

Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?

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Following a trilogy of Supreme Court decisions in 2004–2005 that found a constitutional duty to consult and accommodate Aboriginal peoples, provincial policies were introduced to guide fulfillment of those duties. This paper analyzes Crown policies on consultation and accommodation of Aboriginal peoples with consideration to the role of reconciliation in fulfillment of the duty, arguing that measuring the policies against a transformative understanding of reconciliation reveals their abilities to foster change. According to the Truth and Reconciliation Commission of Canada (TRC), reconciliation requires rebuilding nation-to-nation relationships of respect between Aboriginal peoples and the Crown. The authors ask whether the policies guiding the practice of

the duty to consult and accommodate are able to facilitate building new relationships towards reconciliation through a comparative analysis of four areas key to meaningful consultation: delegation to third parties; practicalities of funding and response times; accommodation; and the extent to which policies allow for equal collaboration with Aboriginal peoples in the process. The authors conclude that while several of the policies include a few provisions that support new relationships and address power imbalances, these policies frame the duty to consult and accommodate primarily as a process that may alter aspects of Crown decision making, rather than as a process meant to work towards reconciliation.

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À la suite de la trilogie de décisions prises par la Cour suprême en 2004-2005 qui a établi l'obligation constitutionnelle de consulter et d'accommoder les peuples autochtones, des politiques provinciales ont été adoptées afin d'encadrer le respect de cette obligation. Le présent article analyse les politiques de la Couronne en matière de consultation et d'accommodement des peuples autochtones compte tenu du rôle de la réconciliation en ce qui concerne le respect de cette obligation, soutenant qu'évaluer les politiques par rapport à une compréhension transformationnelle de la réconciliation révèle la capacité de celles-ci de favoriser le changement. Selon la Commission de vérité et de réconciliation du Canada (CVR), la réconciliation exige le rétablissement des relations de nation à nation de respect entre les peuples autochtones et la Couronne. Les auteurs souhaitent savoir si les politiques qui guident la

pratique du devoir de consulter et d'accommoder sont en mesure de faciliter l'établissement de nouvelles relations en vue de la réconciliation par l'entremise d'une analyse comparative de quatre domaines clés de consultation significative : la délégation à des tierces parties, les aspects pratiques de financement et les délais de réponse, l'accommodement et l'étendue des politiques en vue de permettre une collaboration équitable avec les peuples autochtones dans le processus. Les auteurs concluent que, bien que plusieurs de ces politiques comprennent quelques dispositions qui appuient l'établissement de nouvelles relations et portent sur les déséquilibres de pouvoir, ces politiques encadrent l'obligation de consulter et d'accommoder essentiellement comme un processus qui pourrait modifier des aspects des décisions prises par la Couronne plutôt qu'un processus qui vise à parvenir à la réconciliation

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1. INTRODUCTION

Section 35 of Canada's Constitution, repatriated in 1982, provided a potentially new direction in the legal relationship between Aboriginal peoples and the Canadian Crown, as it "recognizes and affirms existing Aboriginal and treaty rights."¹ For Patricia Monture-Angus, the way these terms reflect the inherent and pre-existing nature of Aboriginal rights meant that, "[t]he way has been cleared to do Canada differently, to do Canada in a way that also includes Aboriginal people."²

In a trilogy of cases involving disputes over land use on Indigenous traditional territories—*Haida Nation*, *Taku River* and *Mikisew Cree*—the Supreme Court of Canada (SCC) clearly established that section 35 required the Crown to fulfill "the duty to consult and accommodate" Aboriginal peoples.³ Fundamentally, the duty requires that when the Crown contemplates

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¹ Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c. 11, s. 35(1).

² Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations Independence* (Halifax & Winnipeg: Fernwood Publishing, 1999) at 47–48 (Monture-Angus wrote this book from her perspective as a Haudenosaunee legal scholar).

³ These decisions were released in 2004 and 2005, and build on earlier interpretations of section 35, see *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*] (applying the duty to land disputes involving assertions of Aboriginal title);

any action, including land development, that may adversely impact an Aboriginal right, the Crown must consult the Aboriginal community affected⁴ to understand those impacts and find ways to accommodate the community's continued exercise of their rights. Significantly, the purpose of fulfilling this duty is to work towards reconciliation, which is described by the court as a process flowing from rights and aimed at building just relations between communities.⁵ Scholars have explicated the purpose, level, and scope of the duty,⁶ discussed its procedural and substantive aspects,⁷ and analyzed the varied relationships between these duties, understandings of reconciliation, Aboriginal rights, Indigenous land relations and sovereignty.⁸ The duty to consult and accommodate is seen as a way to move along the path of reconciliation

Mikisew Cree First Nation v Canada (Minister of Canadian Heritage), 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*] (affirming that the duty to consult and accommodate also applied where historic treaties existed between Aboriginal groups and the Crown). This interpretive process began with *R v Sparrow* [1990] 1 SCR 1075 at 1119, 70 DLR (4th) 385 [*Sparrow*] where the SCC connected consultation to section 35 by explaining that one factor in justifying an infringement of Aboriginal rights is "whether the aboriginal group in question has been consulted with respect to the conservation measures [i.e. legislative infringement] being implemented." *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*] continued the emphasis on consultation and negotiation as requirements to fulfilling section 35. A recent re-explanation of the duty is found in *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 77–80, [2014] 2 SCR 257 [*Tsilhqot'in*].

- ⁴ In this paper, we use the term Aboriginal communities or Aboriginal groups to discuss groups that are owed a duty to consult, as this includes First Nations, Inuit and Métis peoples. However, some of the provincial policies focus on specific groups such as First Nations and/or Métis peoples, and our discussion of specific policies follows the approach of each policy.
- ⁵ Dwight G Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Prurich Publishing Ltd, 2014) at 31–34 [Newman, "Revisiting"] (Newman supports these approaches by reflecting on *Haida Nation* at paras 26, 32); see also *Mikisew Cree*, *supra* note 3 at para 1.
- ⁶ Newman, "Revisiting", *supra* note 5; Richard Devlin & RONALDA MURPHY, "Reconfiguration Through Consultation: A Modest (Judicial) Proposal?" in Michael Murphy, ed, *Reconfiguring Aboriginal Relations* (Montreal & Kingston: McGill-Queen's University Press, 2014) [Devlin & Murphy]; Shin Imai & Ashley Stacey, "Municipalities and the Duty to Consult Aboriginal Peoples: A Case Comment on *Neskonlith Indian Band v Salmon Arm (City)*" (2014) 47:1 UBC L Rev 293 [Imai & Stacey].
- ⁷ Lorne Sossin, "The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights" (2010) 23:1 Can J Admin L & Prac 93 [Sossin]; Thomas Isaac & Anthony Knox, "The Crown's Duty to Consult Aboriginal People" (2003) 41 Alta L Rev 49; Verónica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" (2006) 17 J Envtl L & Prac 27 [Potes]; Peter Carver, "Comparing Aboriginal and Other Duties to Consult in Canadian Law" (2012) 49:4 Alta L Rev 855.
- ⁸ Mark Walters, "The Jurisprudence of Reconciliation: Aboriginal Rights in Canada" in Will Kymlicka & Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (Oxford: Oxford University Press, 2008) 165 [Walters]; Heather Dorries, *Rejecting the "False Choice": Foregrounding Indigenous Sovereignty in Planning Theory and Practice* (PhD Thesis, University of Toronto, Department of Geography, 2012) [unpublished], see especially chapter 5 [Dorries]; Kiera L Ladner, "Take 35: Reconciling Constitutional Orders" in Annis May Timpson, ed, *First Nations, First Thoughts: The Impact of Indigenous Thought in Canada* (Vancouver: UBC Press, 2009) 279 at 292–293 [Ladner]; Gordon Christie, "A Colonial Reading of Recent Jurisprudence: Sparrow, Delgamuukw and Haida Nation" (2005) 23:1 Windsor YB Access Just 17 [Christie 2005]; Gordon Christie, "Developing Case Law: the Future of Consultation and Accommodation" (2006) 39 UBC L Rev 139 [Christie 2006]; Rachel Ariss and John Cutfeet, "Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law" (2011) 10:1 Indigenous LJ 1.

