Reconciling the Irreconcilable: Major Project Development in an Era of Evolving Section 35 Jurisprudence*

Bernard J. Roth**

I. PART 1: INTRODUCTION

Major project development in Canada has been addressing growing challenges over the past 30 or more years. Increasing societal concern over the environment has resulted in stringent environmental assessment regimes which can take years and hundreds of millions of dollars to navigate. These environmental assessment requirements have been accompanied by regulatory requirements that involve public input and participation from project conception and design through the environmental assessment and regulatory approvals stage. More recently, the idea has arisen that regulatory approvals are not sufficient to allow major project development to proceed. Beyond the legal requirements for environmental assessments and regulatory approvals issued by governments, boards and agencies, major project proponents must now obtain what has become known as social licence.[1]

---

* The title for this article was inspired by an advisory panel report to the Council of the Federation, titled "Reconciling the Irreconcilable: Addressing Canada's Fiscal Imbalance", submitted to the Honourable Ralph Klein, Chair of the Council of the Federation under cover letter dated March 31, 2006. The issues that the report grapples with regarding the federal/provincial fiscal imbalance are very similar to the imbalance that exists between Aboriginal and non-Aboriginal societies that need to be addressed through reconciliation. Section 35 has also significantly increased the imbalance by disproportionately placing reconciliation obligations on the Provinces, while at the same time placing an encumbrance on Provincial crown land and related resources.

** Partner in the Calgary office of Dentons Canada LLP and Co-Leader of the Dentons Aboriginal Law Practice Group. The views expressed in this article are those of Mr. Roth and do not reflect the views of either Dentons or any of its clients.

1 Social licence is an elusive concept. There is no way of determining how or when social licence is achieved. It is a matter of assessing ever-changing public opinion assessed by the media

Added to these challenges has been a slow evolution of jurisprudence interpreting and applying section 35 of the *Constitution Act, 1982*[2] which "recognized and affirmed" aboriginal and treaty rights in Canada. The result of this jurisprudence has, for all practical purposes, made proponents of major projects central players in a process, the ultimate objective of which "is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."[3] Proponents have had to expand their capabilities beyond project engineering and have had to take up the far more abstract and difficult job of contributing to the resolution of complex social issues.

Part 2 of this article defines major projects and provides a general description of the process for their development. Part 3 goes on to discuss the importance of certainty of title and predictability in governance in the development of major projects. Part 4 of the article provides an analysis of section 35 jurisprudence and the effects it has had on certainty of title and governance. Part 5 then provides some suggestions as to how section 35 jurisprudence might continue to evolve to resolve title and governance uncertainty, while at the same time advancing the ultimate objective of reconciliation.

II. PART 2: MAJOR PROJECTS AND THE PROCESS FOR THEIR DEVELOPMENT

The construction, operation and reclamation of major projects have the potential for significant environmental, social (including cultural) and economic impacts, both positive and negative. Environmental assessment legislation has made major projects relatively easy to identify by defining what, in the case of the *Canadian Environmental Assessment Act, 2012*[4] for example, constitutes a "designated project". Examples include large mines; dams that flood large areas of land; nuclear power facilities; long linear projects such as roads, rail lines, pipelines and electrical transmission lines; oil upgraders; refineries; large gas processing plants; liquefied natural gas

---

and pollsters who conduct an ongoing referendum on projects without conducting any vote. It has no foundation in democracy and runs contrary to the concept of the Rule of Law: Dwight Newman, "Be Careful What You Wish For: Why Some Versions of 'Social Licence' Are Unlicensed and May Be Anti-Social" (Macdonald-Laurier Institute Commentary, November 2014).

2 *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, at para. 1, [2005] 3 S.C.R. 388 (S.C.C.) [hereinafter "Mikisew"].

4 S.C. 2012, c. 19, s. 52, s. 2(1); *Regulations Designating Physical Activities*, SOR/2012-147.

plants and large marine terminals. These major projects are often carried out on land that constitutes the traditional territories of Aboriginal groups where they have carried on traditional activities.[5] In most of these cases the public lands involved will be subject to Aboriginal and treaty rights which have been either asserted or established. Major projects such as mines or dams may affect a few Aboriginal groups. Linear infrastructure projects, such as pipelines and power transmission lines, can run hundreds or thousands of kilometers and potentially affect dozens of Aboriginal groups.

Regulatory requirements associated with major project development generally require project proponents to involve Aboriginal and non-Aboriginal individuals and groups with interests in the land that could be potentially affected by a project starting in the later stages of project conception and running throughout project design, assuming the project gets beyond the conception phase. For a major project, the conception and design phase is usually measured in years, rather than months. Project design involves considerable expense because a certain amount of preliminary engineering must be done to define the scope of a project so as to be able to predict its potential environmental, social and economic impacts. You need to know how many people it will take to build and operate a project, where they will come from and where they will stay or be housed. You need to know the physical resources required for the project, such as water and energy used. You need to know all of the potential sources of emissions that could be associated with the project and how they will be managed and controlled. Once the preliminary design work is complete, the environmental assessment process begins. Massive amounts of environmental, social and economic data must be obtained and analyzed. Specific to Aboriginal groups, data and information regarding traditional land use and traditional environmental law knowledge must be obtained. To be most effective, this requires cooperation and participation of Aboriginal groups. It takes multiple seasons of field work to have an understanding of

[5] While much of the resource-rich land in Canada is subject to claims of Aboriginal rights or title, much of the rest of the Canadian landscape is covered by historic Treaties under which rights were surrendered in exchange for defined Treaty rights on defined tracts of land. There are now 3,377,826 hectares of land area registered as reserve land in the Indian Lands Registry System and an additional 159,511 hectares of reserve land currently operating under the First Nations Land Management regime: see Anthony Duggan, Jacob S. Ziegel & Jassmin Grigs, "Reflections on the Maturing of Resource law in Canada 1970-2010" (2011) 50: 525 Can. Bus. L.J. 1. In recent years, the Supreme Court of Canada has broadened Aboriginal title rights by allowing Aboriginal groups to claim title and rights to small areas outside of formal treaty areas: *Tsilhqot'in Nation v. British Columbia*, [2014] S.C.J. No. 44, at para. 7, [2014] 2 S.C.R. 257 (S.C.C.).

base-line conditions of a project area so impacts can be predicted. Once the scope of the project and environmental assessment are defined, and the necessary information to complete the environmental assessment is obtained, the process of completing the environmental assessment to support regulatory applications can begin.

