UNIVERSITY OF CALGARY | THE SCHOOL OF PUBLIC POLICY

Master Of Public Policy
Capstone Project

"Western Canadian Approaches to Aboriginal Consultation: A Comparative Analysis"[1]

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[redacted] Sept 9/2015
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Submitted in fulfillment of the requirements of PPOL 623 and completion of the requirements for the Master of Public Policy degree

[1] Western Canadian in the context of this paper includes British Columbia, Alberta, and Saskatchewan.

Acknowledgements

I want to thank my wife Cristina for lending her unwavering support throughout my graduate experience. I do not know where I would be if it wasn't for her 'enthusiastic' paper editing. There are no words for how grateful I am for all the help and support you have given me.

I also want to thank Dr. Robert Mansell for his guidance and support in helping me tackle this topic. Thank you for being an integral part of one of my proudest achievements.

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Supreme Court cases *Haida*, *Taku River*, and *Mikisew Cree* established the duty to consult's modern form. In these cases, the Supreme Court ruled that the crown has, "a duty to consult and, where appropriate, accommodate when the crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights."[2]

Reacting to the Supreme Court's rulings, each jurisdiction in Canada has created their own approach to consultation. All of these provincial approaches to consultation have similar fundamental qualities and phases such as: pre-engagement and assessment, engagement and consultation, accommodation if required, and a decision on adequacy.

While there are similarities in each provinces' approach to consultation, there are significant differences. There are major differences in aspects of consultation in categories such as timeliness, flexibility, transparency, capacity funding, and others. Ranking provincial consultation policies, according to these criteria, has allowed for particular conclusions to be developed. The cumulative rankings have shown that while Alberta's policy might be considered the 'best' policy from an industry perspective, British Columbia has the 'best' policy from the perspective of First Nations. These rankings are not meant to be scientific, but rather to provide insight into the intricate and sometimes overlooked unique aspects of each provinces' approach to consultation.

In Aboriginal consultation, there is no silver-bullet answer on how to approach consultation. There are five policy suggestions for further research that might allow for Alberta to improve its consultation for all parties involved: 1) Establishing consultation at the stage of issuance of leasing and licencing of crown mineral leases, 2) Establishing an oversight tribunal for effective dispute resolution outside of the court system, 3) The improved inclusion of cumulative effects planning, in particular, cumulative effects of projects, 4) Establishing regional Aboriginal consultation offices to assist with capacity for surrounding First Nations, and 5) True inclusion of First Nations in the creation and adaptation of additional consultation initiatives.

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[2] Government of Canada, "*Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*," Ottawa: Aboriginal Affairs and Northern Development Canada, http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf, p. 1

1 Introduction

Canada is blessed with one of the world's largest deposits of hydrocarbons. This, combined with high prices for oil and gas (albeit, at different times), laid the foundation for a booming resource sector over much of the last two decades. With the prices of oil and gas now hitting low points, this sector is currently facing hard times. However, over the longer term it is expected that global petroleum demand will remain strong and with the eventual recovery of petroleum prices, the prospects for continued development of this sector remain good. The scale of these developments and international investments has kept the Canadian economy strong even in the midst of global financial difficulties and can be expected to continue to drive Canadian economic growth well into the future.

However, in order for this longer term resource development to occur it will require fair, clear, and mutually beneficial agreements with its First Nations.[3] Canada has a history of tenuous relations with its Aboriginal peoples, stemming from major policy initiatives such as the Indian Act, the reserve system, and residential schools. Resource development is no different, having left a bitter taste with many Aboriginals through projects that have provided few direct benefits to locals as well as leaving disruptive and unrestored landscapes.[4]

Looking at the various headlines and court cases there is no shortage of examples of Aboriginal groups protesting resource developments that might affect their traditional lands. While there have been successes such as in the case of the Wood Buffalo reserve in Northern Alberta, there have also be failures, an example of which was the lengthy delays that ultimately undermined the Mackenzie Valley Pipeline. That project shows just how important are cordial and cooperative relations between Aboriginals, the Crown, and Industry as everyone lost out in the end due to a bitter, lengthy dispute and changing economic conditions. For the most part Aboriginal groups are sceptical, and for good reason, as many see resource development as their one and only chance to benefit from a large economic initiative on or near their territories. Faced with poverty, unemployment, and education problems, many chiefs must get these interactions right to serve their communities and ensure the long-term prosperity of their group. Additionally Chiefs may be faced with concern, uncertainty, and memories of past experiences. While many of these issues act as 'brakes' on the process, Chiefs can, as Ken Coates and Brian Lee Crowley say, "apply the brakes gently, but that does not mean halting the entire process."[5]

Canada is faced with an incredible challenge, "at present the country faces the prospect of hundreds of billions of dollars of investment in the resource sector

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[3] Brian Crowley and Ken Coates, "*New Beginnings: How Canada's Natural Resource wealth could re-shape relations with Aboriginal Peoples*," (Ottawa: Macdonald-Laurier Institute, May 2013), p. 6

[4] Ibid.

[5] Ibid.

being held up by Aboriginal protests."[6] These protests are being further bolstered by court victories that all assert that resource developments cannot occur without accommodation or proper consultation. While the Courts have laid out the duty to consult in a way that outlines whose responsibility it is, they have not outlined what constitutes sufficient consultation. There is no single approach that is a cure-all for consultative duties. However what we have seen arise in this gap is a variety of provincial approaches aimed at ways to effectively work with Aboriginals, the Crown, and Industry.

2 Study Objective and Methodology

The purpose of this paper is to provide a comparison and evaluation of the consultation policies and guidelines in three Western Canadian provinces[7] and, using these results, suggest changes to improve the approach used in Alberta. In order to do so, this paper will first provide a brief legal overview of the current duty to consult. Once the groundwork has been laid out, the approach is to compare and contrast the various consultation policies. This involves selecting various criteria that are considered 'important' for the facilitation of the doctrine, social outcomes, and overall 'good regulatory policy'. These criteria are then applied in the comparison and evaluation of each of the provincial approaches and to provide an overall ranking. For the purposes of this study, this is then used to provide a final 'best practices' ranking. The reader should, at the end of this analysis, have an understanding of where a province either excels or is deficient in any particular criteria. Then to complete the analysis, an overall ranking and matrix is provided to summarize the evaluation of the criterion. The summary will provide a 'perspective based' analysis of the rankings. These summary rankings will show how the 'best practices' ranking can change based on perspective whether it is from industry or First Nations. To conclude this paper will proceed to use this analysis to provide recommendations to improve Alberta's approach to Aboriginal consultation.

3 Why Do We Care?

It has been over ten years since the Supreme Court of Canada created the modern definition of the 'duty to consult' in *Haida Nation*.[8] The duty to consult, in its modern form, is the requirement for, "governments to take the initiative to consult with aboriginal communities prior to government decisions that might affect Aboriginal or treaty rights, even when the legal status of these rights is in

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[6] Brian Crowley and Ken Coates, "*New Beginnings: How Canada's Natural Resource wealth could re-shape relations with Aboriginal Peoples*," (Ottawa: Macdonald-Laurier Institute, May 2013), p. 6.

[7] Typically western Canada includes British Columbia, Alberta, Saskatchewan, and Manitoba. However for the purposes of this study '*Western Canadian Provinces*' will refer to British Columbia, Alberta, and Saskatchewan.

[8] Dwight G. Newman, "*The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector*," (Ottawa: Macdonald-Laurier Institute, May 2014)

question."[9] While the courts have ruled that the duty to consult is clearly the responsibility of the crown and requires government action, they have not outlined what constitutes sufficient and adequate consultation. This has led to considerable ambiguity and spurred the creation of provincial policies and guidelines in order to fill the substantial policy gap created by the Courts. Provinces have had considerable difficulties attempting to fill this gap, as many have been unable to substantially reflect the intention of the courts due to little specific direction. Currently, there is a major policy gap between the directions provided by the Courts and the operational realities of extractive resource projects. This policy gap is currently being filled with uncertainty rather than real, concrete direction.

Some of the other major issues arising from this policy gap include increasing legal challenges, endless debates over 'social licence', an increasing cost of delay, and overall negative effects on competitiveness. These represent not just the consequences in the recent past and today but also the huge costs to Canada if future developments are prevented by the inability to appropriately consult with and engage Aboriginal peoples.

3.1 Legal Challenges and the Cost of Delay

The modern duty to consult developed in *Haida Nation* and the subsequent court cases have clearly established the existence of 'the duty to consult.' While this 'right' is clear, there is still considerable debate surrounding the determination of when consultation is deemed adequate. The Courts have been reluctant to give specific direction on what constitutes adequate consultation. This lack of direction has led to a wide range of diverse interpretations of what counts as adequate consultation. A direct consequence of this, along with the Courts establishing little more than a minimum set of standards, are adversarial relationships and divisive legal challenges. When Aboriginal groups feel that they are not 'adequately' consulted, they can take the Crown to court, as they did in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*[10].

Consultation policies of the different provincial jurisdictions have all attempted to clarify these particular aspects, however, much remains to be done. If clarification is sought through court cases rather than through 'best practices' and policy creation, it will be a time consuming piecemeal process. This runs the risk that unlocking our natural resource wealth might soon become a story similar to that of the Mackenzie Valley Pipeline.[11] Thomas Isaac and Maureen Killoran state the importance of this issue quite well: "with every stage of the consultation process now offering its own opportunity for litigation, repeated halts are all but certain –

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[9] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 SCR 511, 2004 SCC 73, Para. 35

[10] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, BCSC 359(2010)

[11] Due to multiple time consuming disputes and legal challenges, the Mackenzie Valley Pipeline was rendered uneconomic and cancelled. Initially the pipeline was to be a profitable venture for all parties.

and with delays come the costs of idle employees and equipment, and the potentially much greater opportunity cost of resources left in the ground."[12]

3.2 Social License

'Social license' is a troublesome phrase because it has become a highly subjective term. Social license is generally thought to be, "general public's perception of the legitimacy of a project, a company or an industry."[13] Extractive industries in Canada are currently subjected to some of the most complex levels of approvals, the highest being public opinion.[14] This has led many corporations to place a focus on increased transparency, higher social investment, and attention to stakeholder management. The benefits of this were reiterated by Brian Yates and Chelsea Horvath when they stated: "The Emergence of a social license as a critical success factor in resource development reflects the growing understanding of the importance of effective risk management."[15] It is through this realization that industry, with their attention and commitment to gaining social license early in a project, will find the attainment of regulatory license much more likely.[16]

However, because the concept of social license remains subjective especially in regards to Aboriginal consultation, it often becomes adversarial. Without any clear guidelines or direction, industry regularly falls short of expectations particularly in an Aboriginal consultation context. This leads to antagonistic outcomes and further complicates an already fragile tripartite relationship between Aboriginals, Crown, and Industry.

4 The Duty To Consult

The modern duty to consult doctrine is a debate largely based on elaborating section 35 of the *Constitution Act, 1982.*[17] This section reflects the 'Honour of the Crown' as a legal responsibility to "…respect and promote the inherent rights of indigenous peoples… especially their rights to their lands, territories, and resources."[18] Section 35 states: "…the 'existing aboriginal and treaty rights of the

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[12] Thomas Isaac and Maureen Killoran, Osler, "*Risks and Risk Management in Project and Resource Development*," last modified January 2014, accessed June 10, 2015, https://www.osler.com/en/resources/governance/2014/capital-markets-report/risks-and-risk-management-in-project-and-resource

[13] Simpson, Robert. "A social license to operate is a critical success factor for resource development." *PR Associates,* November 29, 2013, Accessed June 10, 2015, http://www.prassociates.com/blog/2013/a-social-license-to-operate-is-a-critical-success-factor-for-resource-development

[14] Ibid.

[15] Brian Yates and Celesa Horvath, Pacific Energy Summit, "Social License to Operate: How to Get It, and How to Keep It (Summit Working Paper 2013)," accessed June 10, 2015, http://www.nbr.org/downloads/pdfs/eta/PES_2013_summitpaper_Yates_Horvath.pdf

[16] Ibid

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

[18] *United Nations Declaration on the Rights of Indigenous Peoples*," U.N.G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (13 Sept. 2007), (2007) 46 I.L.M. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf p.2

aboriginal peoples of Canada are hereby recognized and affirmed."[19] While these rights clearly establish certain Aboriginal rights and Treaty rights, this section alone does not proclaim the duty to consult. The actual details and creation of the duty to consult has been left to Court decisions. Court decisions on duty to consult have been vague, giving way to polarizing interpretations of what the Crown is obligated to enforce and protect and the fundamental question of what constitutes sufficient consultation.

As elaborated in Section 3, this discussion has major policy implications for Canada and should be at the forefront of the public policy debate in Canada. While there are a large number of pre-constitutional cases that form a part of the duty to consult doctrine, the modern iteration of the concept is that developed following the *Haida Nation v. British Columbia (Minister of Forests)*[20] case.

4.1 Theoretical Source of Consultation: Honour of the Crown

The duty to consult and accommodate is not a duty that arises solely from section 35 of the *Constitution Act, 1982*. Honour of the Crown is a concept that was developed much earlier and is an underlying assumption in most Aboriginal jurisprudence.[21] It arises as a reflection of the "broader fiduciary footing of the Crown's relationship with Aboriginal peoples who are under its protection."[22] This concept is one that the Supreme Court, in its decisions, has emphasized.

At its very basic level, the honour of the Crown is a concept meant to guide decisions based on promoting reconciliation, while balancing the potential economic effects of development.[23] This honour is a legal obligation that binds the Crown to act with virtue and not to engage in "sharp dealings."[24] The Supreme Court alluded to the continued importance of this concept when they defined it as a key characteristic of Crown obligations, past and present.[25]

4.2 The Duty to Consult Doctrine: *Haida Nation v. B.C.* (2004) to *Beckman v. Little Salmon/Carmaks First Nation* (2010)

Much of the modern duty to consult doctrine has been shaped through recent Court jurisprudence. This section will provide a brief overview of the important cases that contribute to the duty to consult.[26]

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[19] *Constitution Act, 1982*, s. 35

[20] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73, [2004] 3 S.C.R. 511.