between the Crown and Aboriginal peoples,⁹ and as a way to respect the constitutional status of Aboriginal rights.¹⁰ Conversely, it is also seen as a process that facilitates Crown-supported resource exploitation and land development, diminishing Indigenous land rights and access to the land, as more development is justified.¹¹

Since 2004, provincial governments have been developing policies on Aboriginal consultation. This paper analyzes these policies for the extent to which they support the work of reconciliation: building new nation-to-nation relationships of mutual benefit and respect between Aboriginal peoples and the Crown.¹² We ask to what extent do the policies guiding the practice of the duty to consult and accommodate contribute to “doing Canada differently”? To what extent do they facilitate building new relationships? Do provincial policies on the duty merely allow for Aboriginal participation in status quo government decision-making, or, are such policies able to contribute to changing the framework of Aboriginal-Crown relations? We conclude that most Crown policies on the duty to consult and accommodate are limited in their abilities to fundamentally change the framework of Aboriginal-Crown relations, especially where those policies separate consultation procedures from the substantive accommodation and reconciliatory goals of the duty. Several of the policies include provisions that reflect attempts to build relationships, address power imbalances, consult in a truly collaborative fashion, or, are open to a range of accommodations. However, these provisions remain exceptions within policies that frame the duty to consult and accommodate as a process that may alter some aspects of Crown decision making, for example by bringing in Aboriginal groups’ perspectives, but do not fundamentally change Crown-Aboriginal relations.

Our paper begins with an explanation, analysis and critique of the duty to consult and accommodate. We then discuss concepts of reconciliation as put forward by the SCC, as well as by the Royal Commission on Aboriginal Peoples (RCAP) in 1996,¹³ and more recently by the Truth and Reconciliation Commission of Canada (TRC) in 2015. We argue that the application of a broad and transformative understanding of reconciliation is necessary to

⁹ Walters, *supra* note 8 at 186–187.

¹⁰ James (Sákéj) Youngblood Henderson, “Dialogical Governance: A Method of Constitutional Governance” (2009) 72:1 Sask L Rev 29 [Henderson].

¹¹ Kaitlin Ritchie, “Issues Associated with the Implementation of the Duty to Consult and Accommodate Aboriginal Peoples: Threatening the Goals of Reconciliation and Meaningful Consultation” (2013) 46 UBC L Rev 397 [Ritchie]; see also Christie 2005, *supra* note 8.

¹² The Indian Residential Schools Truth and Reconciliation Commission (TRC) states that such relationship building is necessary to reflect “an emerging consensus that the land that sustains all of us must be protected for future generations.” Truth and Reconciliation Commission of Canada, “Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada” (2015) at 357, online: Truth and Reconciliation Commission of Canada <www.trc.ca/websites/trcinstitution/File/2015/Exec_Summary_2015_06_25_web_o.pdf> [TRC Summary Report]. The TRC was created as part of a settlement of lawsuits brought against the federal government and churches for the individual and systemic harms of residential schools; see Truth and Reconciliation Commission of Canada, “Schedule N of the Indian Residential Schools Settlement Agreement” (2015), online: Truth and Reconciliation Commission of Canada <www.trc.ca/websites/trcinstitution/File/pdfs/SCHEDULE_N_EN.pdf>.

¹³ Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward Looking Back*, vol 1 (Ottawa: Indian and Northern Affairs Canada, 1996) at 523 [RCAP].

change the imbalanced status quo relations between Aboriginal peoples and the Crown and substantially fulfill the duty to consult and accommodate.

We then comparatively analyze general provincial policy guidelines on the duty to consult and accommodate Aboriginal peoples in three specific areas—delegation, timelines and financial support, and accommodation—for how they might reflect, in a practical way, the transformative understandings of reconciliation put forward by the RCAP and the TRC. These areas for analysis were chosen based on their relevance to the work of reconciliation, which includes building ongoing relationships of respect and disrupting the imbalance of power between the Crown and Aboriginal groups. The extent of delegation of the process to third parties by the Crown reflects the importance the Crown places on building new relationships with Aboriginal peoples. More delegation to developers, for example, reflects that the Crown is less interested in building direct nation-to-nation relationships.¹⁴ Flexible timelines and provision of financial support reflect attempts to address the imbalance in negotiating power between the Crown and Aboriginal groups who usually have far fewer resources than the Crown. Accommodations are, in part, proof of good faith consultation—tangible evidence that the Crown understands Aboriginal rights, has heard Aboriginal groups' concerns, and addressed those concerns in its plans.

The procedural aspects of consultation and accommodation receive the greatest attention from the courts and in the policies analyzed in this paper. This is not surprising as fair process is understood in the common-law tradition as contributing to justice. The duty, however, contains both procedural and substantive aspects. Fair procedures (and even more so, collaborative procedures) are certainly part of protecting Aboriginal rights. Fair procedures, however, may not be enough where the substantive goal of these procedures, reconciliation, is ignored. Policies that fail to centralize the substantive purposes of the duty cannot transform Aboriginal-Crown relations. In our analysis, a robust interpretation of the reconciliatory purpose of the duty to consult and accommodate is a key measure¹⁵ of the capability of the policies to reflect and contribute to real change in Aboriginal-Crown relations. In the policies, we look for practices that raise “possibilities to foster actual reconciliation between Aboriginal peoples and the settler society in Canada.”¹⁶

¹⁴ See Ritchie, *supra* note 11 at paras 42–46; see also the text accompanying notes 76–85 for further discussion of Crown delegation.

¹⁵ The Fraser Institute released an analysis of provincial policies on consultation in May 2016 while this article was under review. The differences in the analyses lie in their frameworks. We focus on reconciliation as a standard for policies, while the Fraser report focuses on efficiency, certainty and consistency between provinces. Additionally, our analysis includes policy approaches to accommodation and questions the impact of delegation on respect for Aboriginal rights. Ravina Bains & Kayla Ishkanian, “The Duty to Consult Aboriginal Peoples: A Patchwork of Canadian Policies” (2016), Fraser Institute, online: <www.fraserinstitute.org/studies/duty-to-consult-with-aboriginal-peoples-a-patchwork-of-canadian-policies> [Bains & Ishkanian].

¹⁶ Potes, *supra* note 7 at 34.

2. THE DUTY TO CONSULT AND ACCOMMODATE TOWARDS RECONCILIATION

2.1. THE DUTY TO CONSULT AND ACCOMMODATE ...

While the principles informing the duty to consult and accommodate are clear, recognized applications of and processes for fulfilling these principles are still emerging through judicial decisions.¹⁷ This section explains the key doctrinal aspects of the duty to consult and accommodate.