Both provincial and federal environmental assessments and regulatory requirements are often applied to major projects. Although progress has been made toward harmonizing these different processes in order to avoid duplication, the time and costs associated with the environmental assessment and regulatory approvals process is long and expensive. To get to the point of a regulatory decision on a project often takes a decade or more and requires the commitment of capital measured in the tens to hundreds of millions of dollars. Once regulatory approvals are obtained there are opportunities for project opponents to challenge these approvals in the courts. Although judicial review and appeals of regulatory decisions are designed to be expeditious, they commonly take one to two years to complete and potentially longer if a case attracts the interest of the Supreme Court of Canada. In the event that errors are found by the courts, they can often be remedied, but again fixing errors identified by the courts takes more time and money.

Delay associated with major project development often risks proponents missing market opportunities. Commodity prices can fluctuate and international competitors are often not encumbered by the project development process described above and often are in a position to satisfy market needs before Canadian project proponents can get their projects approved and built.[6]

III. PART 3: THE NEED FOR CERTAINTY IN TITLE AND TRANSPARENCY IN GOVERNANCE

Historically Canada has held a competitive advantage relative to its global rivals in terms of providing project developers with certainty of title and stability in governance. These are extremely important factors in the development of major projects. Title and governance uncertainty create a significant impediment to major project development. For example, the

[6] Two attempts at building the MacKenzie Valley Gas Pipeline and recent attempts to build multiple LNG projects on British Columbia's west coast have arguably been unable to satisfy environmental assessment, Aboriginal consultation and other regulatory requirements prior to the market either deferring or eliminating the need for these projects, after the investment of hundreds of millions of dollars in project development capital.

development of coalbed methane resources in Alberta and British Columbia was stalled for a number of years by uncertainty as to whether coal mineral owners or petroleum and natural gas lessees had the right to produce coal-bed methane. Judicial determination of this ownership issue was delayed because the owners of coal rights, who were generally thought to have a weaker claim to the resource, found it was in their interest to use ownership uncertainty to negotiate settlements on a case-by-case basis, rather than litigating the issue to a final conclusion in the courts.[7] The uncertainty delayed development of a valuable resource in a high gas price environment. British Columbia and Alberta intervened with legislation and resolved the ownership issue in favour of the petroleum and natural gas lessees, rather than awaiting the results of litigation.[8] In the absence of constitutional protection of property rights, a legislative solution was possible.

The resolution of ownership of oil and gas rights in Canada's offshore was not as easily resolved. Unlike private property rights, provincial ownership of resources is constitutionally entrenched, making judicial determination of ownership, absent constitutional amendments, a prerequisite to resource development. As a result of two reference cases, stated by the federal government, Canada was ultimately found to have ownership and jurisdiction over the exploration and development of mineral and natural resources in its offshore areas on both the east and west coasts.[9] Judicial determination of ownership was not, however, enough to enable resource development in the case of Canada's offshore. A political solution was also required in the form of joint offshore legislation that provided a governance regime to facilitate the large investment of private capital needed to develop the oil and gas resources in offshore Newfoundland and Nova Scotia.[10]

Canada's constitutional entrenchment of Aboriginal and treaty rights, through section 35, and the subsequent interpretation and application of these rights by the courts, has created significant uncertainty both as to title and governance that has significantly added to the challenges faced

---

[7] Charles Bois & Sarah Hansen, "Regulatory and Legal Issues Respecting Coalbed Methane Development in British Columbia" (2008) 45:1 Alta. Law Rev. 631; see also Michael Laffin, "Legal Considerations in the Development of Coalbed Methane" (2001) 39:1 Alta. Law Rev. 127.

[8] *Mines and Minerals Act*, R.S.A. 2000, c. M-17, s. 10.1; see also *Coalbed Gas Act*, S.B.C. 2003, c. 18.

[9] *Reference re Ownership of Offshore Mineral Rights (British Columbia)*, [1967] S.C.J. No. 70, [1967] S.C.R. 792 (S.C.C.); see also *Reference re Seabed and subsoil of the continental shelf offshore Newfoundland*, [1984] S.C.J. No. 7, [1984] 1 S.C.R. 86 (S.C.C.).

[10] Natural Resources Canada, *Report of the Public Review Panel on the Government of Canada Moratorium on Offshore Oil and Gas Activities in the Queen Charlotte Region, British Columbia*, by Roland Priddle, Catalogue No. M4-13/2004E (2004), at 11, 56, 69.

by proponents of major projects in Canada. Like coal-bed methane and offshore resources, title and governance certainty is required, but is proving to be far more difficult to achieve.

IV. PART 4: THE EVOLUTION OF SECTION 35 JURISPRUDENCE

The *Constitution Act, 1982* was the result of an extended negotiation process between provincial and federal governments to patriate the Canadian Constitution by giving it a domestic amending formula and to also add *Charter of Rights and Freedoms*.[11] The *Constitution Act, 1982*, with its inclusion of section 35, was made possible by the federal government agreeing to the addition of section 92A, known as the *Resource Amendment*, which was intended to give the provinces greater control over the development of their natural resources.[12] So far, section 92A has not had any discernible effect on provincial powers over development of their resources. Instead of increasing provincial jurisdiction regarding the development of resources, the *Constitution Act, 1982* had quite the opposite effect as a result of section 35 and how that provision has been interpreted and applied by the courts. The provinces could not have been aware that they were agreeing to the constitutional entrenchment of communal property rights over virtually all of their public/crown lands that would materially reduce their control over the development of what they thought to be their natural resources. As the milestones in section 35 jurisprudence demonstrate, the provinces gave up far more in section 35 than they could have ever hoped to achieve through the section 92A resource amendment.

1. Major Project Development and Treatment of Aboriginal and Treaty Rights Prior to Section 35

The case of *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*[13] provides a benchmark for assessing the impact that section 35 has had on provincial jurisdiction over development of natural resources. The case involved the proposed development of a $4 billion oilsands project in Alberta. During the provincial regulatory hearings conducted by Alberta's

---

[11] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[12] Robert D. Cairns, Marsha A. Chandler & Willian D. Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23:2 Osgoode Hall L.J. 253, at 263.

[13] [1981] S.C.J. No. 56, [1981] 1 S.C.R. 699 (S.C.C.) [hereinafter "*Athabasca Tribal*"].