[21] Ibid., 312

[22] Thomas Isaac and Anthony Knox, "The Crown's Duty to Consult Aboriginal Peoples," *41 Alta. L. Rev*. 49. 85 (2003): 60

[23] Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed.* (Saskatoon, SK: Purich Publishing, 2014), p. 16

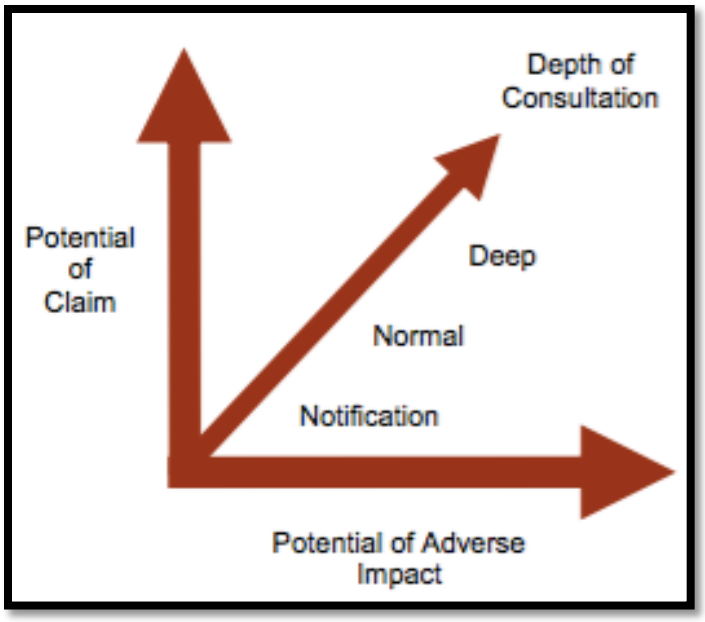
[24] Ibid. 27

[25] Ibid.

[26] This paper will only briefly touch on the cases that shaped the duty to consult. Due to limitations of this capstone it is unable to do a substantial case law analysis. For a deeper understanding and discussion of these ruling and more please see Chapter 2 of Dwight Newman's *The Duty to Consult: New Relationships With Aboriginal Peoples* (Saskatoon: Purich Publishing Ltd., 2009)

4.2.1 *Haida Nation v. B.C.* (2004)

It would not be until the Supreme Court's decision regarding *Haida Nation v. British Columbia (Minister of Forests)* that Aboriginal rights would officially grow to include the Crown's duty to consult. *Haida Nation* is considered a cornerstone case in the doctrine of the duty to consult. While *Delgamuukw*[27] would mention the duty to consult only in passing, *Haida Nation* would become the leading decision on applying the Crown's duty to consult.



The *Haida Nation* case considered two main issues. First, this case explores the circumstances under which the Crown has a duty to consult with Aboriginal people. The second issue the Court deliberated was what this duty to consult entails.[28] In this case, the government of British Columbia sought to transfer a tree farm license to a company in order to farm cedar on the Queen Charlotte Islands. This location was subject to a pending claim by the Haida Nation. The farming of cedar, an integral aspect of Haida culture by Weyerhaeuser, would have an adverse effect on the Haida.[29] The Haida argued that they were not consulted prior to the process of the license transfer and this posed an infringement upon their Aboriginal right to harvest the cedar themselves.

In the Supreme Court decision, Chief Justice McLachlin mentioned that the source of the duty to consult with Aboriginal peoples resides in the honour of the Crown.[30] The duty to consult can also go as far as to accommodate[31] "…when the Crown has knowledge, real or constructive, of the potential existence of an aboriginal right or title and contemplates conduct that might adversely affect it."[32] The Supreme Court put forward a type of spectrum to describe this variation of duty to consult. Where the claim to Aboriginal title is weaker, the Crown shall, at a minimum, only give notice and disclose information to the potentially affected.

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[27] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010
[28] *Haida Nation* para. 11
[29] Ibid., p. 2
[30] Newman, *Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed.,* p.17
[31] Accommodation generally includes: attaching certain conditions, requiring adjustments to proposed activities and programs, delaying decisions and additional consultation, and even cancelling a project. See Section 6.3.
[32] Isaac, Thomas. *Aboriginal Law: Commentary and Analysis. 4th ed*. (Saskatoon, Sk: Purich Publishing, 2012), p.304

However, where the claim is a strong, "*prima facie*" case, the Crown must consult with those affected and may be required to accommodate. Furthermore, the case indicated that the consultation process should also allow for the input of Aboriginals and their participation in the decision-making process.[33]

While consultations have been put forth as a necessary duty henceforth, they are intended to be done by the Crown in good faith. The goal of all consultations, as decided through this case, should be done with the goal of minimizing harm and effect on the infringement of Aboriginal rights. *Haida* also re-affirmed that the rights granted to Aboriginals, via section 35 of the Constitution Act, 1982, do not grant a veto regardless of treaty status.[34]

This case proved to be a seminal moment in defining Aboriginal rights and established a legal duty to consult henceforth. This duty arose out of the honour of the Crown and its historical relationship. It was also affirmed in the *Haida Nation* case that the honour is due through the Crown and not a third party, such as a company (Weyerhauser, in this case).[35]

4.2.2 Taku River Tlingit First Nation v British Columbia (Project Assessment Director)(2004)

Taku River Tlingit First Nation v British Columbia (Project Assessment Director)[36] is a companion case to the *Haida*. *Taku River,* like *Haida,* dealt with the limits of the duty to consult and accommodate Aboriginals. However, unlike in *Haida*, there was consultation beforehand.

The government of British Columbia sought to re-open an old mine on the Taku River Tlingit First Nation. The government held consultations through an environmental assessment process under the *Environmental Assessment Act (EAA)*.[37] Unlike in *Haida,* the Supreme Court ruled against The Taku River Tlingit people's assertion that the government failed to consult with them. The Supreme Court argued that the government was aware of the Taku River Tlingit claim, and that it was a relatively strong *prima facie* case.[38] Therefore, being a strong *prima facie* case, the government was required to do more than just notify, but also at a minimum, to consult and even accommodate if necessary. The Crown, in accordance with its acknowledged duty, implemented strategies on wildlife migration as well as road management plans to reduce any adverse effects on the Taku River Tlingit people.[39] During the environmental assessment, which functioned as the consultation process, the Taku people were deemed by the Supreme Court to be "fully" participating members.[40] Furthermore, the decision by the government of British Columbia, as a result of the environmental assessment, would take into account and

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[33] Newman, *Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,* p.16
[34] Peter Hogg, "The Constitutional Basis of Aboriginal Rights," Aboriginal Law Since Delgamuukw, (Ontario: Canadian Law Book, 2009), p. 15
[35] *Haida Nation* para. 55
[36] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*
[37] Newman, *Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,* p.16
[38] *Taku River Tlingit,* para 30
[39] Newman, *Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed*, p.16
[40] Ibid.

alter their final plans based on the First Nation's immediate and long-term concerns. The Supreme Court interpreted crown action in Taku River as adequate consultation and accommodation.[41]

This case is a great companion piece to the *Haida Nation* decision, as they both contrast the limits and checks of the duty to consult. *Taku River* shows consultation, when required, can be sufficient itself in fulfilling the Crown's duty to consult, granted it is done in a meaningful way.[42] This case showed, once again, that Aboriginals, although constitutionally protected, do not possess a veto over development. Furthermore, the Supreme Court ruled that there is no ultimate duty for the government of British Columbia to reach a mutual agreement.[43] Through this decision, the Supreme Court showed sensitivity for a balance between the rights of Aboriginals and development.

4.2.3 Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) (2005)

While *Haida* and *Taku River Tlingit* are cases that involve First Nations people with no signed treaties, *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*[44] is a remarkable extension of the duty to consult within the context of treaty rights in Alberta.

This case involved a dispute over the "taking up" of lands by the Minister of Heritage for a winter road on Treaty 8 territory. The Mikisew disputed; there was no consultation process involved in the acquisition of the treaty land. By crossing a number of trap lines and hunting grounds, the Mikisew people argued this road interfered and adversely affected their traditional lifestyle and Aboriginal rights guaranteed in Treaty 8.[45] The Supreme Court acknowledged that while the Minister was within his authority to "take up" lands located within the Treaty 8 area, he is obligated through the Honour of the Crown to ensure that this process is fair.[46] According to the Supreme Court, the duty to consult is clearly initiated by the adverse effects on the Mikisew in this case.[47] The proposed road would have an unfavourable impact on the Mikisew's right to hunting and trapping on their lands. The Supreme Court found that the Crown did not fulfill its obligations of consultation through the Honour of the Crown when it unilaterally decided on the location of the road. As a consequence, the Supreme Court found that the Crown failed to address the concerns of the Mikisew.[48]

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[41] *Taku River Tlingit.* para 4
[42] Hogg, The Constitutional Basis of Aboriginal Rights, p. 13
[43] Ibid., 13
[44] *Mikisew Cree First nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.CC.R.388
[45] *Mikisew Cree,* para 3
[46] Ibid., para 64
[47] Issac, *Aboriginal Law and Commentary,* p. 306-7
[48] Ibid., p. 306

The *Mikisew* case is important because it provides an extension of the duty to consult to treaty rights and traditional land in a context similar to previous case law involving un-extinguished title in British Columbia.[49]

Hogg has argued that the duty to consult, when extended to treaties, shows a sort of "unwritten qualification."[50] This "unwritten qualification" can have a significant diminishing effect on the purpose of treaty-making. Because of the Supreme Court's decision, it is obvious that the Court views treaties as a means, rather than an end. This interpretation is consistent with what Hogg alludes to when he argues that the Supreme Court holds the view that treaties should not emphasize certainty, but rather serve as a path towards a modern idea of reconciliation.[51]

4.2.4 Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council (2010)[52]

The *Rio Tinto* case is another case that poses the question of when the duty to consult should arise. While *Rio Tinto* looks to be quite similar to previous cases, it addresses a new question as to the role of administrative bodies in implementing the duty to consult.[53] This case revolved around applications for renewal of a hydroelectric deal at a facility that was built several years earlier without consultation.[54]

In this case, the Supreme Court addressed the possible roles that a Crown administrative body, such as British Columbia Utilities Commission (BCUC), can fulfill. The Supreme Court answered this question by saying: "…the duty on a tribunal to consider consultation and the scope of that inquiry depends on the mandate conferred by the legislation that creates the tribunal."[55] The Courts are alluding to the fact that there are some Crown administrative bodies that are able to adequately deal with consultations. The Supreme Court ruled that the BCUC was well equipped and rightfully had the duty to consult, which was delegated to them through the Crown. However, it also noted that the BCUC shall not engage in consultation without delegation from the Crown.[56]

Another particularly important point expressed through the courts via *Rio Tinto* is that the duty to consult is a "forward-looking" duty.[57] The courts do not interpret this duty retroactively as a historical device to address past issues. However, as Newman suggests, when there is a failure in the duty of consultation, that failure's scope instantly increases. This changes the challenge to include all underlying Aboriginal rights, rather than a simpler "forward-looking" examination

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[49] Newman, *Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed* p. 19
[50] Hogg, *The Constitutional Basis of Aboriginal Rights*, p. 15
[51] Ibid., p. 15
[52] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650
[53] Newman, *Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,* p. 19
[54] The original hydroelectric facility and deal were not subject to consultation even though there were obvious impacts to the First Nations. *Rio Tinto* questioned if consultation arises in the case of 'renewal'; Ibid.
[55] *Rio Tinto Alcan Inc*, para. 55-57
[56] Issac, *Aboriginal Law and Commentary,* p. 309
[57] Newman, *Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,* p. 21

of the legitimacy of a consultation process.[58] The Courts in the *Rio Tinto* case acknowledge that while the duty to consult is an important tool, it also has its limitations and should not be used by the Crown to replace previous Aboriginal and treaty rights precedence.[59]

4.2.5 Beckman v. Little Salmon/Carmacks First Nation (2010)

Beckman v. Little Salmon/Carmacks First Nation[60] is another important addition to the narrative on the duty to consult. This case established that treaties should not, and do not determine an "appropriate level" of consultation with Aboriginals.[61] In this case, The Yukon government granted an agricultural lease on 65 hectares of land that belonged to the Little Salmon/Carmacks First Nation (LSCFN). The LSCFN responded to this by claiming that they were not adequately consulted. The Supreme Court held that the Yukon government fulfilled its duty to consult through the Land Application Review Committee (LARC). Even though the LSCFN did not attend these regulatory meetings by the LARC, the Supreme Court found that the LARC adequately considered the LSCFN's interests.[62]

In its decision, the Supreme Court explained that the duty to consult is a duty that exists independent of agreements or treaties.[63] Furthermore, this duty cannot be extinguished through the existence of treaties. The duty to consult is a duty that is "ever present" and is "always at stake" when the Crown is interacting with Aboriginals.[64] Although treaties represent a solid foundation for reconciliation, the duty to consult represents reconciliation as an ongoing work in progress.