The SCC consultation trilogy emphasizes that the honour of the Crown is at stake in all of its dealings with Aboriginal peoples. To be honourable, any process of consultation in which the state engages must meaningfully reflect the Crown's "intention of substantially addressing the concerns of the aboriginal peoples" involved.¹⁸ The importance of the honour of the Crown should not be underestimated—"[i]t is not a mere incantation, but rather a core precept that finds its application in concrete practices."¹⁹ The court is clear that in negotiations and consultations with Aboriginal peoples, in fulfilling treaty promises, in devising consultation policies and protocols, and in interpreting substantive Aboriginal rights, the Crown must, at a minimum, act and negotiate in "good faith" to remain honourable.²⁰

The Crown's obligation to consult and accommodate Aboriginal people 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."²¹ In lands covered by treaties with Aboriginal communities, the Crown is always on notice of Aboriginal rights exercised over a certain area through the existence of that treaty.²²

¹⁷ Disputes in the lower courts include *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation* [2006] OJ No 3140 (QL), 272 DLR (4th) 727 [*Platinex*] and related proceedings; *Wahgoshig First Nation v Solid Gold Resources Corp*, 2013 ONSC 632, 74 CELR (3d) 8; *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379, 354 DLR (4th) 696 [*Neskonlith*]. At the SCC level, disputes include *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto*].

¹⁸ *Delgamuukw*, *supra* note 3 at para 168, cited in *Haida Nation*, *supra* note 3 at para 40; *Mikisew Cree*, *supra* note 3 at para 55 (where the court uses similar language).

¹⁹ *Haida Nation*, *supra* note 3 at para 16.

²⁰ Henderson, *supra* note 10 at 52, citing *Haida Nation*, *supra* note 3 at para 41; see also *Haida Nation*, *supra* note 3 at paras 16–21.

²¹ *Haida Nation*, *supra* note 3 at para 35. Activities that have been found to trigger a duty to consult include permitting a resource extraction company to harvest timber (*ibid*); early mining exploration (*Platinex*, *supra* note 15); and permitting road building which may impact harvesting rights on treaty land (*Mikisew Cree*, *supra* note 3).

²² *Mikisew Cree*, *supra* note 3 at para 34; see Newman, "Revisiting", *supra* note 5 at 43 for a discussion of the role of the duty in modern treaty agreements.

While the duty is easily triggered, it is flexible in scope. Deeper consultation is required where the potential impacts are more severe:

At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice ... At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required.²³

This spectrum exemplifies the range and flexibility of the duty in various circumstances.

Consultation must be meaningful. It must allow for real negotiation and real change in Crown plans. Courts have found that consultation and accommodation in response to isolated permits for specific activities or specific stages of project development may be inadequate; thus the duty is understood to apply broadly.²⁴ The Crown must engage early with Aboriginal groups as well as throughout the consultation process.²⁵ In order to be meaningful, consultation and accommodation must begin *before* the Crown makes decisions or allows impacting activities on the land to occur.²⁶ To exclude the possibility of accommodations before consultation has occurred renders the process of consultation meaningless.²⁷

Accommodating Aboriginal rights found to be impacted through the consultation process plays a significant role in fulfilling the duty honourably, as consultation “in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.”²⁸ The Crown has a “positive obligation ... to reasonably ensure that [the Aboriginal group’s] representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.”²⁹ Accommodations do not always result where a duty to consult has been executed, however, it is consultation and the exchange of information and perspectives prior to taking action that opens up the Crown’s opportunity and obligation to “demonstrably” accommodate the exercise of Aboriginal rights where those rights are impacted by its proposed activity.

The court, however, has also placed clear limits on this approach. There is no duty on the Crown to reach an agreement; the Crown, while prevented from “sharp dealing” is not prevented

²³ *Haida Nation*, *supra* note 3 at paras 43–44.

²⁴ See Newman, “Revisiting”, *supra* note 5 at 54 stating that consultation should be about “the effect of the overall project”; see also *ibid* at 55, stating that “the duty to consult extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal claims and rights.”

²⁵ *Ibid* at 57–58.

²⁶ *Mikisew Cree*, *supra* note 3 at para 67.

²⁷ *Ibid* at para 54.

²⁸ *Taku River*, *supra* note 3 at para 25.

²⁹ *Mikisew Cree*, *supra* note 3 at para 64, citing Finch J.A. in *Halfway River First Nation v British Columbia (Ministry of Forests)*, 1999 BCCA 470 at paras 159–60, 178 DLR (4th) 666.

from “hard bargaining.”³⁰ This means that the Crown must negotiate honestly, in a way that reflects its honour, and not attempt any trickery, nor take advantage of Aboriginal groups. Since *Sparrow*, and through the trilogy, the SCC has preferred negotiation over litigation, stating that reconciliation can be achieved through “negotiated settlements.”³¹ While the court prefers negotiation over litigation as a way forward, the consultation trilogy has stated quite plainly that Aboriginal groups do not have a veto over Crown plans that impact their rights.³² The lack of veto, and the imbalance of power it creates in consultation and accommodation in favour of the Crown, remains a serious concern for Aboriginal groups and legal scholars.³³

2.2. ... TOWARDS RECONCILIATION

Reconciliation is a concept that has played a role in Canadian political and legal discourse on Aboriginal rights for twenty years.³⁴ In 1996, the RCAP made recommendations towards renewing relationships of “mutual recognition, mutual respect, sharing and mutual responsibility”³⁵ between the Crown, Aboriginal peoples and non-Aboriginal peoples. “Mutual recognition” includes respect for Aboriginal peoples’ status as nations,³⁶ which underlies many of the RCAP recommendations. According to the RCAP, if Canadian governments did engage with Aboriginal peoples as nations, this respect “would pave the way for genuine reconciliation and enable Aboriginal people to embrace with confidence dual citizenship in an Aboriginal nation and in Canada.”³⁷

The TRC re-introduced reconciliation to public view in its 2015 *Final Report*. While the mandate of the TRC was to collect, preserve, publicly document, and commemorate the

³⁰ *Haida Nation*, *supra* note 3 at para 42.

³¹ *Delgamuukw*, *supra* note 3 at para 186 (note that when discussing negotiation the Court refers to reconciliation of Aboriginal and state interests, as well as to just settlements); see *Delgamuukw*, *supra* note 3 (stating that section 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place” at para 186, quoting *Sparrow*, *supra* note 3 at 1105); *Haida Nation*, *supra* note 3 (which states that the promise of section 35(1) is realized “through the process of honourable negotiation” at para 20; the court also states that “[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling Aboriginal and state interests” at para 14, and that “the honour of the Crown requires negotiations leading to a just settlement” at para 20, citing *Sparrow*, *supra* note 3 at 1105–06); see also *Taku River*, *supra* note 3 at para 24.

³² *Haida Nation*, *supra* note 3 at paras 42, 48, cited in Ritchie, *supra* note 11 at paras 82, 84–85; see *Delgamuukw*, *supra* note 3 for early articulations of the duty to consult (which suggested that some situations “may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands” at para 168, although this is contradicted at para 160 with a statement that section 35 rights “are not absolute”).

