending Arthurs' work to me.

55. Arthurs in Economides, *Ibid* at 113.

56. *McCullough*, *supra* note 2 at para 36.

57. *Ibid* at para 80.

58. See *ibid* at para 75.

59. See recently e.g. Jamie Sarkonak, "Court Attacks Racial Fairness" *National Post* (8 October 2022) A18.

60. *McCullough*, *supra* note 2 at para 76.

> circumstances of this individual clearly obviate the need to provide reassurance to them of the integrity of the profession.[61]

While the panel did not provide any specific evidence of public opinion on reconciliation and *Gladue* principles, what is important is the understanding by the Law Society Tribunal, disciplinary counsel, and the Law Society itself about such public opinion. I do not mean to suggest that disciplinary counsel or the panel would not have had the courage to pursue this lesser penalty in the face of public opposition—instead, I recognize the importance of potential public support for such a penalty. That is, even if the panel in *McCullough* was mistaken that the public would accept the importance of reconciliation and *Gladue* principles as applied in *McCullough*, the panel and disciplinary counsel recognize that the public *should* accept that importance and that the panel should decide as if the public did accept it. In this respect, I also observe that this case is not one in which, as Alice Woolley has suggested may occur, "the ethical economy undermines effective regulation."[62] Instead, given the panel's attention to public trust and confidence, ethical economy here reinforces that effectiveness.

While *McCullough* reaffirms and develops the application of *Gladue* principles in the professional discipline of Indigenous lawyers, at least two questions remain to be answered in future decisions.

First, can *Gladue* principles apply to reduce or eliminate costs orders against Indigenous lawyers? The panel in *McCullough* accepted the costs order agreed to by the parties and did not specify the role if any for *Gladue* principles in accepting that proposal.[63] Insofar as costs are purportedly non-punitive, the answer would presumably be no.[64] However, the Law Society of Alberta in *Willier* explicitly recognized this as a future possibility.[65] Moreover, I have previously argued (in my analysis of the role of *Gladue* principles in administrative law) that those principles should apply to costs orders.[66]

Second, will the application of *Gladue* principles—either in its initial sense in *Robinson* or in its more recent fuller sense in *McCullough*—be adopted as persuasive by law society panels in other jurisdictions? Outside of Ontario, the only reported consideration of *Gladue* principles in the professional discipline of Indigenous lawyers is *Willier*, a 2018 decision which did not apply *Gladue* principles on the facts but explicitly did not rule out that application in future cases.[67]

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61. *Ibid* at paras 36, 75 (citation omitted).

62. Woolley, *supra* note 54 at 246.

63. *McCullough*, *supra* note 2 at para 84.

64. For more detail, see Martin, "*Gladue*," *supra* note 5 at 47.

65. *Willier*, *supra* note 31 at para 35 ("we would not rule out the possibility that its principles could be of assistance to both the sanctions and costs aspects of LSA disciplinary proceedings in a future case"), as discussed in Martin, "*Gladue*," *supra* note 5 at 47.

66. Martin, "Creative," *supra* note 3 at 368.

67. *Willier*, *supra* note 31 at para 35.

Beyond these questions about lawyer discipline, it also remains to be seen whether *McCullough* will promote the application *Gladue* principles in the discipline of Indigenous members of professions other than law.[68]

68. There appears to have been only one matter to date in which *Gladue* principles were explicitly applied in professional discipline of a non-lawyer: *Alana Grace Nahdee, RMT* (26 October 2015), Ottawa (Discipline Committee of the College of Massage Therapists of Ontario), as discussed in Martin, "Creative," *supra* note 3 at 47. But see *Ontario College of Teachers v Fox*, 2021 ONOCT 34 at para 48, a disciplinary decision that did not invoke *Gladue* principles by name but nonetheless applied a similar analysis: "While College Counsel is correct in his submission that the evidence of the Member's Indigenous identity and whether he attended residential school is lacking in detail, the Panel nevertheless finds that it is relevant in its determination of the appropriate penalty. The history of Indigenous people in Canada, and particularly in education, is fraught with colonial violence. As such, it would be inappropriate for the Panel not to consider this history in the case of an Indigenous man who worked as a teacher in an Indigenous community." For a post-*McCullough* decision involving misconduct by a justice of the peace (which is analogous to a professional discipline matter) in which there was a dissent on the impact of *Gladue* principles, see *Concerning A Complaint about the Conduct of Justice of the Peace Anna Gibbon* (25 August 2022) (Ont Justices of the Peace Review Council), Charyna JP dissenting, online: <https://www.ontariocourts.ca/ocj/files/jprc/decisions/2022-gibbon-disposition-EN.pdf>, stay pending judicial review granted, 2022 ONSC 5735 (Div Ct, single judge). *Gibbon* cited *Robinson*, *supra* note 1 at paras 26–27, but did not cite *McCullough*.

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

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CONTENTS

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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

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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

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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.

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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.

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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]

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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

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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

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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.

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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,

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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]

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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]

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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.
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> . . .
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> 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

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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

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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.

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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.

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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.

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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

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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

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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.

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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

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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,

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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

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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.

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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.