This case shows that regulatory processes can be sufficient enough to discharge the duty to consult.[65] *Beckman v. Little Salmon/Carmacks First Nation* suggests that treaties can only go so far in fulfilling the duty to consult. However, it is important to understand that the Crown cannot relinquish themselves of this responsibility by contracting it out to a third party. Even though the Crown may delegate the duty to consult to other parties, they themselves are ultimately responsible.[66] The Supreme Court reasoned this way stating: "…although you can delegate the duty to consult out you cannot delegate the honour of the Crown".[67]

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[58] Newman, "*Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,"* p.21
[59] Ibid., p.21
[60] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 [2010] 3 S.C.R. 103
[61] Issac, *Aboriginal Law and Commentary,* 309
[62] Jason Annibale and Amanda Klein, "Aboriginal Treaties are not "Complete Codes," Aboriginal Law Bulletin McMillian LLP December 2010, http://www.mcmillan.ca/aboriginal-treaties-are-not-complete-codes--Supreme-Court-confirms-duty-to-consult-independent-of-treaty-obligations-part-II-of-II
[63] Issac, *Aboriginal Law and Commentary,* 309
[64] *Beckman v. Little Salmon/Carmacks First Nation*, para 52
[65] Annibale and Klein, *Aboriginal Treaties are not "Complete Codes"*
[66] Issac, *Aboriginal Law and Commentary,* p. 309
[67] Ibid., p. 328

4.3 Key Misconceptions About the Duty to Consult

Since the outset, there have been many widespread misconceptions about the duty to consult. These misunderstandings are often significant barriers for moving the doctrine forward.

The first of these misconceptions is that the duty to consult is akin to a veto over development. Courts have constantly reiterated that legally, "in no case is there an Aboriginal veto or consent requirement."[68]

Conversely, many argue that, because the government has the final say, the entire process is hollow and nothing more than a procedural show. However, as noted by Newman: "…the fact that governments are legally required to act in good faith means that they must take account of the issues identified in consultation."[69]

Another misconception is that the duty does not apply to existing projects and past breaches of treaty right. The courts have been clear that the duty can only be applied to new potential impacts.[70] Simply put the duty is a proactive duty and is not to be applied retroactively.

Lastly, and possibly the most damaging misconception, is that the duty to consult has become a 'weapon' that Aboriginal peoples wield to combat resource development. Media feeds off sensationalism, and Newman provides a great example of this: "[I]n January 2014, the media paid enormous attention to Neil Young's concerts to stop oil sands development, while around the same time, the Fort McKay First Nation held a conference on how it can participate in the economic opportunities offered through partnership in oil sands development."[71]

4.4 Fundamental Components of the Duty to Consult

While the duty to consult is a continually developing concept that is being shaped to this day, there are established principles. These components, as Dwight Newman describes, are fundamental to understand the existing law and its future potential development. [72] Currently there are five fundamental components of the duty to consult which are outlined perfectly by a leading consultation scholar, Dwight Newman[73]:

1. The duty to consult arises prior to proof of an aboriginal rights or title claim or in the context of uncertain effects on a treaty right;
2. The duty to consult is triggered relatively easily, based on an insufficient level of knowledge on the part of the Crown relative to a possible claim with which government action potentially interferes;
3. The strength or scope of the duty to consult in particular circumstances lies along a spectrum of possibilities, with a richer consultation requirement arising from a stronger *prima facie* Aboriginal claim

[68] Driedzic, "Industry and Government."
[69] Newman, "*The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector*," p.1
[70] Ibid.
[71] Ibid.
[72] Newman, "*Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,"* p. 25
[73] Ibid. p. 26 (These five points are a direct quotation from Dwight Newman's book "*Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed"*)

and/or a more serious impact on the underlying Aboriginal right or treaty right;
4. Within this spectrum, the duty ranges from a minimal notice requirement to a duty to carry out some degree of accommodation of the Aboriginal interest, but it does not include an Aboriginal power of veto over any particular decision; and
5. Failure to meet a duty to consult can lead to a range of remedies from an injunction against a particular government action altogether (or, in some instance, damages) but, more commonly, an order to carry out the consultation prior to proceeding.

4.5 Roles And Responsibilities

A fundamental aspect to the duty to consult is the awareness of roles and responsibilities during the consultation process. In any consultation situation, there are generally three main entities: the Crown, Aboriginals, and Industry. The degree to which each of these stakeholders have a role in the process has been shaped through the constitution, legal doctrine, and provincial strategic policy directions.

4.5.1 The Crown

Section 91(24) of the *Constitution Act, 1867* states the federal government retains "exclusive Legislative Authority" over Indians, and Lands Reserved for the Indians."[74] While Indian lands are located within provinces, these lands reserved for Indians are not under provincial jurisdiction, but rather federal jurisdiction and are held for the 'use and benefit' of Indian peoples.[75] The Aboriginal Affairs and Northern Development Canada is the body that is tasked with the general administration of these reserves and Canada's Aboriginal peoples.

Because these reserves are located within provinces, there is overlap of jurisdiction, primarily provisions located in section 92. Provincial legislation can also apply to Indians and Indian reserve lands; however, it is restricted through three main concepts:

1. It is of a general nature;
2. Does not deal specifically with Indians or lands reserved for Indians;
3. There is no federal legislation dealing with Indians or Indian reserves that would conflict with the provincial legislation.[76]

While these acts provide the legal guidelines, Aboriginal Crown relations are also guided by a fiduciary or *sui generis* relationship. This responsibility is founded from the Crown's assumption over lands and resources formerly held by the Aboriginal groups.[77] This action, according to the Courts, has placed the Crown

[74] "*The Constitution Act*," (1867)
[75] "*Indian Act*." (R.S.C., 1985, c. 1-5)
[76] Anthony Knox and Thomas Isaac, "Canadian Aboriginal Law: Creating Certainty in Resource Development," *University of New Brunswick Law Journal* 53, (2004) p. 4
[77] *Haida Nation v. British Columbia (Minister of Forests)*, Para 53

alone, "legally responsible for the consequences of its actions and interaction of third parties that affect Aboriginal Interests."[78]

These developments have led to the expansion of a variety of diverse provincial approaches to consultation. Consultation policies, while foundationally similar, often differ across jurisdictions as they tailor the approaches to their often unique policy stance, situation, and priorities.

4.5.2 Aboriginals

A major misconception surrounding the duty to consult is that Aboriginals, while one of the most vital members, do not have any responsibility in the process. Aboriginals, just like their Crown counterparts, are legally required to carry out consultation in a meaningful and purposeful way. First Nations have a reciprocal duty in which they are expected to proceed with consultation in a manner that reflects good faith. The reciprocal nature of consultation was a focal point of the case of *R v. Douglas et. Al [2007],* where the Cheam First Nation did not reciprocate meaningful dialogue and thereby did not fulfill their 'obligation to participate'.[79]

A major initiative that many First Nations are now partaking in is the creation of their own consultation policies. These consultation policies outline how a First Nation expects to be engaged. An example is the Horse Lake First Nation's Consultation Policy. This document outlines how the First Nations expect to be engaged and guides the operation of their consultation office located in Edmonton.[80]

While these Aboriginal-led consultation policies are not law, they provide a great opportunity to form better relationships through understanding of expectations.

4.5.3 Industry

While Aboriginal groups and the Crown have been busy creating their versions of consultation policies, industry has also been developing their versions - typically called Corporate Social Responsibility (CSR) policies. As stated previously, while the duty to consult is the sole responsibility of the Crown, procedural aspects of the duty to consult may be delegated to third parties, such as industry proponents. CSR approaches have become a focal point of companies and often provide open and transparent policies to guide industry's relationship with Aboriginal groups. While this is a more modern concept for industry, it has become clear that those with proven results and strong CSR reputations have a competitive advantage over others. Thus, the effort put into CSRs can become much more than just a change in a company's image, but may bring dividends to their business as a result. In recognizing this advantage, companies have been investing in CSR initiatives.

Many industry actors are also engaging in impact benefit agreements (IBA). These agreements provide Aboriginals with significant profit or benefit sharing

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[78] Ibid.

[79] Kevin O'Callaghan and Katey Grist, "BC Court of Appeal Reinforces the Reciprocal Duty on First Nations to Consult." In *Aboriginal Law Bulletin* (Vancouver: Fasken Martineau, 2007); *R v. Douglas et. Al, BCCA 265(2007)*

[80] Newman, "*Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,"* p. 132

opportunities that coincide with authorization of resource development on their lands. Many companies realized long ago that a collaborative relationship with Aboriginal people provides for a healthy profitable relationship that can provide significant economic return. Pinehouse Metis community is a great example of a successful IBA that provided investment in infrastructure, jobs training, and hiring programs, as well as support for locally owned businesses.[81] The returns for industry for collaborating with Pinehouse have resulted in mutual prosperity. For the community it meant: "…building a regional labour force, developing ties with area service and supply companies, and providing a noticeable return to the aboriginal communities for activities on their traditional territories."[82]

5 Consultation Policies

While the past norms of Aboriginal engagement have been primarily shaped through Court proceedings or 'law in the books', the new 'rules of engagement' will be predominantly shaped by the policies and practice of key stakeholders or 'law in action'.[83] Roscoe Pound pointed out this phenomenon when he offered an approach that analyzed the importance of not only "law in the books" but also "law in action."[84] Pound argued that the two would eventually and inevitably diverge. This phenomenon would be particularly apparent in situations where social norms rendered law less useful, legislation did not allow for flexibility, and where administrative mechanisms were perceived as faulty.[85] There can be many reasons that the law in action might diverge from the law in the books. In the case of Aboriginal consultation, the duty to consult doctrine developed through the Courts has a particularly limiting view, stopping short of defining many important aspects in consultation, such as what constitutes sufficient consultation. This has led many scholars to focus on the importance of how the duty to consult is being shaped, not only through Courts, but also through the policies and practices of Aboriginals, governments, and industry.[86]

It has been over 10 years since the *Haida Nation* Court decision and since then, the majority of Canadian provinces have started to shape their own forms of consultation policies and guidelines. For most jurisdictions in Canada, these consultation initiatives have come in the form of interim consultation policies. While they all have a common foundation, there are major differences as well. These will be outlined in detail later in this paper. Such consultation policies and guidelines have been legally recognized as having a major influence in and importance to the consultation process. This was made apparent when the courts recognized the role of government policies in *Haida Nation*:

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[81] Coates and Crowley, "*New Beginnings: How Canada's Natural Resource Wealth Could Re-shape Relations with Aboriginal Peoples*," p. 15-16

[82] Ibid.

[83] Adam Driedzic, "Industry and Government are Slowly Defining the Duty to consult and Accommodate First Nations,"

[84] Newman, "*Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,"* p. 115

[85] Ibid.

[86] Ibid. 115-116

> "It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision-makers."[87]

While these guidelines are not regulatory schemes, they do provide a strong guard against unfettered decision-making. The guidelines provide 'teeth'[88] where there would typically only be a policy stance. It is in these documents that the duty to consult is being shaped as we see it today.

5.1 Overview of Western Canadian Consultation Policies

The approaches in the provinces of B.C., Alberta and Saskatchewan to consultation share a somewhat similar structure. This section will provide a high-level overview of the general nature of these consultation policies.

Jurisdiction	Level of Detail	Responsibility	Rights Considered	Initial Determination	Consultation Design	Strategic
Alberta	Broad Policy with Guidelines and Consultation Matrix	Centralized (ACO)	Treaty rights and traditional uses	Government Determined	Consultation Matrix	Yes
Saskatchewan	Detailed Policy	Distributed	Treaty rights, traditional uses, Métis rights and traditional uses (not including Aboriginal title)	Government Determined	Consultation Matrix	Yes
British Columbia	Detailed Policy	Distributed*	Treaty and Aboriginal rights including title	Government Notification and First Nation Response	Government notification and First Nation response will set the consultation level and process	Yes

Figure 1 Overview of Western Canadian Consultation Policies [89]

5.1.1 Alberta

Alberta has a broad policy with accompanying guidelines that set out the foundation of its consultation policy. The Aboriginal Consultation Office is the centralized point, which oversees and undertakes the vast majority of decisions and actions regarding consultation in the province. Alberta's duty to consult is triggered when impacts to treaty rights, as well as traditional uses, are known. The province is

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[87] *Haida Nation,* para. 51

[88] While teeth are a commonly used word in this context, some argue that these guidelines provide little 'teeth' at all.

[89] David Laidlaw, and Monique Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook*," (Calgary: Canadian Institute of Resources Law), appendix 4B p. 110

the sole decision-maker when it comes to determining the initial level of consultation required for a particular project or impact. Although the province is the sole decision-maker, it does delegate procedural aspects of consultation to proponents. The actual design and process of consultation is outlined in Alberta's Consultation Matrix. This provides time-centred deadlines based on the level of consultation. These deadlines are elaborated further in Section 7. Alberta, like British Columbia and Saskatchewan, employs a strategic application of the duty to consult, which goes above and beyond the minimum legal requirements of consultation established by the Courts and actively attempts to be innovative with respect to interpretations and implementation of the duty.

5.1.2 Saskatchewan

Saskatchewan also has a detailed policy on the duty to consult. However, as compared to Alberta's centralized ACO, Saskatchewan's is more decentralized, spreading authority amongst a few provincial departments.[90] Saskatchewan incorporates a wide variety of rights into its application of the duty to consult, such as: Treaty rights, Metis rights and traditional uses.[91] Like Alberta, Saskatchewan is the sole decision maker in determining the initial level of consultation to be carried out. The initial level of consultation can be anywhere from Level 1 to Level 5, depending on the government interpretation of the impacts incurred by the particular project. Once a level is decided upon, the consultation process commences and is then subject to specific, time-based consultation deadlines. One interesting aspect of Saskatchewan's consultation policy is that while there is delegation of procedural aspects of consultation, the province takes a lead in the procedure and proponents typically are given supporting roles.[92]

5.1.3 British Columbia

British Columbia has implemented a detailed policy, which like those in Alberta and Saskatchewan, covers a variety of aspects of consultation, such as procedural instructions for proponents. British Columbia has distributed the responsibility for overseeing consultation between two main departments. These departments are the Ministry of Aboriginal Relations and Reconciliation and British Columbia Oil and Gas Commission (BCOGC). The Ministry covers the entire province, except for Treaty 8 lands, which is governed by the BCOGC. British Columbia, unlike its neighbours, is not completely covered by numbered treaties and thus considers a variety of additional rights in its consultation policies comprising Treaty and Aboriginal rights including title.[93]

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[90] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 111

[91] Government of Saskatchewan, "*First Nations and Métis Consultation Policy Framework*," Ministry of First Nations and Métis Relations (Regina, SK 2010), p. 14-15

[92] Saskatchewan, "First Nation and Métis Consutlation Policy Framework," p. 8-9; Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 111

[93] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 111

There are major differences in how British Columbia determines initial level of consultation from its neighbours' methods. Once the government assesses the level of consultation and it deems sufficient, the Crown allows for First Nations input and confirmation. Once an agreement is reached between First Nations and the Crown, consultation begins.[94] Like Alberta and Saskatchewan, British Columbia has employed a strategic application of the duty to consult which goes above and beyond the minimum legal requirements of consultation established by the Courts to actively try to shape and innovate their interpretations of the duty.