³³ For a discussion on consent and *Tsilhqot’in*, see the text accompanying notes 109–116, *infra*; see especially Ritchie, *supra* note 11 at paras 82–85; Christie 2006, *supra* note 8 at paras 105–125.

³⁴ Walters, *supra* note 8 at 176, citing *R v Van der Peet* [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*] as applying reconciliation to section 35 (in the same year that the RCAP urged the Canadian government to adopt “a national policy of reconciliation and regeneration” in its relationships with Aboriginal peoples, Walters *supra* note 8 at 173).

³⁵ RCAP, *supra* note 13 at 524.

³⁶ *Ibid* at 526.

³⁷ Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Renewal: A Twenty-Year Commitment* (Ottawa: Indian and Northern Affairs Canada, 1996) at 5.

residential school experience, and make recommendations on the systemic legacy of residential schools, much of its work included development of broad themes of reconciliation. Echoing the RCAP, the TRC defines reconciliation as “an ongoing process of establishing and maintaining respectful relationships.”³⁸ The TRC understands responsibility and need for reconciliation at the individual, family, community, business, civic, institutional, and governmental levels: “Reconciliation not only requires apologies, reparations, the relearning of Canada’s national history, and public commemoration, but also needs real social, political, and economic change.”³⁹

Despite setting out reconciliation as the purpose of the duty to consult and accommodate, the SCC provides only brief explanations of the concept. Mark Walters argues, however, that the idea of reconciliation as relationship, similarly expressed by the TRC, is developing within SCC jurisprudence as a “normative principle that shapes the interpretation of legal rights and duties, establishing a constitutional framework for political actors to seek the reconciliation of peoples.”⁴⁰ Walters’ argument for an understanding of reconciliation as a normative principle recognizes the role of reconciliation in constitutional law and the role that just relations between Aboriginal peoples and the Crown should play in shaping Canada’s legal and political frameworks.

Newman explains that the SCC’s concept of “reconciliation” has shifted over time since it first appeared as a limit on federal powers in light of finding Crown duties to Aboriginal people in *Sparrow*.⁴¹ Balance and compromise were introduced as functions of reconciliation in *Van der Peet* and *Delgamuukw*, and although these decisions frame reconciliation broadly, “reconciliation” here acts as a limit on the scope of section 35.⁴² *Haida Nation* focuses on process and, like *Van der Peet*, speaks of “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”⁴³ *Mikisew Cree* expands upon this emphasis on Crown sovereignty, stating that the purpose of the duty to consult and accommodate is “reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions.”⁴⁴ Walters argues that use of the language of “peoples” in *Mikisew Cree*, following *Haida Nation*’s reference to Crown as sovereignty as *de facto*, suggests that the court’s understanding of reconciliation reflects something beyond formal law, something that can guide both legal and social relationship building.⁴⁵ In a similar vein, according to Newman, the emphasis on reconciliation in the trilogy has shaped the concept into “something that structures the processes of current interaction between the Crown and Aboriginal peoples.”⁴⁶

³⁸ TRC Summary Report, *supra* note 12 at 16.

³⁹ *Ibid* at 238.

⁴⁰ Walters, *supra* note 8 at 187.

⁴¹ Dwight Newman, “Reconciliation: Legal Conception(s) and Faces of Justice” in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon Canada: Purich Publishing, 2008) 80 at 81–82 [Newman, “Reconciliation”].

⁴² *Ibid* at 82; see *Van der Peet*, *supra* note 34 at para 31 (as cited by Newman).

⁴³ *Haida Nation*, *supra* note 3 at para 17, citing *Delgamuukw*, *supra* note 3 at para 186, quoting *Van der Peet*, *supra* note 34 at para 31.

⁴⁴ *Mikisew Cree*, *supra* note 3 at para 1.

⁴⁵ Walters, *supra* note 8 at 186–87.

⁴⁶ Newman, “Reconciliation”, *supra* note 41 at 85.

Reconciliation as relationship is always a reciprocal process that “invariably involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts” and includes “facing past evil openly, acknowledging its hurtful legacies, and affirming the common humanity of everyone involved ... [It] is about peace between communities divided by conflict, but it is also about establishing a sense of self-worth or internal peace within those communities.”⁴⁷ Walters explains that it is a change from a conflictual approach to a conciliatory attitude that makes reconciliation as relationship possible. He argues that the court’s development of the duty to consult and accommodate, and its insistence that negotiation be conducted so as to uphold the honour of the Crown, supports a conception of reconciliation as a relationship. The court has ordered the Crown “to adopt the attitude of honour that is essential for the reconciliation of peoples to flourish.”⁴⁸ Reconciliation as relationship cannot be imposed, thus is best understood as a normative principle: “[G]ood relations between two peoples with opposing cultural traditions necessitate an infinite search for reconciliation, so that reconciliation in this case is not a fact as much as a normative principle that guides decision-making on an ongoing basis.”⁴⁹ This emphasis on relationship provides a connection to an aspect common to several Indigenous legal traditions—that maintaining good relationships with and between communities, with all beings, and with the land is the overall role or purpose of law.⁵⁰

Reconciliation is a rich, forward-looking concept connoting contrition, acknowledgment, restorative justice, and equity.⁵¹ Reconciliation has, however, been critiqued as a “pacifying discourse” that does not challenge colonialism.⁵² Reconciliation, particularly in its legal manifestations, does not require Canadian legal and political institutions to change, nor does it ask enough of “broader society” to produce real transformation.⁵³ While Walters expects reconciliation-as-relationship to be pursued with sincerity, Dorries argues that emphasizing “common humanity,” as some Canadian political actors have done, results in a tendency for contemporary legal conceptions of reconciliation to subsume Indigenous difference in an effort to reach consensus.⁵⁴ Emphasizing this consensus diminishes the relevance of politics

⁴⁷ Walters, *supra* note 8 at 168.

⁴⁸ *Ibid* at 186.

⁴⁹ *Ibid* at 169.

⁵⁰ James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society*. (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 119–176. Henderson focuses this chapter on Aboriginal jurisprudences and introduces it by explaining that Aboriginal jurisprudences “reflect[] a vision of how to live well with the land and with other peoples”, at 122); see also Monture-Angus, *supra* note 2, chapter 3, especially pages 40–42, 57 and 60; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002), chapter 1; and Ariss and Cutfeet, *supra* note 8 at 5–11. I note here that I am a settler, and that the explanation of Kitchenuhmaykoosib Inninuwug legal traditions in this paper comes from my co-author, John Cutfeet.

⁵¹ Kevin Avruch & Beatriz Vejarano, “Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography” (2002) 4:2 *Online J Peace & Conflict Resolution* 37 at 39, 41.

⁵² Taiaiake Alfred, “Restitution is the Real Pathway to Justice for Indigenous Peoples” in Gregory Younging, Jonathan Dewar & Mike DeGagné, eds, *Response, Responsibility, and Renewal: Canada’s Truth and Reconciliation Journey*, vol 2 (Ottawa: Aboriginal Healing Foundation, 2009) 165 at 166, 168.

⁵³ *Ibid*; Ladner, *supra* note 8 at 286.