Energy Resources and Conservation Board ("ERCB", a predecessor of the current Alberta Energy Regulator), the Athabasca Tribal Council ("ATC"), representing five First Nations whose traditional territories included the project development site, intervened with the assistance of the federal Department of Indian Affairs and Northern Development supporting the project, but on the condition that the ERCB impose an affirmative action program. The purpose of the affirmative action program was to mitigate the social, cultural and economic impacts that the development of the project would have upon affected Aboriginal groups. The ERCB was sympathetic toward the ATC, but in the face of arguments that such a condition could violate provincial human rights legislation by preferring native employment over non-native employment, the ERCB held that it lacked jurisdiction to impose the requested condition. The ATC pursued appeals to the Supreme Court of Canada, which released its reasons for decision in June of 1981, shortly before the conclusion of the constitutional negotiations behind the *Constitution Act*, *1982* were completed. The Supreme Court of Canada held that the ERCB lacked jurisdiction to impose the requested condition. The Court found that:

> … I take the view, which I have perhaps indicated, that the Board's jurisdiction is governed and controlled by the statutes to which I have referred and in conformity with the purposes for which these statutes were enacted, that jurisdiction is limited to the regulation and control of the development of energy resources and energy in the Province of Alberta. The powers with which the Board is endowed are concerned with the natural resources of the area rather than with the social welfare of its inhabitants, and it would, in my view, require express language to extend the statutory authority so vested in the Board so as to include a program designed to lessen the age-old disadvantages which have plagued the native people since their first contact with civilization as it is known to the great majority of Albertans.
>
> It is however true that the expenditure of four billion dollars in the creation of a new town and a new industry in an area formerly enjoyed exclusively by the native peoples undoubtedly presents new problems for those people and it may well be that some form of legislation could be devised and adopted to meet their needs. No such legislation appears to have been enacted in Alberta and in my opinion it is no compensation for this lack of authority to seek to apply legislation designed for the conservation of energy resources to the amelioration of social inequalities.[14]

[14] *Id.*, at 708. The oilsands project that was the subject of the case did not proceed. Shortly after the ERCB approved it, the federal government introduced its October 1980 budget that

Ten months later, in April of 1982, the *Constitution Act, 1982* was law. A legal basis for the amelioration of the social inequalities acknowledged by the Supreme Court of Canada in the *Athabasca Tribal* case became entrenched in Canada's Constitution. It would, however, take a succession of cases over more than two decades for the Supreme Court of Canada to recognize that section 35 was designed to achieve the legislative gap it identified in *Athabasca Tribal*.

2. The *Grand Council of Crees* Case

The first cases to make it to the Supreme Court of Canada dealing with section 35 were the result of individual Aboriginal people being prosecuted for violating provincial resource management legislation (*e.g.*, hunting, fishing and forestry legislation). The Court began to make findings of constitutionally protected Aboriginal and treaty rights that affected the application of provincial resource management powers.[15] The implications of section 35 on the development of major projects took longer to become apparent.

By 1994, a major project development case involving section 35 issues made it to the Supreme Court of Canada. The main issue in the case was the extent of National Energy Board ("NEB") jurisdiction and the application of federal environmental assessment requirements to upstream hydroelectric generation facilities in Quebec as a result of Hydro Quebec requesting an NEB electricity export licence. In the case of *Quebec (Attorney General) v. Canada (National Energy Board)*[16] the Grand Council of Crees of Quebec challenged a decision of the NEB recommending the issuance of the electricity export licence, arguing that it would have a negative impact on their Aboriginal rights, compelling the NEB to meet the justification test that the Court had established in *R. v. Sparrow*.[17] The provincial government's response was that the electricity export licence would not impact any rights. Rather impacts on rights, to the extent that they would be affected at all, would only result from the construction of the upstream hydroelectric facilities that were not being

included the National Energy Program ("NEP"). Notwithstanding provisions in the NEP that exempted oilsands from some of its provisions, it was perceived by the oil and gas investment community as an example of extreme instability in governance. The NEP was a significant factor behind Alberta's insistence on the inclusion of section 92A in the *Constitution Act, 1982*.

15 See *e.g.*, *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.).

16 [1994] S.C.J. No. 13, [1994] 1 S.C.R. 159 (S.C.C.) [hereinafter "*Grand Council of Crees*"].

17 [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075 (S.C.C.) [hereinafter "*Sparrow*"].

applied for to the NEB or permitted by the NEB. The Court commented on the section 35 argument in *obiter* saying that even if it were assumed that the NEB's decision affected the Aboriginal rights of the appellants and that the NEB had to justify the impacts, by conducting a rigorous, thorough and proper cost-benefit review, the NEB's review process would have met that purpose.[18]

Grand Council of Crees did not foreshadow that section 35 would pose any significant challenge to major project development. To the contrary, the case suggested that justification for infringing Aboriginal rights could be demonstrated through an NEB hearing and public interest determination process.[19]

The case, however, had a materially different impact on proponents of major projects. The Grand Council of Crees had made another argument to the Supreme Court that the Crown's fiduciary duty owed to Aboriginal people arose on making decisions that affected their interests and this duty extended to the NEB as agent of the Crown when exercising powers delegated to it. The Supreme Court rejected this argument finding that the NEB was a quasi-judicial decision-maker and could not owe a fiduciary duty to any party any more so than could the Courts.[20]

The Supreme Court's finding on this point ended up having a significant impact on how the NEB later approached applications in which concerns were raised by Aboriginal groups about impacts on their rights. Instead of following the *obiter* remarks of the Court to the effect that justification of impacts on section 35 rights could be achieved by following the NEB's rigorous court-like process, the NEB issued a Memorandum of Guidance ("MOG") that encouraged project proponents to provide evidence in support of their applications that the Crown had met its section 35 obligations to Aboriginal groups who were potentially

---

[18] The NEB hearing had accorded the Grand Council of Crees a full suite of procedural rights, including testing Hydro Quebec's evidence through cross-examination, submitting its own evidence and making argument. It took 25 years, but without expressly admitting it, the Supreme Court essentially adopted this *obiter* and applied it in a post-*Haida* context in *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, [2017] S.C.J. No. 41, 2017 SCC 41 (S.C.C.).