6 Commonalities in Western Canadian Provincial Approaches to Consultation

Since *Haida Nation,* the three western provinces have all adopted some sort of cabinet-approved consultation policy and/or guidelines.[95] These approaches to consultation all follow a somewhat generic outline, which addresses the procedural aspects of consultation. While each provincial approach is unique, they all contain some form of: pre-consultation and assessment; engagement and consultation; accommodation; and decision and follow up.

6.1 Pre-Consultation and Assessment

The first phase of the consultation process usually involves the proponent or Crown gathering information pertaining to the project. This information usually contains some combination of the following: affected Aboriginal groups, Treaties, Traditional Land Use studies, and previous consultations. Once the preliminary project information has been gathered and the affected areas identified, the Crown must then review the presented information. The Crown at this point functions as the decision-maker and has the ultimate responsibility to determine if the project requires consultation and at what level consultation is required, depending on the impacts presented in the initial analysis.

The Crown can also decide at this point if it, or the proponent, takes the lead in the consultation process with the Aboriginal peoples. It is in its authority that the Crown can both choose to undertake the entirety of consultation, or delegate particular procedural aspects. The extent to which the Crown is involved in consultation or delegates procedural aspects to proponents varies from jurisdiction to jurisdiction. As the Courts stated in *Haida*, the Crown has the ability to delegate procedural aspects of consultation. However, responsibility over consultation is not a duty that can be delegated, but rather rests solely with the Crown.[96]

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[94] Government of British Columbia, "*Updated Procedures For Meeting Legal Obligations When Consulting First Nations: Interim,*" Ministry of Aboriginal Relations and Reconciliation (Victoria, BC 2010), p.15-16; Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 41

[95] Newman, "*Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,"* p. 130

[96] *Haida Nation,* Introduction para 6

6.2 Engagement and Consultation

The consultation process begins with a referral letter or notification. The primary function of the notification is to outline the proposed decision or activity to the affected First Nations group. Additionally, there is typically detailed information pertaining to impacts as well as the Crown allocated level of consultation that is deemed necessary.[97] This decision is based on a combination of factors, such as the level of impact, as well as the Aboriginal groups' strength of claim. One of the most important parts of the letter is the call for a response from the affected Aboriginal group, if they feel this is necessary. This allows the Aboriginal group to contest to or seek clarification of details in the notification letter. As stated previously, a notification letter can, in some cases, serve as sufficient consultation. However, if the Aboriginal group requests further consultation, a more lengthy process may be commenced.

Guiding the decision on the level of consultation required is based on the 'consultation spectrum' established in *Haida Nation*. Some provinces (Alberta and Saskatchewan) have also placed their interpretation of the spectrum and have established their own 'consultation matrix'. These matrices follow a similar formula on the spectrum, in that they consider the impact of the project as well as the strength of claim in establishing the level of consultation required.

6.3 Accommodation

In typical consultation guidelines, accommodation is something that is left vague and open. Accommodation can be quite varied depending on the circumstances. While accommodation can be ruled necessary in certain cases, it is not required in all cases. Accommodation generally includes: attaching certain conditions, requiring adjustments to proposed activities and programs, delaying decisions and additional consultation, and even cancelling a project.[98] A contentious part of accommodation often revolves around the burden of payment. Often these costs are born by the proponents rather than the Crown, based on the logic that they are in the best position to understand and provide solutions.

Some guidelines have gone into further contemplation of accommodation, attempting to provide insight into what might be required in such a circumstance. For example, British Columbia published a guide outlining how the province includes proponents in accommodating First Nations.[99]

6.4 Decision

At this stage consultation is essentially complete. It is here that the Crown renders its decision on whether or not it believes the consultation process has been sufficient. It is at this stage that the entire process of consultation comes under scrutiny. All aspects are ultimately the responsibility of the Crown, from the decision on the initial level of consultation required, to the adequacy of consultation, and

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[97] In the case of British Columbia the decision on the level of consultation is a joint decision with First Nations input.

[98] Saskatchewan, "*First Nation and Métis Consultation Policy Framework*," p. 13

[99] Government of British Columbia, "*Guide to Involving Proponents When Consultation First Nations*," Ministry of Aboriginal Relations and Reconciliation (Victoria, BC 2011).

even procedural aspects that were carried out by the proponent. This can be a very tense decision that the Crown must get right, or possibly face lengthy legal action. Given the likelihood that one side will be unhappy with the decision, it is paramount that the Crown be able to justify its decision.

7 Ranking Western Canadian Approaches to Consultation

The consultation policies of the three provinces all cover similar core issues discussed in Section 6. While consultation approaches seem generic across the provinces, they are anything but. Alberta, British Columbia, and Saskatchewan are all examples of policies that go beyond merely applying existing case law. These policies strive to achieve outcomes that extend further than a 'simple application of case law'.[100] For the most part, each of the approaches to consultation includes strategic elements. These innovative approaches to consultation are analysed and compared in this section.

In order to rank the policies, nine particular aspects important to Aboriginal consultation are used as criteria for the analysis. These show the subtle but critical differences among the three provincial approaches to consultation. A ranking out of six stars is given to each of the provinces under each of the respective criteria. A province with six stars in a particular category would, according to this evaluation would be interpreted as representing a best practice situation. Likewise, a ranking of one star would indicate a poor rating under the particular criterion.

7.1 Certainty in Timeliness

Consultation is a process that has the potential to be particularly time-consuming. The concern with timeliness in Aboriginal consultation has fostered the long-standing stereotype that consultation is exceedingly and inherently an uncertain undertaking. For firms in the extractive resource business, uncertainty can become a costly gamble, with potential losses upwards of many millions of dollars in resources and planning wasted. Some provinces have recognized this problem and have moved to provide more 'certainty in timeliness' through establishing decision-making timelines. Where applicable, these timelines establish deadlines for Aboriginals, proponents, and the Crown. However, some critics argue that placing deadlines on consultation does not allow for a true meaningful and in-depth consultation process.

7.1.1 Alberta ★★★★★

Alberta has taken an aggressive stance in combating the issue of certainty in timeliness. Efficient processing timelines have been a focus of Alberta's Guidelines with the stated goal of, "processing all assessments quickly and thoroughly."[101]

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[100] Newman, "*Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,"* p. 121

[101] Government of Alberta, "*The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management*," Ministry of Aboriginal Relations (Edmonton, AB 2014), p. 11

Highlights:

- Rigid system of deadlines based on the initial level of consultation determined by the Aboriginal Consultation Office (ACO).
    - Level 1 consultation occurs in 44 days
    - Level 2 consultation occurs in 49 days
    - Level 3 consultation occurs in 110 days
- From the initial notification, all parties know their respective deadlines.
- Deadlines for Crown decisions on consultation adequacy are clearly defined.

	Pre- Consultation Assessment	First Nation Response to Notification	Consultation Time Frame	Determination of Adequacy by ACO	Total Days
Level 1	4 Days	15 Days	15 Days	10 Days	44 Days
Level 2	4 Days	15 Days	20 Days	10 Days	49 Days
Level 3	10 Days	20 Days	60 Days	20 Days	110 Days

Figure 2 Alberta Consultation Timeframes[102]

Alberta has designed a system of consultation that provides for a variety of strict deadlines. While this approach provides a framework to expedite consultation, it also comes with drawbacks, such as issues with capacity and fairness, discussed in subsequent criteria. However, in establishing 'certainty in timeliness', Alberta has made great strides and receives a five out of six stars in this category.

7.1.2 British Columbia ★★★

British Columbia takes a much different approach than Alberta in establishing timelines. Where Alberta establishes rigid timelines, British Columbia takes a more open ended and collaborative approach in determining timelines. British Columbia has centered its approach on flexibility.[103]

Highlights:

- Deadlines are set on a case-by-case basis and collaboratively with First Nations input.
- The focus around flexibility is shown not only in preliminary engagement stages, but also throughout the entire consultation process.

[102] Ibid.
[103] Government of British Columbia, "*Guide to Involving Proponents When Consultation First Nations*," p. 14-15

- British Columbia's approach allows for the deepening of consultation at any phase in the consultation process when it may be deemed necessary.[104]

While this process allows for great flexibility and collaboration, it does not advance 'certainty and timeliness'. In British Columbia, what may start as a straightforward consultation, has a greater potential to be escalated into a lengthy, complicated, and uncertain process. This provides a level of uncertainty that is higher in British Columbia than in Alberta and Saskatchewan. For that reason, British Columbia's approach to establishing timelines to the consultation process receives a three star rating in the category 'certainty through timeliness'. Although this is lower than its colleagues, British Columbia's approach will provide benefits in other categories, such as Fairness and Cooperative Nature.

7.1.3 Saskatchewan ★★★★

Saskatchewan takes a similar approach to Alberta in consultation, with its own version of a Consultation Matrix with respect to deadlines.

Highlights:

- The Government of Saskatchewan initially assigns a level of consultation to a particular case ranging from level one to level five. These levels are associated with the potential impacts of decisions or actions on treaty and Aboriginal rights and traditional uses. [105]
- Saskatchewan also notes that in a level five consultation, anticipated timeline for government decision from day of notification is anticipated to exceed 90 days.[106]

	Response from First Nations Following Initial Notification	Anticipated Timeline for Government Decision from Day of Notification	Total Days
Level 1	N/A	N/A	N/A
Level 2	21 Days	30 Days	51 Days
Level 3	30 Days	60 Days	90 Days
Level 4	30 Days	90 Days	120 Days
Level 5	45 Days	90+ Days	135+ Days

Figure 3 Saskatchewan Consultation Timeline Matrix[107]

[104] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 44
[105] Saskatchewan, "*First Nation and Métis Consultation Policy Framework*," p. 9-10
[106] Ibid.
[107] Ibid. p. 10

Saskatchewan, along with Alberta, has designed their consultation policy around a deadline based Consultation Matrix Timeline. This has allowed for more certainty in the process of consultation. However, while levels one to four establish concrete deadlines, a level five consultation leaves the possibility of an open-ended process with no certainty with respect to response times.[108] While this flexibility may prove to be advantageous in other categories, for the purposes of 'certainty in timeliness', Saskatchewan is given a four star rating.

7.2 Process Flexibility

While policies and guidelines are meant to provide 'teeth' to a particular process and guard against unfettered decision-making, they should also provide for flexibility in their application to account for unique or diverse circumstances. Consultation is a textbook example of a diverse process that can entail a wide array of potential projects, plans, and other triggers. Just as diverse as the triggers initiating consultation, so too are the circumstances of each unique consultation process. A well-designed and considered consultation policy requires constant flexibility throughout the various steps of the process. Some policies have addressed this issue, while some have continued to push for more rigid timeline-based goals.

7.2.1 Alberta ★★

In Section 7.1, Alberta was shown to be a leader in establishing consultation deadlines. Although establishing deadlines for consultation is an effective way to increase certainty that a decision will be rendered, it can also be harmful. Courts have noted that consultation requires flexibility to be meaningful.

Highlights:

- Alberta's current guidelines have extremely tight timelines for consultation.[109]
- Alberta's Consultation Guidelines have little possibility for extension.[110]
- Many scholars have noted that these timelines for consultation are 'unreasonably short'.[111] It is hard to imagine that First Nations can carry out a sufficient consultation and analysis on a Level 3 'deep consultation' in the allotted timeframes.
- First Nations are not designed like businesses, with dedicated legal departments, gathering the resources and spending time on thoughtfully analysing a consultation document. This requires more time than Alberta outlines in its Consultation Matrix.

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[108] Saskatchewan Investment and Growth Committee/Environment Committee, "*Duty to Consult*," Chamber of Commerce p.3

[109] Government of Alberta, "*The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management*," p. 12-13

[110] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 54-55

[111] Ibid. p. 42

While Alberta's consultation timeframes helps establish certainty surrounding decision-making, it does not exhibit flexibility. While it should be noted that there are certain factors that allow for the increase or elevation of the level of consultation and thus the time frame for consultation, these are few and limited. It is due to these reasons that Alberta receives a two star rating.

7.2.2 British Columbia ★★★★★

British Columbia provides for the most flexible of all the provincial approaches to consultation.

Highlights:

- British Columbia does not set deadlines for consultation on a level-based system like Saskatchewan and Alberta.
- Consultation timelines are set collaboratively with First Nations, Industry and the Crown.[112]
- British Columbia recognizes that consultation may bring up various issues and impacts not initially seen in the primary evaluation of the level of consultation. Throughout the consultation process, there is the opportunity to deepen consultation, if required. [113]

While this flexibility can bring about a level of uncertainty, it remains the most flexible of all the western provincial approaches to consultation and one many scholars believe represents true reconciliation. For the criterion 'Flexibility', British Columbia receives a score of five stars out of six.