⁵⁴ Dorries, *supra* note 8 at 156–57.

and power, simultaneously legitimating the settler state and ignoring issues of Indigenous self-determination.⁵⁵ A focus on reconciliation is also seen as a refusal to question Crown sovereignty, an effort to ignore the contemporary presence of Indigenous nations, and a denial that treaties are nation-to-nation agreements.⁵⁶

This critique is particularly salient where reconciliation is discussed in the contexts of “balance” and “interests” instead of in protection of rights. Vermette argues that recent jurisprudence on reconciliation emphasizes ideas of “balance” and the needs of Canadian society, rather than upholding Aboriginal rights and supporting a nation-to-nation relationship.⁵⁷ As a result of the emphasis on “balance,” over time the concept of reconciliation has acted as a burden on section 35, rather than providing guidance for how to recognize and affirm Aboriginal rights.⁵⁸ Walters acknowledges that an emphasis on balance and compromise pushes the court’s explanation and uses of reconciliation towards a concept of “reconciliation as consistency.”⁵⁹ This minimizes the normative power of the term, as Walters understands it, reducing “reconciliation” to a technical exercise in rendering consistency.⁶⁰ Finally, the emphasis on “balance” tends to downplay resource and power differences that shape negotiations and consultations between the Crown and First Nations.

Given these critiques, it is apparent that reconciliation is a risky proposition. In particular, where reconciliation is used to promote “balancing interests,” as will be seen in some of the provincial consultation policies discussed below, Crown sovereignty is left unchallenged with very little attempt to make substantial change required by the idea of reconciliation as relationship.⁶¹ Yet, it is in exploring richness of the concept, and in particular, expanding on its connection to constitutionality and to Indigenous sovereignty that reconciliation might guide a way forward.

While Ritchie expresses serious concern that the evolution of the duty to consult will result in more land loss over time as development is approved, she also explains that in *Haida Nation*, the duty to consult and accommodate is expected to promote the process of reconciling Aboriginal and Canadian sovereignties “through a restructuring of the rules of governance regarding the relationship between Aboriginal parties and the Crown.”⁶² Here, the court articulates reconciliation as a “process flowing from rights” and “from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people.”⁶³ The statement that Crown sovereignty

⁵⁵ *Ibid.*

⁵⁶ Ladner, *supra* note 8 at 286.

⁵⁷ D’Arcy Vermette, “Dizzying Dialogue: Canadian Courts and the Continuing Justification of the Dispossession of Indigenous Peoples” (2011) 29 Windsor YB Access Just 55 [Vermette].

⁵⁸ *Ibid* at 58.

⁵⁹ Walters, *supra* note 8 at 179, 182.

⁶⁰ *Ibid*; see Walters’ discussion on reconciliation as consistency, and the problems with a one-way notion of consistency, *ibid* at 167–68.

⁶¹ Vermette, *supra* note 57 at 69.

⁶² Ritchie, *supra* note 11 at para 23.

⁶³ *Haida Nation*, *supra* note 3 at para 32.

exists *de facto* is important. According to Walters, it is one of the first judicial statements that questions the “lawful authority” of Crown sovereignty, rather than simply assuming it.⁶⁴ Thus, reconciling is about recognizing and respecting previous and notably, as Ritchie argues, *ongoing* Indigenous sovereignty, in part through restructuring governance relations between the parties.

Although cautious, Ladner suggests that the role of the Crown in the duty to consult “represent[s] a shift in the court’s understanding of both Aboriginal rights and Crown responsibilities (its honour), which may open the door more widely for a discussion of reconciliation.”⁶⁵ Henderson sees the requirement to consult and accommodate as a new form of “dialogical governance” characterized as “a dramatic, but largely unappreciated, transformation in constitutional relationships between Aboriginal peoples and the Crown.”⁶⁶ The SCC’s emphases on consultation and accommodation as a legal process, on a legal articulation of the Crown’s honour, and on negotiation framed by reconciliation are meant to promote the political goals of reconciliation and push the Crown towards an attitude appropriate for reconciliatory effort.⁶⁷ By articulating the Crown’s obligations in a way that reaches beyond legal technicality, this framing of reconciliation encourages the building of new relationships.

The TRC puts forward a robust concept of reconciliation that ties reconciliation to self-determination for Indigenous peoples in Canada. The TRC calls for Canada to integrate Aboriginal peoples’ rights to self-determination into its constitutional and legal orders and civic institutions, consistent with the principles and standards in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).⁶⁸ Respecting Indigenous peoples’ right to self-determination “is an animating force for efforts towards reconciliation. ... Self-determination requires confronting and reversing the legacies of empire, discrimination, and cultural suffocation ... [in order] to build a social and political order based on relations of mutual understanding and respect.”⁶⁹

The SCC rarely speaks to reconciliation as it is discussed in Canada’s contemporary political discourse.⁷⁰ Yet it is negotiation—political work—that the courts prefer in working towards reconciliation.⁷¹ Thus, the explanations of reconciliation put forward by the TRC and RCAP should be relied on to clarify the goals of consultation and accommodation policies. The TRC explicitly recommends that Aboriginal rights under section 35 should be interpreted with the aim of facilitating “Aboriginal peoples’ collective and individual aspirations.”⁷² Specifically, the TRC explains that “the reconciliation vision” found in section 35 is not about exercising absolute Crown sovereignty over Indigenous peoples, but rebuilding the kinds of relationships

⁶⁴ Walters, *supra* note 8 at 186.

⁶⁵ Ladner, *supra* note 8 at 293.

⁶⁶ Henderson, *supra* note 10 at 33.

⁶⁷ Walters, *supra* note 8 at 187.

⁶⁸ TRC Summary Report, *supra* note 12 at 244.

⁶⁹ *Ibid* at 243–4 (quoting James Anaya, Special Rapporteur on the Rights of Indigenous Peoples).

⁷⁰ Walters, *supra* note 8 at 176.

⁷¹ *Haida Nation*, *supra* note 3 at para 14.

⁷² TRC Summary Report, *supra* note 12 at 259.

envisaged in the Royal Proclamation of 1763 and in post-Confederation Treaties.⁷³ According to the TRC, while the law has set parameters for the development of reconciliation, ongoing guidance is needed for negotiations and other work that will be part of reconciliation. A wider understanding of reconciliation as comprising constitutional, legal, political and social dimensions has practical and aspirational import. Further, as one avenue for providing such guidance, policy can reach beyond formal law towards fundamental restructuring of the relationships between the Crown and Aboriginal people.

These richer explorations of the meaning of reconciliation thus provide a standard for our analysis of the Crown policies. We look for evidence as to whether and to what extent the duty to consult and accommodate as expressed in the policies reaches towards the transformative concepts of reconciliation as relationship, as tied to Indigenous self-determination, and as respecting Indigenous sovereignty and building nation-to-nation relationships. We also consider where the policies limit the role of the duty, and of reconciliation, to maintaining the status quo.

3. DOCTRINAL TENSIONS, CONSENT AND NEGOTIATING ISSUES

Consultation is largely, though not only, procedural. This is because it sets out how the Crown and Aboriginal peoples are to engage in a discussion of Crown plans and Aboriginal rights. Conversely, accommodation is largely though not only, substantive: it is the *outcome* of consultation, the specific *what* that will be done to minimize or avoid impacts on Aboriginal rights through implementation of Crown plans. Sossin explains that there is “a dynamic tension between process and outcome” in both court decisions and scholarship on the duty to consult and accommodate.⁷⁴

Such doctrinal tensions are not isolated. Circumscribing the duty to consult is the no-veto interpretation,⁷⁵ which limits the extent to which decision-making about developments on traditional territories can become fully shared between Aboriginal peoples and the Crown. The social contexts of inequality in which Aboriginal people live in Canada, and the specific context of unequal bargaining power between most Aboriginal groups and the Crown and industry proponents further shape both the process and outcome of consultation and accommodation.