[19] Shortly following the *Sparrow* decision in 1990, *supra*, note 17, the NEB considered a pipeline application in which allegation of infringement under *Sparrow* was made by an Aboriginal group with treaty rights. The NEB purported to apply *Sparrow*, but did not have to undertake a justification analysis because it could not find evidence that supported any infringement. This is reportedly the only pre-*Haida* case where the NEB attempted to apply the *Sparrow* analysis: see Morris Popowich, "The National Energy Board as Intermediator Between the Crown, Aboriginal Peoples and Industry" (2007) 44 Alta. Law Rev. 837 at 854 [hereinafter "Popowich"].

[20] *Grand Council of Crees*, *supra*, note 16, at 184.

affected by projects.[21] The Guidance created a problem for project proponents because they had no control over whether, how or when Crown consultation was to be undertaken and completed. At this early stage in the development of section 35 consultation jurisprudence, the federal government had not yet developed any structure or departmental accountability to meet its emerging and evolving consultation duties. This created a practical problem for project proponents who were essentially left to deal with Aboriginal groups on their own in the hopes of being able to resolve all of their concerns. While technically not evidence that the Crown had met its consultation obligations, consent or evidence of non-objection given to project proponents was sufficient for the NEB to complete its approvals process.[22]

In addition to the practical problems associated with a project proponents' ability to obtain evidence of sufficiency of Crown consultation to file with the NEB, there was also a problem with the approach from a theoretical perspective. The NEB had the obligation to use its expertise to assess project effects, which included the impacts on the rights and interests of both Aboriginal and non-Aboriginal individuals and groups. Without the NEB assessment of an application and supporting evidence, in many cases the Crown would not have all of the information it may require to meet its consultation obligations prior to the NEB issuing decisions on applications.

3. *Haida*

The use of administrative law processes, including those associated with environmental assessment requirements, to satisfy Crown consultation obligations developed following the Supreme Court of Canada's decision in *Haida Nation v. British Columbia (Minister of Forests)*[23] and the companion case of *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*.[24] Following the release of these decisions, the NEB revoked its MOG.[25]

---

[21] For discussion of this Memorandum of Guidance, see Popowich, *supra*, note 19, at 855-56.

[22] In instances where consent or non-objection could not be obtained, the NEB showed flexibility and continued to process applications without evidence of the Crown having met its consultation obligations: see Popowich, *supra*, note 19, at 856.

[23] [2004] S.C.J. No. 70, [2004] 3 S.C.R. 511 (S.C.C.) [hereinafter "*Haida*"].

[24] [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 (S.C.C.) [hereinafter "*Taku River*"].

[25] The MOG had been in place for just over 3 years before being revoked in August of 2005: see Popowich, *supra*, note 19, at 856. However, its influence lasted long after that as a result of the idea behind it being incorporated into the Crown consultation process established for the

Haida applied section 35 at the claim stage, finding that the honour of the Crown required it to consult and accommodate potential impacts on claimed rights, not yet proven. The duty of the Crown to consult and potentially accommodate was triggered by the contemplation of conduct that the Crown knew or ought to have known might adversely affect claimed rights.[26] The depth of consultation and potential accommodation required was established by a combination of the strength of the claim made and the potential for the contemplated conduct to adversely affect the claimed rights.[27]

Prior to *Haida*, the impacts on claimed rights by major project development was generally determined through interlocutory injunction applications, where the requirements of establishing irreparable harm and the balance of convenience test often resulted in the denial of injunctions to Aboriginal groups.[28] However, where relief was granted, it practically resulted in a requirement of obtaining consent of the Aboriginal group before a project could proceed.[29]

Although *Haida* created a significant new obligation on the Crown to consult and potentially accommodate outside of the context of proven infringements of rights, it also opened the door to satisfying these obligations through the use of regimes administered by impartial decision-makers.[30] *Taku River* was such an example, where British Columbia's environmental assessment process was found by the Supreme Court of Canada to be sufficient to meet the newly-defined Crown duty of consultation and accommodation described in *Haida*.[31] The Supreme Court's creation of a duty to consult and potentially accommodate in a pre-proof context was motivated by its interpretation

---

Mackenzie Valley Gas Project. The consultation process for the project was established between 2002 and early 2004. It created a Crown consultation unit from multiple federal departments tasked with consulting with Aboriginal groups affected by the project and having that unit submit evidence of consultation to the NEB as well as a separate joint review panel that was established to undertake the environmental and socioeconomic assessment for the project. The report of the NEB suggests that the concerns of Aboriginal groups ended up being directly addressed to the NEB through the participation of those groups in the process, rather than through the Crown consultation unit originally envisioned under the MOG.

[26] *Haida*, *supra*, note 23, at para. 35.

[27] *Id.*, at para. 39.

[28] *Id.*, at para. 14.

[29] The Court in *Haida* held that the duty of the Crown to consult and potentially accommodate did not create a consent requirement or give Aboriginal groups a veto over projects. (*Haida*, *supra*, note 23, at para. 48). However, *Haida* did not take away the right of Aboriginal groups to seek injunctive relief: see *Haida*, *id.*, at para. 13 and gain a *de facto* project veto as a result.

[30] *Haida*, *id.*, at para. 44.

[31] *Taku River*, *supra*, note 24.

of section 35 as creating a framework for the encouragement of the just settlement of claims through treaties.[32]

Paradoxically, the practical result of *Haida* has been to discourage the ultimate settlement of claims through treaties. Even before *Haida*, the resolution of outstanding land claims through comprehensive settlements was difficult. The reality is that comprehensive settlements have been continually improving from the perspective of Aboriginal groups who have been able to secure more in terms of land rights and monetary settlements with each successive generation of treaty. There is a reasonable expectation that settlement terms will only continue to improve as time passes creating a disincentive to achieving a comprehensive settlement. Once *Haida* established the concept of consultation and accommodation on a project-by-project basis, with the availability of benefits through accommodation that could previously only be achieved through settlement, there was a path forward to secure benefits in a way that did not require relinquishing any title or rights into the future.