7.2.3 Saskatchewan ★★★

Saskatchewan's approach to consultation is reflected primarily through its mostly inflexible Consultation Matrix with deadlines. This is a similar system to Alberta, although with a slight variation, which allows for a marginally more flexible approach.

Highlights:

- Similar to Alberta, these deadlines do not allow for much flexibility in the consultation process, placing the meaningfulness of consultation at risk.[114]
- There is opportunity to extend consultation, but those occasions are rare.[115]

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[112] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 41
[113] Government of British Columbia, "*Updated Procedures For Meeting Legal Obligations When Consulting First Nations: Interim*," p. 15
[114] Saskatchewan, "*First Nation and Métis Consultation Policy Framework*," p. 10
[115] Ibid. p. 12

- However, unlike Alberta, Saskatchewan allows for flexibility in its level 5 extensive consultation scenarios. Saskatchewan recognizes that a 'level 5' consultation includes significant consultation and with that, a timeframe deadline is not appropriate in that situation.[116]

It is for this greater flexibility exhibited in 'level 5' consultation that Saskatchewan receives a slightly higher score than Alberta. However, for the most part, there is the same level of inflexibility as in Alberta for lower level consultation. In the category of flexibility Saskatchewan scores a three star rating.

7.3 Transparency

Transparency of process and decision-making is a fundamental part of any well-functioning regulatory system in a democratic state. Transparency is important to consultation for a variety of reasons. Primarily, transparency and openness furthers trust and strengthens decisions. Transparency can be achieved through a variety of means, such as allowing access to information on how decisions are made and knowing who is the 'decision-maker'. Showing how consultation is determined in all steps and allowing free and open access to information to industry and First Nations, facilitates a longer lasting and more trust-worthy relationship. Furthermore, this allows for First Nations and proponents the ability to make better and more informed decisions early in the process, possibly freeing up important time and resources later on.

7.3.1 Alberta★★★

Alberta has recognized the importance of transparency in its consultation process. This has been one of the driving factors behind creating a single body in the ACO for all aspects of consultation. Some of Alberta's other initiatives that facilitate transparency are listed below.

Highlights

- Centralized decision-making body allows for all parties to know where decisions are made and where to find information.
- Variety of documents, in addition to the current Policy and Guidelines, are readily available, including the *Government of Alberta Proponent Guide to First Nations Consultation Procedures for Land Dispositions*.[117]
- Extensive list of current Crown consultation contacts is provided, including updated queues for Assessment Requests and Consultation Summaries.[118]

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[116] Ibid. p. 10

[117] See Government of Alberta, "*Aboriginal Consultation Policy and Guidelines*," Ministry of Aboriginal Relations, http://www.aboriginal.alberta.ca/1036.cfml ; and Government of Alberta, "Proponent Guide," Ministry of Aboriginal Relations, http://www.aboriginal.alberta.ca/571.cfm

[118] Government of Alberta, "*First Nations Consultation Approvals Unit*," Ministry of Aboriginal Relations, http://www.aboriginal.alberta.ca/FNC-Unit.cfm

- Lack of documentation and collaboration on how the Crown assesses the initial level of consultation.[119]
- Lack of documentation or policy on what constitutes adequate consultation.

Although Alberta has created a transparent decision making process, there are still important aspects of consultation that need clarification. An aspect that is not included in Alberta's policy, guidelines, or other information is what constitutes adequate consultation. It is for this reason that Alberta receives just a three star rating.

7.3.2 British Columbia★★★★

British Columbia has also made great strides towards transparency in its consultation process. Transparency can be seen through the posting of the British Columbia Oil and Gas Commission (BCOGC) consultation agreements and the creation of a consultation database.

Highlights

- Semi-Centralized decision-making (BCOGC for Treaty 8 territory and Ministry of Aboriginal Relations and Reconciliation for the rest of British Columbia), which allows for parties to know where decisions are made and where to find information.
- Agreements outlining the details between Treaty 8 and the BCOGC are posted online. This is a great source for proponents looking to engage these groups, as well as other First Nations looking to build similar arrangements.[120]
- Variety of documents available including: Engaging First Nations: Proponent Resources, Sector-Specific Proponent Guides (Environmental Assessments, Major Mines, and Clean Energy).[121]
- Consultative Areas Database of First Nations service that allows the general public, industry, other governments and First Nations to easily identify First Nations who have treaty rights or asserted or proven rights or title on the land base queried.[122]
- Lack of documentation on what constitutes adequate consultation.

Initially when looking at British Columbia's approach to consultation, it seems to have a similar level of transparency to its neighbours. However, it has

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[119] Government of Alberta, "*The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management*," p. 13-15

[120] See British Columbia Oil & Gas Commission, "*Consultation Process Agreements*", online: https://www.bcogc.ca/first-nations/consultation-process-agreements

[121] See Government of British Columbia, "*Consulting with First Nations*," online: http://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations

[122] See Government of British Columbia, "*First Nations Consultative Areas Database*," http://geobc.gov.bc.ca/applications/index.html#firstnation

forged ahead of Alberta and Saskatchewan with its Consultative Areas Database and the public posting of its consultation agreements with Treaty 8 First Nations. It is these unique and innovative approaches that give British Columbia a four star rating, one star above the other two provinces.

7.3.3 Saskatchewan ★★★

Saskatchewan has sought to bring more transparency to its consultation process through the use of its Consultation Matrix.

Highlights

- Departmental style decision-making bodies allow for all parties to know where decisions are made and where to find information. However, this is not the 'one-window' approach that is represented by Alberta.
- A clear, concise consultation policy, that allows for the quick identification of what the duty to consult is applied to.[123]
- Consultation procedures and decision-making can be spread amongst different departments, which can cause confusion and overlap.[124]
- Lack of documentation on what constitutes adequate consultation.
- Lack of documentation and collaboration on how the Crown assesses the initial level of consultation.[125]

Saskatchewan, like B.C and Alberta, has moved towards a more open and transparent consultation approach. However it still falls short for many of the same reasons that Alberta does, such as what constitutes adequate consultation and how the Crown determines initial levels of consultation. It is for these reasons that Saskatchewan gets a three star rating.

7.4 Fair and Cooperative Nature

Canada has sought to advance its past colonial history with Aboriginals through improving its interactions with First Nations. However, many critics argue that there has been anything but cordial and inclusive decision-making between the Crown and Aboriginals. These critics argue that provincial policies on Aboriginal consultation are simply colonialism version 2.0.[126] Consultation has the primary purpose of reconciliation, which the Courts have said, is a balance that should strike a middle ground between Aboriginal interests and the broader needs of Canadians.[127] This criterion is intended to capture how well the elements of reconciliation are fostered in the approach to consultation in each jurisdiction. . Fairness typically incorporates the notion that the policy should be 'just and

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[123] Saskatchewan, "*First Nation and Métis Consultation Policy Framework*," p. 5-6
[124] Ibid.
[125] Ibid. p. 9-10
[126] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 22
[127] *Haida Nation*

reasonable' and does not result in 'unjust discrimination'.[128] In the context of Aboriginal consultation fairness can embody a variety of aspects.

7.4.1 Alberta★★

Alberta has had a somewhat tumultuous history with Aboriginals in implementing their consultation policies. For the most part, the extent that Alberta's approach is considered 'fair and cooperative' has yet to be appreciated by First Nations.

Highlights

- The ACO carries out consultation and assesses the adequacy of consultation, which is controversial for many First Nations.[129]
- No recourse to ACO decisions, aside from court action.
- Initial consultation levels are set solely by the ACO without any input from the affected First Nations.[130]
- First Nations have been excluded from the creation of the guidelines and policy.[131]
- First Nations input was largely ignored when creating the capacity funding initiative: *The Aboriginal Consultation Levy Act.*[132]
- No form of economic benefit agreements with First Nations.
- While Alberta recognizes the duty to consult Metis, there is currently no specific policy for consulting Metis in Alberta.[133]

Alberta has failed to live up to the criterion of 'Fair and Cooperative Nature'. There are currently many examples[134] of a failed relationship, which is why Alberta receives a score of two stars.

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[128] Robert Mansell and Jeffery Church, "*Traditional and Incentive Regulation Applications to Natural Gas Pipelines in Canada*," Calgary: Van Horne Institute for International Transportation and Regulatory Affairs, University of Calgary, 1995, p.55

[129] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. p.60

[130] AB Guidelines p.13-14; Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p.40

[131] Bob Webber, "Alberta Chiefs Boycott Consultation Meetings with Province Over Development," *Globe and Mail*, August 2014, http://www.theglobeandmail.com/news/national/alberta-chiefs-boycott-consultation-meetings-with-province-over-development/article20268781/

[132] Ibid.

[133] Aboriginal Relations Office, *Aboriginal Consultation Office Q&As.* Edmonton: Government of Alberta, 2014. http://www.aboriginal.alberta.ca/573.cfm

[134] "Alberta backs off consultation proposals after pushback from First Nations", *CTV News* (9 January 2013), http://www.ctvnews.ca/canada/alberta-backs-off-consultation-proposals-after-pushback-from-first-nations-1.1107373; "Alberta Sets New Rules on Industry" *Globe and Mail*, (9 August 2013), http://www.theglobeandmail.com/news/national/alberta-sets-new-rules-on-industry-aboriginal-consultation/article13856983/

7.4.2 British Columbia★★★★

British Columbia's approach has a variety of unique characteristics that have allowed its consultation process to score higher than the approaches in Alberta and B.C.

Highlights

- Initial consultation levels are set collaboratively with First Nations input into the Crown's determination.
- BCOGC has entered into economic benefit agreements with Treaty 8 First Nations allowing for a form or revenue sharing in exchange for development cooperation on their lands.[135]
- In cooperation with the BCOGC, Treaty 8 First Nations have created individual broad policies for how to approach and carry out consultation with each respective First Nation.
- Allows for consultation to occur at the stage of licencing and leasing of mineral rights.

British Columbia has had a much better record of acting in a 'Fair and Cooperative Nature' with its First Nations. It is for these reasons listed above that British Columbia receives a score of four stars.

7.4.3 Saskatchewan ★★

While Saskatchewan has a different approach than Alberta in the criterion Fair and Cooperative Nature, Saskatchewan is in a similar situation as Alberta.

Highlights

- Saskatchewan's inclusion of consultation on strategic decision making, such as land use planning, is clearly laid out.
- Initial consultation levels are set solely by the Crown without any input from the affected First Nations.[136]
- Consultation does not include cumulative impacts and, in fact, seeks to restrain Aboriginal consultation in this matter. [137]
- No form of economic benefit agreements with First Nations.[138]

Saskatchewan has failed to live up to the criterion of 'Fair and Cooperative Nature'. There are currently more examples of a failed relationship than a fair and cooperative one, which is why Saskatchewan receives a poor score of two stars

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[135]Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 58

[136] Saskatchewan, "*First Nation and Métis Consultation Policy Framework*," p. 10

[137] Saskatchewan, "*First Nation and Métis Consultation Policy Framework*," p. 6; Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation,"* p. 32

[138] Saskatchewan, "*First Nation and Métis Consultation Policy Framework*,"

7.5 Ease of Access: Centralization

Consultation is inherently complicated and often unclear. Adding to the problem, access to information and decision makers is also sometimes troublesome. Jurisdictions across Canada have strived to address this issue and have subsequently started a variety of initiatives to address the often confusing nature of consultation experienced by all parties in the process. Some examples of these initiatives are databases and the centralization of offices. Each province takes a somewhat different approach with respect to this criterion.

7.5.1 Alberta ★★★★★

Alberta has been a leader in centralizing the consultation process. Since the advent of the Aboriginal Consultation Office (ACO), Alberta's consultation process has made great strides in centralization.

Highlights

- ACO is a centralized, one-window department in charge of all aspects of consultation including: policy development and implementation, pre-consultation assessment, management and execution of the consultation process, assessment of consultation adequacy, and consultation capacity building initiatives with First Nations.[139]
- Extensive list of internal contacts at the ACO available on the website.[140]
- All provincial policies, guidelines, and other guides are posted on the website for public access.

Alberta boasts a completely centralized system with its newly formed ACO. While this office is still going through growing pains, Alberta is a true leader in this category. For the criterion of 'Ease of Access: Centralization' Alberta scores five stars.

7.5.2 British Columbia ★★★★

British Columbia has also moved towards centralization in order to provide a more efficient one-window regulator. Additionally, British Columbia has also implemented a database initiative that allows for quick identification of possibly impacted First Nations groups.

Highlights

- British Columbia has a semi-centralized model, which is somewhat similar to Alberta. The BCOGC governs British Columbia's Treaty 8 territories in its northern regions and functions as a one-window regulatory body that manages all aspects of consultation. For the remainder of the province, the

[139] Alberta, Government of. "Aboriginal Consultation Office." Edmonton: Ministry of Aboriginal Relations. http://www.aboriginal.alberta.ca/1.cfm (accessed July 25, 2015).
[140] Ibid.

Department of Aboriginal Relations and Reconciliation manages consultation matters.[141]

- British Columbia has an innovative database called the Consultative Areas Database, which is an accessible online interactive map that allows the general public, industry, other governments and First Nations to identify First Nations who have interests in a specific area. When contemplating a project in British Columbia, this tool allows for quick identification of First Nations groups and a list of contacts.[142]
- Not a completely centralized system which can possibly lead to confusion and overlapping if projects span from Treaty 8 territory into other parts of British Columbia.

British Columbia has made great steps in centralizing its process in order to provide a more efficient one-window approach. While it has not centralized its process as much as its neighbor Alberta, it is still a leader in this criterion. Furthermore, British Columbia has instituted a public database tool that allows for the quick identification of First Nations and their contact information. It is through British Columbia's efforts of centralization and its innovated database initiative that has improved and eased access to information that, British Columbia receives a score of four stars.