The following subsections focus on the internal tensions between substance and procedure arising through the court’s directions on delegation to third parties, practical procedural steps

⁷³ TRC Summary Report, *supra* note 12 at 259. For explanations of how Indigenous peoples viewed post-Confederation treaties as relationships, see also Walter Hildebrandt, Dorothy F Rider & Sarah Carter, *The True Spirit and Original Intent of Treaty 7: Treaty 7 Elders and Tribal Council* (Montreal & Kingston: McGill-Queen’s University Press, 1996) (note that the post-Confederation Treaties have largely been seen by the Crown as surrendering all land rights. Most First Nations signing such treaties did not intend, and their own traditions and laws would not have allowed them to surrender or cede the land. Most First Nations entered treaties to preserve their access to land, resources and ways of life in the face of settlement and other pressures); See also Shin Imai, “Treaty Lands and Crown Obligations: The “Tracts Taken Up” Provision” (2001) 27 *Queen’s LJ* 1 at 13–14 and accompanying footnotes (arguing that the “tracts taken up” provision can only be interpreted in light of the fundamental Crown promise to Aboriginal signatories to Treaty 9 to preserve enough control over and access to resources to continue their way of life).

⁷⁴ Sossin, *supra* note 7 at 113.

⁷⁵ For a brief discussion on the no-veto interpretation, see the text accompanying notes 32–33.

and accommodation. We also provide a brief overview of the contextual tensions that may arise in negotiations through varying concepts of consent, and unequal bargaining power between the Crown and Aboriginal groups.

3.1. DELEGATION

The SCC stated that, while the legal responsibility to fulfil the duty clearly remains with the Crown, it “may delegate procedural aspects of consultation to industry proponents seeking a particular development,” likening this to environmental assessment processes.⁷⁶ There are benefits to delegation in that project proponents may be best situated to explain proposed activities and their impacts, and delegation may contribute to efficiency.⁷⁷ Bains and Ishkanian argue that “clear offloading procedures” allowing proponents to administer aspects of consultation are important supports for effective Crown consultation.⁷⁸ However, Ritchie argues that while delegation is a necessary tool for government to function efficiently, it risks blurring the nation-to-nation relationship as continued negotiations between Aboriginal communities and entities other than the Crown tend to weaken the Crown-Aboriginal nation-to-nation relationship.⁷⁹ Aboriginal groups have a broad range of interests, such as traditional land use, economic development, internal governance, social development, developing equal relationships with the Crown, and gaining respect for treaty promises, that come into play when projects are proposed. Industry’s primary interest, however, is profit. Dealing primarily with private industry will limit an Aboriginal group’s ability to advocate for its other interests, which are typically within the purview of government rather than industry.

Despite the onus on the Crown to fulfill the duty, in practice, the substantive aspects of the duty are often informally delegated to project proponents.⁸⁰ Ritchie discusses three primary risks in over-delegation. Firstly, excessive delegation sets the Crown up to act as a “neutral arbiter” between a proponent and an Aboriginal group, seeking balance instead of protecting Aboriginal rights.⁸¹ This approach allows the Crown to evade its constitutional duty set out in section 35 as well as to shape social perceptions of Indigenous communities as “stakeholders” rather than as nations.

⁷⁶ *Haida Nation*, *supra* note 3 at para 53.

⁷⁷ Ritchie, *supra* note 11 at paras 39 and 27. For example, a proponent for timber harvesting will have specific information about harvest areas and techniques and will be better equipped to explain the project to, and answer questions from, the Aboriginal community involved.

⁷⁸ Bains & Ishkanian, *supra* note 15 at 11.

⁷⁹ See Ritchie, *supra* note 11 at paras 27–8, 42; see also Andrea Bradley & Michael McClurg, “Consultation and Cumulative Effects: Is there a role for the duty to consult in addressing concerns about over-development?” (July 2012) Ontario Bar Assoc Aboriginal L 15:3 1 at 2, online: <www.oba.org> [Bradley & McClurg].

⁸⁰ Ritchie, *supra* note 11 at para 30. One practical result of the duty has been to encourage proponents to negotiate Impact Benefit Agreements with Aboriginal groups, thus working around the duty to consult with little government involvement; see Kenneth Coates & Dwight Newman, *The End Is Not Nigh: Reason Over Alarmism in Analyzing the Tsilhqot’in Decision* (Ottawa: MacDonald-Laurier Institute, 2015) at 16–17, online: <www.macdonaldlaurier.ca/files/pdf/MLITheEndIsNotNigh.pdf> [Coates & Newman].

⁸¹ Ritchie, *supra* note 11 at para 44.

Secondly, delegation to third parties allows for those parties to shape the discourse around the duty to consult and move away from principles set out by the courts. Bradley and McClurg state that “[a]s soon as consultation is delegated to a proponent, the discourse naturally shifts gears and the question becomes framed as, ‘how does this project get done?’”⁸² Emphasizing proponent certainty and project completion is problematic in that this emphasis neglects the purpose of consultation: to accommodate the exercise of constitutional Aboriginal rights, towards reconciliation. As well as narrowing the potential result of consultation, this shift in discourse also limits the effect of community efforts to bring their own processes and legal norms to the process. For its part, industry remains focused on its ends, reducing the scope of the consultation process.

Finally, Ritchie explains that the court has suggested that tribunals and other public bodies may have duties to consult and accommodate, raising the possibility that the duty will be owed by multiple regulatory decision-makers for any single project.⁸³ As multiple players are delegated aspects of consultation, the scope of consultation as well as the range of accommodation possibilities may be reduced. Both industry and regulatory boards may consider themselves limited by Crown direction, or, by powers set out in regulations.⁸⁴ Engaging with multiple parties results in confusion over who is actually responsible for fulfilling the duty.⁸⁵

3.2. PRACTICAL PROCEDURAL CONSIDERATIONS

The ability of Aboriginal groups to engage with and participate in the process of consultation is, in part, what makes it meaningful. The ability to participate is often shaped by details. Courts have given several practical examples of what aspects of consultation fulfill the honour of the Crown. One key aspect is providing sufficient information on the proposed project and its expected impacts.⁸⁶ According to Simon and Collins, standards for the information provided about consultation and proposed development to Indigenous peoples are developing

⁸² Bradley & McClurg, *supra* note 79 at 4–5. Various law firms have described this shift from the proponent’s perspective. One law firm states by introducing the duty to consult “risk management skills are increasingly required in the development of projects” and concludes that “[r]esource project proponents must continue improving their risk management capabilities while at the same time making thorough and thoughtful efforts to participate effectively in the consultation processes relevant to the areas in which they operate.” See Thomas Isaac & Maureen Killoran, “Risks and Risk Management in Project and Resource Development” (January 2014), online: Osler <www.osler.com/en/resources/governance/2014/capital-markets-report/risks-and-risk-management-in-project-and-resource>. McInnes Cooper Lawyers further provides a list of how “[r]esource and energy sector companies can pro-actively manage the risk related to the Duty to Consult.” See “The Duty to Consult: Important Lessons from Canada’s Mining Sector” (15 March 2013), online: Indigenous Corporate Training Inc. <www.ictinc.ca/blog/legal-update-the-duty-to-consult-important-lessons-from-canadas-mining-sector>.