Haida has also created a disincentive on the part of the Crown to negotiate as part of the process of consultation and accommodation. Although the Supreme Court held that the Crown could not legally delegate its duty of consultation and accommodation to third-party project proponents, aside from procedural aspects of consultation such as information exchange,[33] in reality, the Crown has *de facto* delegated its obligation in the case of major project developments. Many project proponents find that in order to get certainty for their projects, they must not only do all the consultation from a procedural perspective, but must go on to meet the accommodation expectations of Aboriginal groups. The Federal Court of Appeal has recently described the law on the duty to consult as "firmly established, but its contours are imprecise, both with respect to the extent of its application and with regard to its variable requirements".[34] Uncertainty is resolved on a case-by-case basis by major project developers agreeing to provide "accommodation" that may or may not relate to the mitigation of their project effects.[35]

---

[32] See *Haida*, *supra*, note 23, at paras. 20, 25, 38.

[33] *Id.*, at para. 53.

[34] *Canada (Governor General in Council) v. Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, [2016] F.C.J. No. 1389, at para. 40, 2016 FCA 311 (F.C.A.).

[35] See Dwight Newman: "The Economic Characteristics of Indigenous Property Rights: A Canadian Case Study", 95 Nebraska Law Rev., 432 at 457-59, recognizing the difficulty uncertainty poses for reconciliation.

This type of private accommodation is provided in order to address a cloud on the title to Crown lands and natural resources that results from Aboriginal rights, whether asserted or proven. Provincial and federal governments have come to rely on project proponents to resolve uncertainty regarding Crown title as a cost of industry. The problem with such reliance is that federal and provincial governments already attempt to extract all available economic rent from projects through the collection of taxes and royalties.[36] This economic rent is established on the assumption of unencumbered title. The economic benefits associated with major projects largely flow to provincial and federal governments.[37] Project proponents often treat the cost of clearing section 35 title defects in a similar way to mitigating environmental consequences of their operations, which is viable as long as the expectation of Aboriginal groups are met by mitigation of project impacts. However, accommodation expectations often extend further and seek compensation associated with resource ownership, rather than the mitigation of effects on the exercise of Aboriginal rights. Some major projects may be able to take on incremental economic rent that has not been fully captured by provincial and federal governments, but this is not true for most projects. Further, major project proponents can make commitments during the regulatory approvals phase of project development and leave the assessment of economic feasibility to final investment decisions that are made following regulatory approval and detailed engineering. Major projects can get approved but never proceed. The fact that they don't proceed does not, however, affect unrealistic expectations regarding the total economic rent that can be extracted by governments and Aboriginal groups before rendering projects uneconomic.

---

[36] Natural resources, such as oil and gas, are generally publicly owned, but developed using private capital that is used to acquire some form of tenure through the payment of bonuses, royalties and taxes. Governments try to ensure that they extract all possible economic rent from the private development of their natural resources, leaving private developers with the minimum return on the capital needed to attract the investment necessary to develop and produce the natural resources. Any return in excess of this is economic rent which governments look to capture through adjustments to royalties and taxes: see *infra*, note 45, at 344-47.

[37] Even though provincial governments are the resource owners, higher levels of federal taxation often result in the federal government obtaining as much or more revenue from major project development than provincial governments.

4. *Mikisew Cree*

The Supreme Court of Canada's decision in *Mikisew Cree First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*[38] extended the uncertainty created by *Haida* onto what was previously thought to be settled lands subject to treaties that provided for the "taking up of public lands". *Mikisew* cast a significant cloud over the title of provincial Crown lands that were subject to historical treaties, bringing the provinces to the realization that they had given up far more control over the development of their natural resources through the introduction of section 35, than they gained through the introduction of section 92A of the *Constitution Act, 1982*.

In the decade since *Mikisew*, provincial governments have disproportionately delegated responsibility for consultation and accommodation to individual project proponents, just as they had done for unsettled land claims, in the hope that project proponents would be able to resolve their new defect in title. They have not, however, adjusted the economic rent they require project proponents to pay through royalties and taxes. Rather, they have treated dealing with their defect in title as just another cost of doing business.

5. The *Tsilhqot'in* Case

The case of *Tsilhqot'in Nation v. British Columbia*,[39] made the first declaration of Aboriginal title in Canada over a large area of the interior of British Columbia. The declaration was unexpected. It had previously been thought that Aboriginal title required relatively permanent and exclusive occupation of lands. In making its declaration, the Supreme Court of Canada cast two significant clouds over the newly recognized title. First, it confirmed that Aboriginal title lands could not be used in a manner inconsistent "with the communal and ongoing nature of the group's attachment to the land".[40] The second cloud related to various aspects of governance rights both as they relate to the Aboriginal group with title and the provincial government's legislative jurisdiction. For example, the case left open the question how a project developer obtains a secure form of tenure to lands subject to Aboriginal title. What

---

38 *Mikisew*, *supra*, note 3, at para. 1.

39 [2014] S.C.J. No. 44, [2014] 2 S.C.R. 257 (S.C.C.) [hereinafter "*Tsilhqot'in*"].

40 *Tsilhqot'in*, *id.*, at para. 67.

regulatory approvals have to be obtained prior to development? Do provincial and federal environmental assessment requirements apply to the development of projects on lands subject to Aboriginal title?

In addition to these two clouds the Court placed over the newly declared title, it also darkened the existing cloud that hangs over areas still subject to title claims. It warned that if the "Crown" were to begin a project without consent of an Aboriginal group claiming title prior to the establishment of title, the Crown may have to "cancel" the project upon establishment of title. Further, legislation validly enacted prior to the establishment of title may be rendered inapplicable to titled lands. Both of these risks could be triggered to the extent that the Aboriginal title was subsequently found to be unjustly infringed by project development or the application of previously valid legislation.[41] Unfortunately, the Court appears to have been intentionally vague in articulating the risk.

Prior to *Tsilhqot'in*, it would have been reasonable to advise governments and project proponents that satisfaction of the *Haida* duty of honour through reasonable consultation and accommodation would have preserved rights and protected investments made prior to a declaration of Aboriginal title. The intention of *Haida* was to ensure preservation of the positions of the parties. For example, financial compensation may have to be paid by the Crown or alternate lands may have to be ceded by the Crown in exchange for those developed that are subsequently declared to be subject to Aboriginal title, but projects would not have to be abandoned and reclaimed. The uncertainty left by the Court provides encouragement for governments and developers of major projects to obtain consent from Aboriginal groups with strong title claims, which appears to have been the Court's intention.[42]

Just as in the case of development of offshore oil and gas resources, resolution of title issues is not itself enough to create the type of certainty required to support the private capital needed to develop major projects. A political agreement is needed to create certainty in governance. The Supreme Court decision in *Tsilhqot'in* makes clear that reconciliation cannot be achieved through litigation. The course of section 35 litigation to date has taken us down the path of confounding uncertainty for the

---

[41] *Id.*, at para. 92. The suggestion is that to be safe, governments and project developers need to go beyond *Haida* in the case of stronger claims to title and rights and be in a position to meet the *Sparrow* justification test.