7.5.3 Saskatchewan ★★★

Saskatchewan is unlike its counterparts in the aspect of centralization. While Alberta and British Columbia have attempted to centralize their consultation processes with the ACO and the BCOGC, Saskatchewan has a model that has roles spread amongst different departments.

Highlights

- Consultation system in Saskatchewan involves a number of different departments and is not centralized. Decentralization may lead to overlap and confusion for both proponents and First Nations.[143]

Although Saskatchewan has a centralized Ministry of First Nations and Métis, consultation is undertaken by a variety of its ministries rather than a centralized ACO. It is for this overlap and decentralization that Saskatchewan receives a three star rating.

7.6 Capacity Funding

For many First Nations, a major stumbling block to achieving meaningful consultation is the lack of capacity to deal with the sheer volume of requests. For

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[141] Government of British Columbia, "*About Us*," British Columbia Oil and Gas Commission, https://www.bcogc.ca/about-us, (accessed September 3, 2015).

[142] Governement of British Columbia, "Guide to Involving Proponents When Consulting First Nations," p. 4

[143]

example, excluding Crown referrals, Ktunaxa Nation in Prince George, British Columbia received an average of 48 referral notifications per month in 2007.[144] Likewise, Treaty 8 Tribal Association received 15,000 referral notifications in the last eight years.[145] The lack of financial and resource capacity to deal with the large number of responses represents a very real and persistent practical problem for many First Nations. While the Courts have recognized the importance of consultation on an equal playing field, they have not addressed who pays the consultation costs of the Aboriginal people. To address this gap, some provinces have developed their approaches to consultation to include some form of capacity funding. Although funding is provided through provincial means, it is not unusual for proponents to also contribute funds to Aboriginal consultation capacity as well. The Courts have not directly addressed this question of whether the Crown is obligated to provide consultation capacity funding. However, it should be noted that when the Crown provides funding, it is considered positively when Courts assess if the Crown has adequate fulfilled its duty to consult.[146]

7.6.1 Alberta ★★★

Currently, Alberta has a funding regime in place to assist in providing consultation capacity funding to First Nations.

Highlights

- The First Nations Consultation Capacity Investment Program (FNCCIP) is a program that all First Nations in Alberta can apply to for funding to build capacity to participate in consultation activities and natural resource management.[147]
- The FNCCIP is a core investment program that, under current procedures, requires a yearly application.
- While the fund is used to assist in obtaining immediate consultation capacity, it is also meant to "Assist First Nation communities and organizations in building consultation structures (i.e. single-point of contact for resource development or land management)."[148]

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[144] Carrier Sekani Tribal Council and First Nations technology Council, "First Nations Land Referrals Forum: Final Report," (Prince George, BC 2007), 6

[145] Ibid.

[146] *Taku,* para. 13 & 37; *Ka'a'Gee Tu; Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General),* 2012 FC 517

[147] Alberta, Government of. "Building Capacity for Consultation." Edmonton: Ministry of Aboriginal Relations. http://www.aboriginal.alberta.ca/581.cfm (accessed July 12, 2015).

[148] Alberta, Government of. "Aboriginal, First Nations Consultation Capacity Investment Program." Edmonton: Ministry of Aboriginal Relations. http://www.aboriginal.alberta.ca/documents/FNCCIP-Overview.pdf?0.5786798184271902 (accessed July 29, 2015).

- However, First Nations and industry have both indicated to government that current funding levels are inadequate.[149]
- The current FNCCIP provides for approximately $6.6 million of annual core funding.[150] This is in addition to the current proponent funding of approximately $150-200 million.[151]
- This shortfall has hindered the ability for First Nations to carry out their consultation obligations. In response, the government of Alberta attempted to implement a source of revenue for consultation called Bill 22 or *Aboriginal Consultation Levy Act* (ACLA).[152]
- The ACLA proposes to charge a levy on industry proponents involved with provincially regulated activities. These funds will be used to create grants to First Nations or other identified Aboriginal groups to, "assist them in developing capacity to participate in, and in meeting the costs of, any required Crown consultation in respect of provincial regulated activities."[153]
- The ACLA received Royal Assent on May 27, 2014. This Act will come into force upon promulgation, which has yet to be received.

Alberta has yet to release any information as to how the funds will be collected and dispersed. In a briefing, the Government of Alberta indicated that the Consultation Levy Act is expected to generate approximately $70 million. This leaves a considerable funding gap and has the industry asking where the remaining funding will come from or if proponents are expected to pay into the levy, in addition to providing current industry funding.[154] While Alberta has recognized this capacity shortfall and attempted to address it, much uncertainty remains. While Alberta's consultation capacity fund garners good marks for providing assistance for permanent capacity building, due to the uncertainty surrounding the ACLA, Alberta receives a score of three stars.

7.6.2 British Columbia ★★★

British Columbia finds its situation somewhat different as both Treaty Lands and Non-Treaty Aboriginal Lands are in play. For the geographical area, excluding Treaty 8 areas, authority over Aboriginal consultation in British Columbia resides with the Ministry of Aboriginal Relations and Reconciliation. Although the British Columbia Court of Appeal has questioned the requirement of the Crown to provide

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[149] Aboriginal Relations, *Building Capacity for Consultation* (Edmonton: Government of Alberta, 2014), http://www.aboriginal.alberta.ca/581.cfm Accessed November 12, 2014
[150] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 49-50
[151] Ibid.
[152] *Aboriginal Consultation Levy Act*, SA 2013, c A-1.2.
[153] Ibid. Section 4(3)
[154] Stephanie Axmann and Thomas Isaac, "Alberta's Aboriginal Consultation Levy on Industry," *McCarthy Tetrault*, June 2013, https://www.mccarthy.ca/article_detail.aspx?id=6325

financial assistance for 'meaningful' consultation, it has become common for the Crown to provide capacity funding for consultation.[155]

Highlights

- Both the province and industry proponents currently provide capacity funding in this particular jurisdiction in British Columbia.
- While there is no obligation for proponents to provide capacity funding, the British Columbia Environmental Assessment Office, "encourages Proponents to have early discussions with First Nations to determine what reasonable capacity funding would assist a First Nation."[156]
- In Northern British Columbia, Treaty 8 rests under its jurisdiction. The British Columbia Oil and Gas Commission (BCOGC) acts much like the ACO as a one-stop streamlined regulatory agency for all Treaty 8 activities. The BCOGC, much like the planned ACLA, collects fees for applications and places levies on proponents undertaking oil and gas activities in their jurisdiction.[157]
- Currently, the BCOGC has entered into a number of agreements with various Treaty 8 First Nations. In these agreements the BCOGC has agreements that they will provide payments to First Nations for consultation facilitation.
- Additionally, the agreements restrict First Nations from acquiring payment from proponents, which includes, "any fees, levies, compensation or other charges for the review of Applications".[158]
- These funding agreements are made under confidential appendix sections.[159]

British Columbia finds itself in a unique situation where it has the obligations of numbered treaties and non-negotiated Aboriginal lands. While literature was difficult to find on the sufficiency of funding in British Columbia, the majority of information pointed to a similar shortfall in funding, much like that in Alberta and Saskatchewan. Although British Columbia has innovative policies in place to address its unique situation, capacity is still an issue, which is why they receive three stars.

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[155] *Halfway River,* para. 146.

[156] Government of British Columbia, "Guide to Involving Proponents When Consultation First Nations,"

[157] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation,"* p. 58

[158] Ibid.

[159] See BC Oil & Gas Commission, "Consultation Process Agreements", online: https://www.bcogc.ca/first-nations/consultation-process-agreements

7.6.3 Saskatchewan ★★★

Saskatchewan, like its neighbours, recognizes that consultation funding to provide First Nations equal footing is important to meaningful consultation.[160]

Highlights

- Saskatchewan has developed a consultation funding initiative. The Ministry of First Nations and Metis Relations administer this fund.
- First Nations are eligible for access to this fund where the Crown has determined the duty to consult exists.
- Consultation capacity funding is a major step in the right direction, but there are still considerable gaps in Saskatchewan. Currently, the provincial First Nations and Métis Consultation Participation Fund (FNMCPF) falls short of providing sufficient funding.[161]
- Aboriginal groups have been seeking additional funding from industry on top of what the provincial FNMCPF provides.

While the FNMCPF provides valuable funding, it is not enough to cover the costs of consultation. As a consequence, this forces First Nations to seek additional funding from industry.[162] Furthermore, there is no strategy beyond simply providing monetary assistance for consultation capacity. Providing direction and becoming a partner in not only providing monetary assistance, but co-developing long-term capacity, would be an ideal scenario. It is for these reasons that Saskatchewan receives a rating of three starts, the same score as Alberta and B.C.

7.7 Comprehensiveness

Aboriginal consultation can be evoked in a variety of ways such as legislation, strategic decision-making, and resource development on or even adjacent to Aboriginal traditional lands. Each jurisdiction has slight variations on the comprehensiveness of their consultation scope. While some jurisdictions include a wide scope to the duty to consult, others provide a more limited scope in which the duty to consult is applied. This criterion will analyse what aspects of consultation each jurisdiction applies to the duty and how 'comprehensive' the policies are.

7.7.1 Alberta ★★

Alberta, like other jurisdictions in Canada, has attempted to develop a comprehensive and balanced approach to Aboriginal consultation. While it includes the regular aspects of Aboriginal consultation, there are a few issues that remain for the category 'Comprehensiveness'.

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[160] Saskatchewan, "First Nation and Métis Consultation Policy Framework," p. 9
[161] Saskatchewan Investment and Growth Committee/Environment Committee, "*Duty to Consult*," Saskatchewan Chamber of Commerce, p 3
[162] Ibid.

Highlights

- Alberta currently does not perform consultation at the stage of the issuance of mineral leases and licences.[163]
- Failure to consult on strategic initiatives such as Alberta's Land Use Framework (LUF) and Lower Athabasca Regional Plan (LARP).[164]
- While cumulative impacts are something that Alberta may consult on, there has been a failure to include the cumulative impacts of projects.
- Alberta does not require consultation on legislation that directly impacts Aboriginals.

There are many aspects in which Alberta could significantly improve its consultation policy, such as the consultation at the stage of the issuance of mineral leases and licences. There are also examples of failed comprehensiveness, in particular through the LUF and LARP initiatives where there was little to no consultation, even with obvious directl impacts.[165] Alberta has room to improve on the comprehensiveness criterion, which is why it receives a two star rating.

7.7.2 British Columbia★★★★

British Columbia has one of the widest and most inclusive Aboriginal consultation approaches. British Columbia's approach to comprehensiveness could partially be attributed to its unique circumstance compared to its neighbours, being covered by both Treaty Lands and non-Treaty Lands.

Highlights

- Consultation on strategic decision making, such as land use planning, are clearly laid out.
- Consultation includes consultation on cumulative impacts and, in particular, cumulative impacts of projects.
- Currently performs consultation at the stage of the issuance of mineral leases and licences.

British Columbia's consultation approach reflects a very in-depth and comprehensive approach. They have applied many advanced initiatives such as commencing consultation earlier at the leasing phase and included all aspects of consultation in strategic planning and cumulative impacts. By having a more complete comprehensive consultation policy, British Columbia receives a four star rating.

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[163] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 29-30

[164] Five of the First Nations whose reserves and traditional lands are located within the Lower Athabasca Region filed requests for review of the LARP with the government; Alberta Treaty Chiefs Position Paper Position Paper (2010), Appendix 3.5. Alberta was criticized for ultimately ignoring the First Nations' input in formulating LARP. LARP was referenced in the Dover/Brion decision with negative consequences for the Fort McKay First Nation

[165] Ibid

7.7.3 Saskatchewan ★★★

Saskatchewan takes an approach that resembles a similar stance to Alberta in the area of comprehensiveness.

Highlights

- Like Alberta, Saskatchewan currently does not perform consultation at the stage of the issuance of mineral leases and licences.[166]
- There is no inclusion of cumulative effect planning of projects in the policy. The government's policy states that there will be no consultation retroactively to any decisions or actions it has made in the past.[167]
- Saskatchewan allows for consultation on legislation, which may include creating or mending a price of legislation, regulation, policy, or strategic plan[168]

Saskatchewan's approach to consultation is slightly better than Alberta's. For the most part, Saskatchewan is a close twin to Alberta, but where the province stands out is through applying consultation to legislation, regulation, policy, and strategic planning. It is through this much clearer addition to the application of consultation that Saskatchewan scores one star higher than Alberta, with three stars.

7.8 Summary of Rankings

These consultation criteria rankings have hopefully provided insight into the different aspects of the Western Canadian approaches to consultation. It should be clear that these rankings are not intended to be scientific. Rather, the rankings exist in order to stimulate further insight into key elements of each of the three provincial approaches. Each province faces key trade-offs when creating their consultation policies, for example, between providing more flexibility or strict adherence to timeliness. These key trade-offs have led to the unique consultation policies that are active today.

However, establishing which policy has the best combination of attributes, is a much more complicated question. For instance, Alberta's policy might be more favourable to industry, but for First Nations it leaves much to be desired. In order to demonstrate how the concept of the 'best' consultation policy might change based on perspective, this paper has provided the overall ranking summary, followed by hypothetical perspectives such as industry and First Nations. In the end, deciding what province houses the best policy is highly influenced by preference and weighting, over particular categories.

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[166] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 30

[167] Saskatchewan, "First Nation and Métis Consultation Policy Framework," p. 6

[168] Saskatchewan, "First Nation and Métis Consultation Policy Framework," p. 5

7.8.1 Overall Ranking Summary

Jurisdiction	Certainty in Timeliness	Process Flexibility	Transparency	Fairness and Cooperative Nature	Ease of Access	Capacity Funding	Comprehen-siveness	Total
Alberta	"5/6"	"2/6"	"3/6"	"2/6"	"5/6"	"3/6"	"2/6"	"22/42"
British Columbia	"3/6"	"5/6"	"4/6"	"4/6"	"4/6"	"3/6"	"4/6"	"27/42"
Saskatchewan	"4/6"	"3/6"	"3/6"	"2/6"	"3/6"	"3/6"	"3/6"	"21/42"

Figure 4 Provincial Consultation Policies Ranking Overall Summary

While these rankings indicate that British Columbia has particular aspects of consultation that might be of interest for further study, these rankings can vary depending on a particular perspective. Below are some examples of possible 'perspectives' that may alter which consultation policy might be the most preferable.