⁸³ Ritchie, *supra* note 11 at para 33.

⁸⁴ *Ibid* at paras 47–48; see Sossin, *supra* note 7 at 108 referencing *Huu-Ay-Aht First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 697, 33 Admin LR (4th) 123 [*Huu-Ay-Aht*], where “those negotiating on behalf of the Crown with the aboriginal community did not even have the authority to grant any other form of accommodation than under the particular Act.”

⁸⁵ Ritchie, *supra* note 11 at para 55.

⁸⁶ Sossin, *supra* note 7 at 103 stating that in *Klahoose First Nation v Sunshine Coast Forest District (District Manager)*, 2008 BCSC 1642, [2009] 1 CNLR 110 [*Sunshine Coast*], the Crown withheld meaningful information and therefore the “Crown’s actions could hardly even be called consultation.”

under the UNDRIP's "free, prior and informed consent" (FPIC) requirements.⁸⁷ Information provided on the FPIC process must be full and accurate.⁸⁸ Information about the nature and scope of a project and its possible health and environmental risks should be provided in a "culturally appropriate manner that will allow [Aboriginal communities] to make informed decisions."⁸⁹

Engaging in consultation processes requires human and economic resources that may be in short supply in any given Aboriginal community.⁹⁰ This places many Aboriginal groups in already compromised positions before beginning the consultation. Courts have stated that governments may have to provide funding in order to ensure that an Aboriginal community can participate meaningfully in consultation.⁹¹ Providing sufficient funding is one way in which the Crown can address the inequality of bargaining power and any limits on the participation of Aboriginal communities in consultation processes.

Procedures must also reflect the constitutional significance of the duty. Expecting Aboriginal groups to respond to general calls for public consultation is not sufficient because public consultation is not specifically aimed at rights-holders under section 35(1) nor towards addressing those rights.⁹² Sossin suggests that, under judicial review, the time taken to consult would be one of the criteria to determine whether any specific consultation process had been reasonable.⁹³ While the courts do not give a definition of reasonable timelines, we suggest that a reasonable time is one that reflects communities' abilities to respond, in that the timelines recognize the resources and foundations necessary to respond to requests for consultation proactively, rather than only reactively. As well, the courts have required the Crown to take Aboriginal community responses into account in decision-making processes, and to include Aboriginal community participation in discussions around potential accommodations. All of these requirements deal with fostering participation on a basis of equality, which is an important aspect of fulfilling the duty to consult and accommodate.

3.3. ACCOMMODATION

The tension between procedure and substance also appears in understandings of accommodation. The tension arises in part because of the various interpretations of reconciliation

⁸⁷ Penelope Simon & Lynda Collins, "Participatory Rights in the Ontario Mining Sector: an International Human Rights Perspective" (2010) 6:2 JSLDP 177 [Simon & Collins] (this argument is based on documents developed by the Working Group on Indigenous Populations and on decisions made by the Inter American Court on Human Rights); *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, UN Doc A/RES/61/295 (2007) 1 at art 32.2 [UNDRIP].

⁸⁸ Simon & Collins *supra* note 87 at 192 citing Maya Indigenous Communities of the Toledo District (Belize) (2004), Inter-Am CHR No 40/04, at para 142.

⁸⁹ Simon & Collins, *supra* note 87 at 190.

⁹⁰ Dorries, *supra* note 8 at 184.

⁹¹ Newman, "Revisiting", *supra* note 5 at 71; but see Devlin & Murphy, *supra* note 6 at 381 for their discussion of *Kelly Lake Cree Nation v British Columbia (Minister of Energy and Mines)* [1998] BCJ No 2471, [1999] 3 CNLR 126 regarding the court's acceptance of BC's refusal to fund an advisor to assist the band in the consultation process, at 280–281.

⁹² *Mikisew Cree*, *supra* note 3 at para 64.

⁹³ Sossin, *supra* note 7 at 102.

that arise in policy development. *Haida Nation* focuses on making interim arrangements to avoid irreparable effects and minimize harm to Aboriginal interests as accommodation: “seeking compromise in an attempt to harmonize conflicting interests”⁹⁴ Newman explains that accommodation will be fact-specific and yet at the same time, must advance the principles underlying the duty to consult.⁹⁵ Some accommodations will be simply “practical adjustments to plans such that they are taking account of Aboriginal interests in a reasonable manner.”⁹⁶ Lower courts have stated that Aboriginal groups must not be stopped from participating in discussions around potential accommodations;⁹⁷ that leaving accommodations to be fulfilled by a future party over which the decision-maker had no control was insufficient;⁹⁸ and that offering an Aboriginal group only one option for accommodation, without having authority to negotiate different options, did not fulfill the duty.⁹⁹

In situations where accommodation of rights is very expensive or impossible, Newman argues that, “there must be a weighing of the different interests with an openness to talking them through.”¹⁰⁰ Potes argues, however, that it is a high standard for accommodation that embodies the constitutional aspect of the duty to consult and accommodate. The adequacy of accommodation following consultation should be based on the Crown’s “obligations to cause the least infringement possible, to give priority to Aboriginal interests, to avoid irreparable damage, and to recognize the Aboriginal preferred means to exercise their rights.”¹⁰¹ This would reflect the constitutional nature of Aboriginal rights: “law must develop in such a way that, in some circumstances ... meaningful consultation and accommodation can mean no further development.”¹⁰² Where reconciliation is understood robustly, as a requirement to renew Crown-Aboriginal relationships and as an opportunity to support Indigenous self-determination, it is likely more attention will be paid to the substance of accommodations in exercising the duty. Thus, considering the role provinces set out for accommodation in their policies helps to discern the understandings of reconciliation underlying those policies.

⁹⁴ *Haida Nation*, *supra* note 3 at paras 44, 47 and 49.

⁹⁵ Newman, “Revisiting”, *supra* note 5 at 105.

⁹⁶ *Ibid.*

⁹⁷ Sossin, *supra* note 7 at 103, citing *Sunshine Coast*, *supra* note 86.

⁹⁸ *Ibid.*, citing *Wii'litsux v British Columbia (Minister of Forests)*, 2008 BCSC 1139, [2008] 4 CNLR 315 at para 186.

⁹⁹ Sossin, *supra* note 7 at 108, citing *Huu-Ay-Aht*, *supra* note 84.

¹⁰⁰ Newman, “Revisiting”, *supra* note 5 at 105.

¹⁰¹ Potes, *supra* note 7 at 42.

¹⁰² Bradley & McClurg, *supra* note 79 at 5; see e.g. Newman, “Revisiting”, *supra* note 5 at 105–06 (in 2014, the federal government rejected the Taseko’s New Prosperity mine proposal. Taseko’s proposals were found to have significant environmental impacts on a lake that was spiritually important to a local Aboriginal community. There was no way to accommodate this right, which led to the cancellation); see also Canadian Environmental Assessment Agency, “Backgrounder: Proposed New Prosperity Gold-Copper Mine Project”, (Ottawa: CEAA, 2014) (the Taseko’s New Prosperity mine was “likely to cause ... [s]ignificant adverse effects on the current use of lands and resources for traditional purposes by certain Aboriginal groups, on their cultural heritage and on their archaeological and historical resources” at 1).