[42] *Tsilhqot'in*, *supra*, note 39. Paragraphs 91 and 92 indicate that development projects undertaken with anything less than prior, informed consent are liable to being cancelled at a late stage.

apparent purpose of encouraging reconciliation through negotiation.[43] Aboriginal groups and governments are essentially being told by the Supreme Court that major development of public lands and resources will be subject to constraint absent a political solution. Until reconciliation is achieved, the Supreme Court will not allow Aboriginal groups or governments to gain any significant advantage through litigation that could be used as leverage in negotiation of just settlements and the advancement of reconciliation. The assumption seems to be that by creating uncertainty, political pressure will be put on Aboriginal groups and governments from both Aboriginal and non-Aboriginal societies to achieve the type of reconciliation that the Supreme Court has interpreted section 35 to require.

This approach does not, however, appear to be working. Reconciliation raises too many politically contentious issues that governments prefer to avoid. Under the section 35 jurisprudence as it currently stands, governments can, for all intents and purposes, delegate sufficient responsibility to achieve a piecemeal state of reconciliation where major project development is curtailed, but not entirely stopped. Modest benefits accrue to Aboriginal and non-Aboriginal society, in spite of the stalled state of reconciliation. Further, opponents of major project development, who believe that economic and social benefits of development can never be justified, are placated in the resulting inertia.

If reconciliation is to be achieved through section 35, the Courts must better define and broaden the duty of governments to provide a more direct incentive to achieve reconciliation relative to where we stand today. They must also broaden section 35 protection to rights and benefits secured through consultation and accommodation under *Haida*.

V. PART 5: AREAS FOR EVOLUTION IN SECTION 35 JURISPRUDENCE

Part 4 of this article argues that the development of section 35 jurisprudence to date has created uncertainty in order to incent reconciliation through negotiation. Historically, the role of courts in

[43] There are many examples of the Supreme Court of Canada's belief in the importance of negotiation. See for example, *Haida*, *supra*, note 23, at para. 14: "While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests." See also the recent decision in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] S.C.J. No. 40, at para. 24, 2017 SCC 40 (S.C.C.): "True reconciliation is rarely, if ever, achieved in courtrooms." See also *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, at para. 207, [1997] 3 S.C.R. 1010 (S.C.C.): "On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake."

societies governed by the rule of law has not been to create or perpetuate uncertainty. To the contrary, courts have tried to create legal certainty regarding the rights and obligations of individuals and governments, whether Aboriginal or non-Aboriginal. In order to provide this clarity and to advance reconciliation between Aboriginal and non-Aboriginal peoples, there are three areas in which section 35 could meaningfully evolve. Firstly, benefits negotiated between project proponents and Aboriginal groups could receive section 35 protection, so that Aboriginal groups are able to fully benefit from their rights. Additionally, providing section 35 protection to these negotiated benefits would facilitate an element of certainty for the project proponent, as the project must continue to exist in order to provide the aforementioned benefits, thereby encouraging investment in projects of mutual benefit to Aboriginal and non-Aboriginal peoples. Secondly, section 35 could evolve to create positive obligations on the Crown, preventing the government from avoiding its constitutional duty to consult by choosing not to act. This change would meaningfully further the protection of Aboriginal rights, as the Crown's failure to act has as much or more potential to damage Aboriginal rights as positive Crown conduct. Finally, the Crown could be found to owe a duty to project proponents, which would serve to erase the outdated "us versus them" approach to reconciliation and instead recognize that reconciliation is a process whereby Aboriginal and non-Aboriginal interests should be advanced together.

1. Constitutional Protection of Rights and Benefits Secured through *Haida* Consultation and Accommodation

One of the problems identified in Part 4 is that a practical consequence of *Haida* has been to allow governments to leave reconciliation to direct negotiation between Aboriginal and non-Aboriginal societies, by effectively delegating their responsibility of consultation to project proponents, who are forced to assume this role if they want their projects to proceed. This delegation allows governments to extract any surplus of economic rent that their combined royalties and tax regimes may have left on the table. In order to create an incentive for governments to involve themselves in the process of reconciliation under *Haida*, the rights and benefits that Aboriginal groups manage to secure in their negotiations with project proponents should qualify for section 35 protection. If the rights and benefits negotiated are only contractual

obligations assumed between Aboriginal groups and project proponents, they remain unprotected from future government conduct that could adversely affect major projects and, in turn, the rights and benefits secured by Aboriginal groups through their agreements with project developers. But, on the other hand, if the rights and benefits secured by Aboriginal groups through consultation and accommodation measures achieved in negotiations with project developers gained constitutional protection, project proponents might achieve some measure of property rights protection associated with their investment and governments would have an incentive to understand the agreements that are entered into if they are to be bound by them as a result of their permitting of projects on the basis of this type of delegated reconciliation.

Constitutional protection of rights and benefits of Aboriginal groups required through agreements with project proponents can advance reconciliation in a principled way. The types of rights and benefits secured through agreements are, for the most part, almost always directed toward economic, cultural and environmental interests of Aboriginal groups consistent with their attachment to their traditional lands. Natural resource development that relies on participation of Aboriginal groups has historically achieved this purpose. The fur trade, fisheries and forestry are historical examples, but natural resource extraction and infrastructure development can create the same opportunities for Aboriginal groups to maintain their connection to their traditional lands by creating employment and other opportunities on or near their traditional territories.[44] This type of reconciliation assists Aboriginal groups in resisting the forces of urbanization and the resulting abandonment of their traditional territories in order to survive in a modern economy. To the extent that the preservation of Aboriginal culture and identity is tied to attachment of traditional lands, the development of these lands as part of a modern economy is essential. Constitutional protection of the rights and benefits Aboriginal groups secure through project development is entirely consistent with the preservation of the underlying Aboriginal rights that form the basis of the negotiation of benefits. The result of providing constitutional protection

[44] Aboriginal communities who take advantage of energy projects have realized many benefits such as employment, community infrastructure and training which otherwise would not have been realized (William M. Laurin & Joann P. Jamieson, "Aligning Energy Development with the Interests of Aboriginal Peoples in Canada" (2015) 53:2 Alta. Law Rev. 453 at 473.) It follows that large-scale resource projects allow Aboriginal peoples the opportunity to stay attached to their traditional lands as a result of these benefits.

to the rights and benefits associated with project development is that some level of constitutional protection might also be accorded to non-Aboriginal investment in projects. Such indirect protection would create certainty in major project investment that does not presently exist outside of foreign investment treaties.[45] If governments were constrained from increasing the economic rent required of major project developers because of potential adverse impacts on Aboriginal rights and benefits secured through such projects, they would derive certainty from making Aboriginal rights and benefits an integral part of their project development, creating a significant incentive to achieve mutually beneficial relationships between Aboriginal and non-Aboriginal society.