7.8.2 Industry Perspective

Jurisdiction	Certainty in Timeliness	Transparency	Ease of Access	Capacity Funding	Total
Alberta	"5/6"	"3/6"	"5/6"	"3/6"	"16/24"
British Columbia	"3/6"	"4/6"	"4/6"	"3/6"	"14/24"
Saskatchewan	"4/6"	"3/6"	"3/6"	"3/6"	"13/24"

Figure 5 Hypothetical Industry Perspective Consultation Policy Ranking

When the perspective of a hypothetical industry proponent is taken into consideration, it can drastically change what is considered the best approach to consultation. For instance an industry proponent might place more importance on certainty in timeliness, transparency, ease of access, and capacity funding. This particular proponent's weighting of the categories can alter the final total score. Where British Columbia was the top policy in the overall ranking, when different preferences are added, Alberta comes forward as the 'best' policy in a hypothetical 'Industry Perspective'.

7.8.3 First Nation Perspective

Jurisdiction	Process Flexibility	Transparency	Fairness and Cooperative Nature	Ease of Access	Capacity Funding	Comprehen-siveness	Total
Alberta	"2/6"	"3/6"	"2/6"	"5/6"	"3/6"	"2/6"	"17/36"
British Columbia	"5/6"	"4/6"	"4/6"	"4/6"	"3/6"	"4/6"	"24/36"
Saskatchewan	"3/6"	"3/6"	"2/6"	"3/6"	"3/6"	"3/6"	"17/36"

Figure 6 Hypothetical First Nations Consultation Policy Ranking

When the perspective of First Nations is taken into account, the result once again is subject to change. Hypothetically, a First Nation group may value different criteria than an industry proponent. A hypothetical First Nations might value flexibility, comprehensiveness, and cooperative nature among others. This time, the result would favour British Columbia as a front-runner, with Alberta and Saskatchewan following its lead.

7.8.4 Ranking Conclusion

The weighting or importance placed on particular criteria can influence what province has the 'better' approach to consultation. These rankings have the purpose of evoking discussion and inspiring further research into bettering Aboriginal consultation policies.

8 Where does Alberta Go From Here?

The previous analysis in Section 7, laid out the subtle but important differences between the western Canadian provincial approaches to consultation. While it is important to note that these rankings are not scientific, they are a purely subjective interpretation of current policies in place. These rankings are meant to invoke questions through comparisons and spark further analysis into important aspects of consultation. What might work in one province might prove to be a failed policy in another jurisdiction. There is no 'silver-bullet solution' in the context of improving a provincial approach to consultation. The following sections lay out potential policy suggestions and are merely proposals for further analysis and scrutiny to determine feasibility.

8.1 Cost Savings and Certainty

A particular jurisdiction that has a consultation strategy that might be of interest to Alberta is British Columbia's approach to the leasing and licencing of rights to Crown minerals. Alberta currently has no policy in place that proposes the consultation prior to the disposition of Crown minerals. The leasing and licencing of Crown minerals to a proponent, at its core, is a strategic decision that implies the purchaser's expectations that development will occur. This expectation of development is precisely the reason why in Alberta, Chiefs pointed out that

consultation should occur at the disposition stage rather than after.[169] Conversely, to further prove this point, if there were expectations that development would not occur, the sale would have not been of interest to the bidder. British Columbia is a jurisdiction where consultation occurs prior to the granting of tenure and sale of lands.[170] There are many reasons that both industry and Aboriginal groups could benefit from this earlier consultation initiative. The potential for industry to target areas where First Nations do not object to development benefits all parties. Consultation at the disposition of land stage also provides a much-desired certainty that is constantly sought by many industry proponents. Furthermore, early consultation at the leasing stage facilitates better relationships and partnerships, and furthers the overall goal of reconciliation.

The practical nature of consultation at the disposition stage in Alberta is not an unprecedented concept either. An agreement in Alberta's *Metis Settlement Act*[171] allows for the government to maintain title over mineral interests on Métis Settlements, but grants a co-management agreement in leasing mineral rights. Additionally, other jurisdictions consult at the disposition phase, such as New Brunswick. Lastly, consultation at the leasing stage does not give First Nations uninhibited influence over the process. As noted earlier in this paper, consultation does not mean a veto and all parties are required to consult in good faith. Overall, this initiative could have the possibility to avoid unseen disagreements further in the process, which can cost incredible time and money in project development planning.

8.2 Oversight Tribunal

While the creation of the ACO is a good step to centralizing the decision making process, some scholars see this as a missed opportunity to establish a formal regulatory scheme with an appeal systems for consultation.[172] In *Haida Nation,* the Supreme Court alluded to the idea that a regulatory scheme should be created in order to avoid unproductive recourse through the court system.[173] Currently, it is the same office that conducts consultation that also determines the adequacy of consultation. The ACO, according to opponents, violates fundamental legal norms by being the adjudicator of adequacy, as Reddekopp says, "no person should be a judge in his own case."[174]

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[169] Treaty 8 First Nations of Alberta, "*Treaty 8 Alberta Chiefs' Position Paper on Consultation*," September 2010, http://www.treaty8.ca/documents/FINAL%20TREATY%208%20CONSULTATION%20PAPER%20SENT%20TO%20GOVERNMENT%20ET%20AL.pdf p. 19

[170] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 30

[171] *Metis Settlement Act,* RSA 2000, c M-14 [*MSA*]

[172] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 38

[173] *Haida Nation*, *supra* note 8 at para 51

[174] Neil Reddekopp, "Theory and Practice in the Government of Alberta's Consultation Policy," *Constitutional Forum Constitutionelle*, Volume 22 no.1 2013: p. 53

As it stands, the ACO provides no way to appeal decisions, leaving the only option to go to the Courts.[175] Developing an alternative dispute resolution process in Alberta is a good step towards facilitating better relations with First Nations. If an agreement cannot be reached, a specialized tribunal could be engaged for mediation. This tribunal could consist of representatives from both First Nations and non-First Nations experts. British Columbia is one jurisdiction that is currently exploring this possibility with their *New Relationship Initiatives*, while other jurisdictions have been silent.[176] Furthermore, this concept of an alternative dispute resolution process is consistent with the Court's decisions. In *Haida* and *Mikisew*, the Courts encouraged the balancing of interests and negotiated resolutions. Furthermore, in *Platinex*[177], the Courts stated that parties, rather than enter into litigation, should reach agreements on the issues before them.[178] When consultation is not successful, a specialized tribunal could adjudicate the dispute. Additionally, legislation could empower this tribunal with the authority to order general accommodation, land protections, revenue sharing, and resource or land allocation.[179]

Often these types of processes carry with them the apprehension of a drawn out lengthy process. One method that could be used to address this is to apply reasonable time frames and dictate how substantial concerns may be addressed.[180] Through establishing a framework on how the disputes are carried out, uncertainty can be reduced.

Alberta currently lacks a mechanism to address the current imbalance of power, which is evident in land use planning and referral processes.[181] This reform is consistent with the Supreme Court's suggestion in *Haida*:

> *The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.*[182]

Through establishing this sort of alternate dispute resolution mechanism, Alberta's approach to consultation can establish greater legitimacy.

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[175] David Laidlaw and Monique Passelac-Ross, "Alberta Energy Regulator and the Crown's Duty to Consult and Accommodate," *Canadian Institute of Resources Law University of Calgary Faculty of Law*, February 2014, pg. 15

[176] National Center for First Nations Governance, "Crown Consultation Policies and Practices Across Canada," National Center for First Nations Governance, April 2009, http://fngovernance.org/publication_docs/NCFNG_Crown_Consultation_Practices.pdf, (accessed July 30, 2015), p. 9

[177] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation,* 2006 CanLII 26171 (ON SC)

[178] Ibid. para 98

[179] National Center for First Nations Governance, "Crown Consultation Policies and Practices Across Canada," p. 10

[180] Ibid.

[181] Ibid.

[182] *Haida Nation, supra,* note 12 para. 44.

Alberta currently has existing regulatory schemes with viable appeal systems in place. Appeal mechanisms such as the Environmental Appeal Board, is one that could be modified and applied to assess adequacy of Crown consultation.[183] An appeal process such as this would help impose discipline on the Crown and the ACO and further overall goals of reconciliation.

8.3 Cumulative Impacts of Projects

Although, Alberta's approach to consultation mentions cumulative impacts, there is no mention of cumulative impacts of projects. This is a major shortcoming of Alberta's Policy and Guidelines. Currently, Alberta only takes into consideration project and site-specific effects, not cumulative effects of all projects planned or occurring in a region or territory when consulting.[184] This is a major concern for many First Nations groups in legal challenges, regulatory proceedings, and consultation processes. [185]

Since the inception of Alberta's approach to consultation, it has failed to adequately address the issue and develop criteria and thresholds for assessing the direct and cumulative impacts of resource development.[186]

Consultation based simply on site-specific impacts, fails to capture the essence of the duty to consult. True consultation embodies the potential indirect, derivative impacts, induced, and cumulative impacts of a project or decision.
Courts have also acknowledged the need to assess impacts on treaty rights taking into account indirect, and more widespread cumulative impacts on Aboriginal rights and traditional ways.[187]

It is recommended that Alberta review its current stance on cumulative impacts and consider a proactive policy that includes the cumulative impacts of projects in its current consultation process. Alberta can start this progression by directing consultation on strategic matters, such as the previously mentioned Land Use Frameworks. Currently, Treaty 8 Chiefs have stated that consultation rarely occurs at the strategic planning stage, if ever. Consulting on the cumulative impacts of projects and development ensures not only an inclusive and more comprehensive consultation process, but also fosters a mutually beneficial and trusting relationship.

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[183] Ibid. p. 9
[184] Calgary Chamber of Commerce, "The Consultation Conundrum: Examining Aboriginal Consultation in Alberta," Calgary Chamber of Commerce, March 27, 2015, https://www.calgarychamber.com/policy/projects/consultation-conundrum-examining-aboriginal-consultation-alberta (accessed Sept 1, 2015), p. 7
[185] In *Lameman v Alberta*, 2013 ABCA 148 there were approximately 19,000 authorizations for over 300 companies. According to Beaver Lake Cree Nation these authorizations have cumulatively deprived them of their Treaty No 6 harvesting rights; Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 31
[186] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 31
[187] *Mikisew Cree*, *supra* 44, 47

8.4 Capacity

Consultation capacity is a lingering issue that challenges a strong majority of First Nations. First Nations not only have a capacity issue with financial resources, but they also lack the expertise at their disposal that proponents often possess. This problem risks growing particularly worse as projects and impacts become more complex over time. In one case, the Métis Nation of Saskatchewan incurred a cost of $40,000 through required consultation with the Nuclear Safety Commission over the implications of abandoned uranium mines.[188] Across Canada, many First Nations are involved with hundreds of consultations each year. This places a great burden on their already bottlenecked financial and capacity resources. While capacity plans such as the proposed *Aboriginal Consultation Levy Act* and current funding structure the First Nations Consultation Capacity Investment Program provides a short-term fix for First Nations, it is recommended that a joint strategy with First Nations be created that not only provides capacity funding, but also provides training that may permanently increase independent Aboriginal capacity.

While much of this paper has been devoted to critiquing the provincial approaches to consultation, in order to have effective consultation, First Nations can also play a part in improving the partnership. First Nations all face somewhat similar shortfalls in the face of capacity issues in consultation. One potential solution would be to establish regional offices in order to have an ACO-style one-contact/one-window approach to streamline the interaction. This office could be the point of exchange for information, communication, interaction, and relationship building. This concept is already in action in The Horse Lake First Nation Industry Relations Corporation (HLFN IRC). HLFN's head office, located in Edmonton, preforms many aspects of consultation for First Nations such as:

- "Fee-for-Service Assessment and Consultation Work Plan Development;
- Public Disclosure Input/Review (if applicable);
- Terms of Reference Input/Review (if applicable);
- Application Review;
- EIA Input/Review (including technical expertise, as required);
- Sites & Areas Assessment;
- Coordination of Community Engagement and Participation;
- Issues Report and Resolution; and
- Submission of Letter of Support or Objection."[189]

The HLFN provides these services based on a fee-for-service model. Although further research is needed, regional offices like HLFN provide the potential to bring much needed expertise and capacity to First Nations.

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[188] Newman, "*Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed,"* p. 71

[189] National Centre for First Nations Governance, "Consultation Funding Fact Sheet 5," National Center for First Nations Governance, https://www.fngovernance.org/resources_docs/Consultation_Funding_FactSheet.pdf, pg. 2

8.5 First Nations as True Partners

An issue that cuts to the center of First Nations' displeasure with Alberta's approach to consultation is that they feel their voice has been left out of the formulation of the very processes that is designed to provide remedy to Aboriginal consultation issues.[190] While the implementation of the 2014 Guidelines in Alberta has the potential for positive steps forward, such as the centralization of the ACO, the *Aboriginal Consultation Levy Act*, and establishing timelines in the consultation matrix, almost every band in Alberta has opposed it. This widespread opposition culminated in a joint position paper from Alberta Treaty 8 Chiefs. While the Policy and Guidelines came out in 2013 and 2014, respectively, they were introduced into an environment where many First Nations had already established their own policies and were fostering long-standing relations with proponents.[191] Furthermore, many First Nations now feel the current provincial approach to consultation is being 'dictated' to them and they were not adequate partners in its creation.[192]

Reconciliation is widely acknowledged as the ultimate goal of consultation. At its roots, 'reconciliation' can be defined as *re* ("again") and *consilare* ("make friendly"). *Consilare* can be further broken down into *con* ("with") and *sella* ("seat"). Reconciliation can then literally be defined as, "coming and taking a seat together again, to make friendly."[193] If true reconciliation is to be achieved, the Crown must demonstrate a genuine willingness to balance and engage Aboriginal interests with the interests of industry and the Crown.

9 Conclusion

In 1990, in *R v. Sparrow*[194], the Supreme Court of Canada set the precedent that the Crown has a duty to consult Aboriginal people. The past 26 years have seen the expansion of this principle, as well as the consistent reminder to Federal and provincial actors that their position as fiduciaries compels them to, "address this duty in all Crown decisions that affect the rights of Aboriginal peoples."[195] In *Haida*, Chief Justice McLachlin stated that:

> *"The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof."*[196]

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[190] Calgary Chamber of Commerce, "The Consultation Conundrum: Examining Aboriginal Consultation in Alberta," p. 4

[191] Ibid.

[192] Laidlaw and Passelac-Ross, "*Alberta First Nations Consultation and Accommodation Handbook,"* p. 22

[193] Lorraine Land, "Creating the Perfect Storm for Conflicts Over Aboriginal Rights." *The Commons Institute,* January 14, 2014, p. 24

[194] *R. v. Sparrow*, [1990] 1 S.C.R. 1075

[195] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation,* para 94

[196] *Haida Nation,* Introduction para. 4

It is the foundation of the duty in the 'Crown's Honour', as well as the goal of reconciliation, that asserts, "the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[197]

Since the creation of the modern duty to consult in *Haida Nation*, provinces have scrambled to respond to the Supreme Court's direction. This has culminated in the creation of consultation policies being created in almost every Canadian jurisdiction. These policies are designed to provide a framework to guide the consultation process in a consistent and timely manner. While the policies follow a similar framework, which is meant to address court precedents, they have many distinctive aspects to them.

The goal of this paper was to analyse the western Canadian approaches to consultation and examine their unique characteristics in order to find possible best practices. The analysis showed just how different each province's interpretation of the Supreme Court decision can be. Alberta has been the focus of the latter half of this paper and over the last few years, it has seen many significant and controversial developments. No government in Canada has gone as far as Alberta has in centralizing, standardizing, and controlling the process of consultation.[198] However, this has made many First Nations in Alberta distrustful and concerned that their interests and rights are being ignored.

Whatever the case may be, Alberta, like British Columbia and Saskatchewan, cannot afford to have tumultuous relations with First Nations. With global demand for energy rising and the recent distortion of supply from various world actors, Canada's ability to service this demand is diminishing. Canada must expand its capacity, in particular through pipelines, in order to gain access to markets. Simply put, this comes down to effective and meaningful relations with First Nations. A true and meaningful tripartite relationship, between the Crown, First Nations, and Industry, is of fundamental importance to the continuing prosperity of Canada's provinces and subsequently the country.

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[197] *Haida Nation,* Introduction para. 4

[198] Calgary Chamber of Commerce, "The Consultation Conundrum: Examining Aboriginal Consultation in Alberta," p. 1

Bibliography

Aboriginal Consultation Levy Act, SA 2013, c A-1.2.

Alberta, Government of. "*Aboriginal Consultation Office Q&As.*" Edmonton: Ministry of Aboriginal Relations. http://www.aboriginal.alberta.ca/573.cfm (accessed Sept 2, 2015)

Alberta, Government of. "Aboriginal Consultation Office." Edmonton: Ministry of Aboriginal Relations. http://www.aboriginal.alberta.ca/1.cfm (accessed July 25, 2015).

Alberta, Government of. "Aboriginal, First Nations Consultation Capacity Investment Program." Edmonton: Ministry of Aboriginal Relations. http://www.aboriginal.alberta.ca/documents/FNCCIP-Overview.pdf?0.5786798184271902 (accessed July 29, 2015).

Alberta, Government of. "Building Capacity for Consultation." Edmonton: Ministry of Aboriginal Relations. http://www.aboriginal.alberta.ca/581.cfm (accessed July 12, 2015).

Alberta, Government of. "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management." Edmonton: Ministry of Aboriginal Relations. Last Modified July 28, 2014. http://www.aboriginal.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf (accessed July 12, 2014).

Annibale, Jason and Amanda Klein, "Aboriginal Treaties are not "Complete Codes," Aboriginal Law Bulletin McMillian LLP, December 2010, http://www.mcmillan.ca/aboriginal-treaties-are-not-complete-codes--Supreme-Court-confirms-duty-to-consult-independent-of-treaty-obligations-part-II-of-II. (accessed July 30, 2015).

Axmann, Stephanie and Thomas Isaac. "Alberta's Aboriginal Consultation Levy on Industry." *McCarthy Tetrault*. June 2013, https://www.mccarthy.ca/article_detail.aspx?id=6325 (accessed September 3, 2015).

Beckman v. Little Salmon/Carmacks First Nation, [2010] 3 SCR 103

British Columbia, Government of. "About Us." British Columbia Oil and Gas Commission. https://www.bcogc.ca/about-us. (accessed September 3, 2015).

British Columbia, Government of. "Consultation Process Agreements." British Columbia Oil and Gas Commission. 2015. https://www.bcogc.ca/first-nations/consultation-process-agreements (accessed July 25, 2015).

British Columbia, Government of. "Updated Procedures For Meeting Legal Obligations When Consulting First Nations." Ministry of Aboriginal Relations and Reconciliation. Victoria BC. Last Modified May 2010. http://www2.gov.bc.ca/assets/gov/business/natural-resource-industries/consulting-with-first-nations/first-nations/legal_obligations_when_consulting_with_first_nations.pdf (accessed July 12, 2015).

Calgary Chamber of Commerce, "Examining Effective Aboriginal Consultation." Calgary Chamber of Commerce. (May 29th 2015.). https://www.calgarychamber.com/insight/resources-publications (accessed July 21, 2014).

Calgary Chamber of Commerce. "The Consultation Conundrum: Examining Aboriginal Consultation in Alberta." Calgary Chamber of Commerce. March 27, 2015. https://www.calgarychamber.com/policy/projects/consultation-conundrum-examining-aboriginal-consultation-alberta (accessed Sept 1, 2015).

Canada, Government of. "Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult." Ottawa: Aboriginal Affairs and Northern Development Canada. http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf (accessed July 30, 2015).

Canadian Press. "Alberta backs off consultation proposals after pushback from First Nations." *CTV News* (9 January 2013). http://www.ctvnews.ca/canada/alberta-backs-off-consultation-proposals-after-pushback-from-first-nations-1.1107373. (accessed September 3, 2015)

Coates, Ken and Brian Crowley. "New Beginnings: How Canada's Natural Resource Wealth Could Re-Shape Relations With Aboriginal Peoples." Ottawa: Macdonald-Laurier Institute. May 2013

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

Council, Carrier Sekani Tribal, and First Nations Technology Council." First Nations Land Referrals Forum: Final Report." Prince George, BC, 2007.

Delgamuukw v. British Columbia, [1997] 3 SCR 1010, 1997

Driedzic, Adam. "Industry and government are slowly defining the duty to consult and accommodate First Nations." Alberta Oil. Last Modified June 10, 2015. http://www.albertaoilmagazine.com/2010/04/industry-and-government-are-slowly-defining-the-duty-to-consult-and-accommodate-first-nations/

Environmental Assessment Office, "Guide to Involving Proponents when Consulting First Nations in the Environmental Assessment Process," Government of British Columbia, December 2013, http://www.eao.gov.bc.ca/pdf/EAO_Proponent_Guide_Dec2013.pdf

Globe and Mail. "Alberta Sets New Rules on Industry." *Globe and Mail*. August 19, 2013. http://www.theglobeandmail.com/news/national/alberta-sets-new-rules-on-industry-aboriginal-consultation/article13856983/

Guerin v. The Queen, [1984] 2 SCR 335, 1984

Haida Nation v. British Columbia (Minister of Forests) 2004 SCC 73, [2004] 3 SCR 511

Halfway River First Nation v. British Columbia (Ministry of Forests), 1999 BCCA 470

Hogg, Peter, "The Constitutional Basis of Aboriginal Rights," Aboriginal Law Since Delgamuukw, edited by Maria Morellato Ontario, 3-16. Aurora, Ont: Canadian Law Book, 2009

Isaac, Thomas and Anthony Knox. "The Crown's Duty to Consult Aboriginal Peoples." 41 Alta. L. Rev. 49. 85 (2003): 49-77

Isaac, Thomas and Maureen Killoran. "Risks and Risk Management in Project and Resource Development." last modified January 2014. https://www.osler.com/en/resources/governance/2014/capital-markets-report/risks-and-risk-management-in-project-and-resource

Isaac, Thomas.: Aboriginal Law: Commentary and Analysis. 4th ed. Saskatoon, Sk: Purich Publishing, 2012.

Ka'a'Gee Tu; Kwicksutaineuk Ah-Kwa-Mish First Nation v. Canada (Attorney General), 2012 FC 517

Knox, Anthony and Thomas Isaac. "Canadian Aboriginal Law: Creating Certainty in Resource Development." *University of New Brunswick Law Journal,* 53 (2004)

Laidlaw, David, and Monique Passelac-Ross. "*Alberta Energy Regulator and the Crown's Duty to Consult and Accommodate."* Canadian Institute of Resources Law. Calgary: University of Calgary, February 27, 2014

Laidlaw, David, and Monique Passelac-Ross. "Alberta First Nations Consultation and Accommodation Handbook." Calgary: Canadian Institute of Resources Law. 2014.

Lameman v Alberta, 2013 ABCA 148

Land, Lorraine. "Creating the Perfect Storm for Conflicts Over Aboriginal Rights: Critical New Developments in the Law of Aboriginal Consultation." *The Commons Institute*. January 2014.

Mansell, Robert L., and Jeffrey R. Church. "Traditional and Incentive Regulation: Applications to Natural Gas Pipelines in Canada." Calgary: University of Calgary Press, 1995.

Métis Settlement Act. RSA 2000, c M-14 [MSA]

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 S.CC.R.388

National Center for First Nations Governance. "*Consultation Funding Fact Sheet*." National Center for First Nations Governance. (N.D.). www.fngovernance.org/resources_docs/Consultation_Funding_FactSheet.pdf (accessed July 25, 2015).

National Center for First Nations Governance. "*Crown Consultation Policies and Practices Across Canada,*' National Center for First Nations Governance, (April 2009). http://fngovernance.org/publication_docs/NCFNG_Crown_Consultation_Practices.pdf, (accessed July 30, 2015),

Newman Dwight G. "The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector." Macdonald-Laurier Institute. May 2014

Newman, Dwight G. Revisiting the Duty to Consult Aboriginal Peoples. Revised Edition ed. Saskatoon, SK: Purich Publishing, 2014.

O'Callaghan, Kevin and Katey Grist, "BC Court of Appeal Reinforces the Reciprocal Duty on First Nations to Consult." *Aboriginal Law Bulletin* (Vancouver: Fasken Martineau, 2007).

Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation, 2006 CanLII 26171 (ON SC)

R v. Douglas et. Al, BCCA 265(2007)

R. v. Sparrow, [1990] 1 SCR 1075, 1990

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, [2010] 2 SCR 650

Saskatchewan Chamber of Commerce. "Duty to Consult Submitted By: Investment and Growth Committee / Environment Committee." Saskatchewan Chamber

of Commerce. (N.D.). http://www.saskchamber.com/files/File/Policy/2011%20Policy/Duty%20to%20Consult.pdf (accessed July 22, 2015).

Saskatchewan, Government of. "The First Nation and Métis Consultation Policy Framework." Ministry of First Nations and Métis Relations. Regina SK. Last modified June 2010. https://www.saskatchewan.ca/~/media/files/government%20relations/first%20nations/consultation%20policy%20framework.pdf (accessed July 12, 2014).

Simpson, Robert. "A social license to operate is a critical success factor for resource development." PR Associates, November 29, 2013, Accessed June 10, 2015, http://www.prassociates.com/blog/2013/a-social-license-to-operate-is-a-critical-success-factor-for-resource-development

Slattery, Brian.: The Constitutional Guarantee of Aboriginal and Treaty Rights. Queen's Law Journal. 8, no. 1-2 (1983): 232 to 273.

Stephanie Axmann and Thomas Isaac, "Alberta's Aboriginal Consultation Levy on Industry," McCarthy Tetrault, June 2013.

Taku River Tlingit First Nation v British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 SCR 550

Treaty 8 First Nations of Alberta. "Treaty 8 Alberta Chiefs' Position Paper on Consultation." September 2010. http://www.treaty8.ca/documents/FINAL%20TREATY%208%20CONSULTATION%20PAPER%20SENT%20TO%20GOVERNMENT%20ET%20AL.pdf. (accessed September 3, 2015)

UN General Assembly. "United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly." October 2, 2007, A/RES/61/295. http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed June 5, 2015).

Webber, Bob. "Alberta Chiefs Boycott Consultation Meetings with Province Over Development." *Globe and Mail*, Thursday, Aug. 28 2014, http://www.theglobeandmail.com/news/national/alberta-chiefs-boycott-consultation-meetings-with-province-over-development/article20268781/

West Moberly First Nations v. British Columbia (Chief Inspector of Mines), BCSC 359(2010).

Yates, Brian and Celesa Horvath, Pacific Energy Summit, "Social License to Operate: How to Get It, and How to Keep It (Summit Working Paper 2013)." http://www.nbr.org/downloads/pdfs/eta/PES_2013_summitpaper_Yates_Horvath.pdf (accessed June 10, 2015)