According constitutional protection to rights and benefits negotiated by Aboriginal groups through *Haida* consultation with project proponents could advance the cause of reconciliation. There is no doubt that economic rights derived through treaty and modern land claims attract section 35 protection. Since *Haida* may have relegated comprehensive land claims and treaties to history, rights secured as interim measures through *Haida* consultation should be accorded section 35 protection.

The Supreme Court has lent some support to the idea of extending section 35 protection to rights and benefits secured through *Haida* consultation. In *Manitoba Métis Federation Inc. v. Canada (Attorney General)*,[46] the Court acknowledges that "constitutional obligations may even be arrived at after a course of consultation similar to treaty negotiations".[47]

If the law evolves to provide constitutional protection for rights and benefits secured through delegated consultation with project proponents, governments that issue project approvals facilitated by proponent accommodation will have a significant interest in participating in and contributing to the process of consultation and accommodation, which they currently try to avoid in the hope that consultation issues will be resolved as a result of proponent agreements.

Greater government participation in project proponent efforts to achieve Aboriginal consent for development is also consistent with the

---

[45] See Bernard J. Roth, "NAFTA, Alberta Oil Sands and Change: Yes We Can?" (2009) Alta. Law Rev. 335.

[46] [2013] S.C.J. No. 14, at para. 71, [2013] 1 S.C.R. 623 (S.C.C.) [hereinafter "*Manitoba Métis Federation*"].

[47] See also Mark Walters, "Consultation Law and Aboriginal Economic Development in Canada", in Dwight Dorey & Joseph Magnet, eds., *Legal Aspects of Aboriginal Business Development* (Toronto: LexisNexis Canada, 2005), where the author discusses the potential for constitutionalizing economic rights derived through *Haida* consultation.

direction of the Court in *Tsilhqot'in*. Governments need to participate in the process of achieving consent, not only as part of their duty of honour, but also to assist project proponents in navigating difficult issues associated with Aboriginal governance and confirmation of authority to provide consent. In order to meet its duty of honour, the government (Crown) must know the details of all consultation and accommodation provided, and be in a position to confirm that consent has been granted. If the government meets its duty of honour and consent for a project is obtained, the rights and benefits of the Aboriginal groups obtained through the provision of consent should qualify for constitutional protection under section 35. Such protection would promote the reconciliation that the Court has repeatedly suggested section 35 was meant to achieve.

2. Section 35 Should Evolve to Create Positive Obligations on the Crown

The Supreme Court's articulation of the duty to consult in *Haida* could be interpreted as a negative duty. Under *Haida*, the duty is said to arise when the Crown knows or ought to have known of the potential for Aboriginal rights or title that could be "adversely" affected by contemplated Crown "conduct". This is the course that the Supreme Court of Canada has generally taken in interpreting rights guaranteed by the Charter. Although not free from debate, the Court has resisted claims that the Charter creates positive duties on the part of government to advance the rights guaranteed to individuals.[48]

The difficulties the Court has with finding positive obligations under the Charter arguably do not exist under section 35. If all section 35 does is protect Aboriginal rights from further encroachment by government, the type of reconciliation envisaged by the Supreme Court may never be achieved. Some of the Court's language in post-*Haida* decisions lends support to section 35 creating a positive duty on the Crown. For example, in *Manitoba Métis Federation*, the Court says that "the honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and aboriginal interests."[49] Then in its *Tsilhqot'in* decision, the Court says that section 35 not

---

48 See *Gosselin v. Quebec (Attorney General)*, [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.).

49 *Manitoba Métis Federation*, *supra*, note 46, at para. 78.

only "protects aboriginal rights against provincial and federal legislative power" but it also "provides a framework to facilitate negotiations and reconciliation".[50]

The Crown should not be able to avoid triggering its duty of consultation under *Haida* by choosing to do nothing. Arguably the choice not to act is "conduct". The failure to act has as much or more potential to adversely affect Aboriginal rights as positive Crown conduct. Without reconciliation achieved through consultation and negotiation, Aboriginal rights become historical artifacts unable to preserve Aboriginal rights and culture into the future.

Lower Courts have started to acknowledge the positive dimensions of the duty created by section 35. In *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Attorney General)*, the British Columbia Supreme Court rejected the Crown's argument that *Haida* only created a negative duty associated with adverse effects caused by development of lands subject to claims of Aboriginal rights and title.[51] The Court found that continuing to restrict the development of land as a conservation area could adversely impact Aboriginal rights and title associated with commercial development of the lands. In that case, the Aboriginal group wanted to pursue a joint venture development for the hydro-electric project on lands subject to a legislative conservation area, which needed to be altered in order to facilitate the development. The conduct that was adversely affecting the Aboriginal group was the failure to consult on taking positive action by modifying the conservation area affecting the development of land subject to a claim of Aboriginal rights and title.[52] If the courts allow governments to take a no action option by not considering or approving the development of lands subject to Aboriginal claims, which they may be encouraged to do by certain constituencies within both Aboriginal and non-Aboriginal communities in the interests of conservation, reconciliation will not be achieved and the practical value of the claimed rights will be greatly diminished.

---

[50] *Tsilhqot'in*, *supra*, note 39, at para. 118.

[51] [2011] B.C.J. No. 887 at paras. 135-141, 2011 BCSC 620 (B.C.S.C.) [hereinafter "*Da'naxda'xw/Awaetlala*"].

[52] Recognizing the duty is just a start. In order to incent reconciliation, the Courts are going to have to develop law and remedies beyond declaratory and other administrative law remedies like *certiorari*. Such relief can be effective in some cases, but in others the government action or failure to act will have already caused loss of significant opportunities. *Da'naxda'xw/Awaetlala* is an example of a lost project opportunity notwithstanding an order directing the Crown to engage in further consultation: see *Da'naxda'xw/Awaetlala First Nation v. British Columbia (Energy, Mines and Natural Resources)*, [2016] B.C.J. No. 753, 2016 BCCA 163 (B.C.C.A.), leave to appeal refused [2016] S.C.C.A. No. 265 (S.C.C.).

3. Achieving Reconciliation Through Recognition of a Duty to Project Proponents

The Supreme Court has historically defined reconciliation in terms of reconciling pre-existing Aboriginal societies and their rights with the sovereignty of the Crown[53] or the "assertion" of *de facto* Crown sovereignty.[54] The problem with this definition is the determination of what is meant by "Crown sovereignty".[55] The traditional notion, which the courts likely had in mind, was the power of the ruler or government in a state to govern its territory and those within it pursuant to its laws. This antiquated, but historically accurate, notion of sovereignty is not particularly helpful when trying to achieve the type of reconciliation the Supreme Court has more recently articulated. Examples include: "the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions";[56] the "reconciliation of aboriginal interests with those of the broader public";[57] the "reconciliation of aboriginal societies with the broader political community of which they are part";[58] "justice for the aboriginal group and its descendants, and the reconciliation between the group and broader society";[59] and the "reconciliation of aboriginal rights with the interests of all Canadians".[60] The historical notion of the Crown applied to the Supreme Court of Canada's recent interpretation of reconciliation would have Crown sovereignty representing the interests of non-Aboriginal society and reconciling its interests with those of Aboriginal society. This restricted notion of Crown sovereignty may have been relevant when Aboriginal peoples in Canada were disenfranchised and essentially treated as wards of the federal government, but, it has no place in the modern constitutional framework that concluded with the patriation of the Canadian Constitution and the entrenchment of section 35 within it.

---

[53] *R. v. Van der Peet*, [1996] S.C.J. No. 77, at para. 31, [1996] 2 S.C.R. 507 (S.C.C.); *R. v. Gladstone*, [1996] S.C.J. No. 79, at para. 72, [1996] 2 S.C.R. 723 (S.C.C.) [hereinafter "*Gladstone*"]; *Manitoba Métis Federation*, *supra*, note 46, at para. 66.

[54] *Haida*, *supra*, note 23, at para. 20.

[55] Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 Queens L.J. 470; Mark D. Walters "'Looking for a knot in the bulrush': Reflections on Law, Sovereignty and Aboriginal Rights"; and Jeremy Webber, "We Are Still In The Age of Encounter: Section 35 and A Canada Beyond Sovereignty" in Patrick Macklem & Douglas Sanderson, eds., *From Recognition to Reconciliation* (Toronto: University of Toronto Press, 2016).

[56] *Mikisew, supra*, note 3, at para. 1.

[57] *Tsilhqot'in, supra*, note 39, at para. 118.

[58] *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, at para. 161, [1997] 3 S.C.R. 1010 (S.C.C.), citing *Gladstone*, *supra*, note 53.

[59] *Tsilhqot'in*, *supra*, note 39, at para. 23.

[60] *Id.*, at para. 125.

The modern understanding of sovereignty has been described by Binnie J. as a shared one, in which "aboriginal and non-aboriginal Canadians *together* form a sovereign entity with a measure of common purpose and united effort".[61] Under this modern view of sovereignty, the Crown can no longer be viewed as representing the interests of non-Aboriginal society in the reconciliation process. The Crown's duty to seek reconciliation should be owed to both Aboriginal and non-Aboriginal societies. In the reconciliation process, the federal and provincial governments should not be viewed as representing the interests of non-Aboriginal society.

The development of major projects creates the opportunity to advance reconciliation in the mutual interests of both Aboriginal and non-Aboriginal society. Reconciliation could be advanced if provincial and federal governments were found to owe at least a common law duty to major project proponents to advance reconciliation. A recent decision of the lower court in Ontario has expressed a contrary view in *obiter*, as follows:

> In the context of modern-day Canada, with the constitutional recognition of the rights of First Nations and *our*, generally, understood desire for reconciliation, there could be no more powerful policy recognition calling for the setting aside of any duty of care owed by the Crown to third parties than *our* expressed desire to come to terms with *our* history and *our* relations with those who were here first.[62]

The court's repeated reference to "our" does not reflect a modern idea of sovereignty. It conceives of reconciliation as a process of us versus them, where governments and the courts are non-Aboriginal institutions. These *obiter* remarks are also inconsistent with the Supreme Court of Canada's observation:

> that aboriginal law has as its fundamental objective the reconciliation of Canada's Aboriginal and non-Aboriginal communities, and that the special relationship that exists between the Crown and Aboriginal peoples has no equivalent to the usual courtroom antagonism of warring commercial entities. Nevertheless, Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as Aboriginal communities, and to the economic well being of both.

---

[61] *Mitchell v. Canada (Minister of National Revenue)*, [2001] S.C.J. No. 33, at para. 129, [2001] 1 S.C.R. 911 (S.C.C.) (emphasis added).

[62] *Northern Superior Resources Inc. v. Ontario*, [2016] O.J. No. 2808, at para. 89, 2016 ONSC 3161 (Ont. S.C.J.) (emphasis added).

> The existence and scope of Aboriginal rights protected as they are under s. 35(1) of the *Constitution Act, 1982*, must be determined after a full hearing that is fair to all the stakeholders.[63]

The Supreme Court of Canada is acknowledging that the judiciary owes a duty of fairness to both Aboriginal and non-Aboriginal communities in the context of section 35(1) litigation. The Crown, representing the executive branch of government, should likewise owe both Aboriginal groups and non-Aboriginal project proponents a duty to attempt to reconcile their respective interests. Such a duty arguably already exists in the context of administrative law,[64] but the objective of reconciliation would be advanced by making the Crown accountable to both groups under a private law duty of care, imposing liability when damages are suffered as a result of lost reconciliation opportunities due to the conduct of the Crown.

---

[63] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] S.C.J. No. 56, at para. 12, [2011] 3 S.C.R. 535 (S.C.C.).

[64] *Beckman v. Little Salmon/Carmacks First Nation*, [2010] S.C.J. No. 53, at paras. 79-80, [2010] 3 S.C.R. 103 (S.C.C.).