3.4. CONSENT

The concept of FPIC before development on Indigenous lands, as expressed in the UNDRIP,¹⁰³ has become a significant backdrop to Canada's duty to consult and accommodate, particularly in the ways it has opened up challenges to Canada's current no-veto approach to the duty. Interpretations of FPIC vary and the extent to which FPIC requires full consent of Indigenous peoples versus rights to participation in decision-making remains in contentious debate¹⁰⁴ as does Canada's engagement with FPIC principles under UNDRIP.¹⁰⁵

The idea of consent has taken on a new role in Crown relationships with Aboriginal peoples through the decision in *Tsilhqot'in* which defined Aboriginal title and declared Aboriginal title over *Tsilhqot'in* traditional lands. The decision states that if the Crown wishes to proceed with development on Aboriginal title land without the consent of the First Nation involved, the Crown must justify its actions as fulfilling a "compelling and substantial public purpose"¹⁰⁶ and comply with its fiduciary duty to the title-holding group in respecting unique aspects of Aboriginal title.¹⁰⁷ The Crown must also demonstrate proportionality in its justification showing that the infringement of title is necessary to achieve its objective; that the infringement is only to the extent necessary; and that there is minimal impairment of Aboriginal title.¹⁰⁸ The Crown is still obliged to fulfil its duty to consult and accommodate; thus, the depth of consultation would in such a case reflect the fact that title has been proven, rather than claimed.¹⁰⁹

¹⁰³ UNDRIP, *supra* note 87 at art 32.2.

¹⁰⁴ See Simon & Collins, *supra* note 87 at 194, who argue that consent is required under international law before development that severely impacts Indigenous peoples on their lands, such as relocation of Indigenous peoples, storage of hazardous waste or some large-scale projects; The argument for full consent in these specific situations is supported by an analysis of Special Rapporteur Reports and jurisprudence of the Inter-American Court of Human Rights in Gonzalo Bustamante, "The Right to Consultation and Free, Prior and Informed Consent in Latin America: the Governmentality of the extraction of Natural Resources" (2015) *Hors-série RQDI* 179 at 187–188; see also Brenda Gunn, "Moving Beyond Rhetoric: Working Toward Reconciliation Through Self-Determination" (2015) 38 *Dalhousie LJ* 237 at 258–259 where she argues to connect FPIC to rights to self-determination under the UNDRIP, and explains how Canada's duty to consult fails to meet international standards; see also Newman, "Revisiting", *supra* note 5 at 147–153 where he cautions that interpretations of the UNDRIP's "free, prior and informed consent" clauses have varied over time—including some that do and do not advance a veto—and notes that this area of international law is still developing; see also Tara Ward, "The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights within International Law" (2011) 10: 2 *Northwestern J Human Rights* 54 who argues that while there is not yet a full right to consent recognized for Indigenous peoples, there is consensus that "good faith consultation" prior to resource exploration or development is the minimum standard for States.

¹⁰⁵ For example, Canada removed its permanent objector status to parts of the UNDRIP on May 9, 2016, announcing that it will "fully adopt and work to implement" its terms; see Brian Hill, "Canada Endorses United Nations Declaration on the Rights of Indigenous Peoples" *Global News* (9 May 2016), online: <globalnews.ca/news/2689538/canada-endorses-united-nations-declaration-on-the-rights-of-indigenous-peoples/>.

¹⁰⁶ *Tsilhqot'in*, *supra* note 3 at para 77 (compelling and substantial public objective is described more fully at paras 81–84).

¹⁰⁷ *Ibid* at para 77 (the fiduciary duty to title-holders is described more fully at paras 85–86).

¹⁰⁸ *Ibid* at para 87.

¹⁰⁹ *Ibid* at paras 77–79 ("[t]he required level of consultation and accommodation is greatest where title has been established" at para 79).

Tsilhqot'in is a watershed decision, and its proviso that the consent of Aboriginal title-holders is required before development of their lands has attracted much attention.¹¹⁰ The impacts of the decision are not easily predictable. Mascher argues that the requirement that the Crown justify any infringements as consistent with its fiduciary duty towards Aboriginal peoples, especially that any infringements not deprive future generations of their section 35 land rights, is a high threshold. Given this high threshold, negotiating towards consent, rather than justifying its incursions and imposing an accommodation on a dissenting Aboriginal community, may be a more viable option for the Crown. The *Tsilhqot'in* decision does increase uncertainty for those working in traditional territories where there are title claims without consent of the relevant Aboriginal group, in part because it shows that contested title claims can be followed by unequivocal title declarations.¹¹¹ Coates and Newman emphasize, however, that *Tsilhqot'in*, as explained above, provides a legal test for the Crown—stringent but not unreachable—to override consent on Aboriginal title lands.¹¹² Further, the court continues to explain the duty to consult and accommodate in language similar to the trilogy,¹¹³ referring to the spectrum metaphor and stating that where title is established, the highest level of consultation and accommodation is required,¹¹⁴ rather than affecting its basic shape: that good faith consultation and accommodation of Aboriginal rights, towards reconciliation, is necessary to uphold the honour of the Crown. The possibilities of attaching consent to the duty to consult and accommodate through *Tsilhqot'in* and the UNDRIP are significant, yet, as it stands, the duty itself is not changed notably in *Tsilhqot'in*.

¹¹⁰ For a nuanced discussion on how *Tsilhqot'in* has emphasized “consent” over consultation in the conversation around development on traditional Aboriginal territories, see Sharon Mascher, “Today’s Word on the Street – “Consent”, Brought to You by the Supreme Court of Canada”, *ABlawg* (blog), online: <ablawg.ca/wp-content/uploads/2014/07/Blog_SM_Tsilhqot'in_July-2014.pdf>. Ravina Bains argues that the decision raises much uncertainty and is likely to increase litigation on ongoing projects as well as treaty negotiations in BC; see Ravina Bains, “A Real Game Changer: An Analysis of the Supreme Court of Canada *Tsilhqot'in Nation v British Columbia Decision*” (2014), Fraser Institute, online: <www.fraserinstitute.org/studies/real-game-changer-analysis-supreme-court-canada-tsilhqot'-nation-v-british-columbia-decision>; finally, see Coates & Newman, *supra* note 80 (note that Bains and Coates & Newman, while differing in their assessments of risks, uncertainty and increased litigation, agree that questions about how the nature of Aboriginal title and the extent to which consent is required may shape land use on Aboriginal title lands will notably affect non-Aboriginal political, economic and business decision-making on whether to propose certain developments on Aboriginal title land).

¹¹¹ *Delgamuukw*, *supra* note 3, *Haida Nation*, *supra* note 3 and *Taku River*, *supra* note 3 all arose in the context of unresolved title claims. *Mikisew Cree*, *supra* note 3, however, arose in the context of a recognized treaty right to harvest.

¹¹² Coates & Newman, *supra* note 80 (the authors state that “[e]ven though this element of the judgment [the override of consent] has received less attention, the Court is actually striking a careful balance within a significantly nuanced judgment, one that respects Aboriginal title and the rights of Indigenous peoples but that recognizes the compelling broader interests involved with land and resource development” at 19).

¹¹³ *Tsilhqot'in*, *supra* note 3 (“[t]he degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*” at para 79; see also para 91). The idea of Aboriginal consent as necessary to justify infringements of Aboriginal rights, depending, in part, on the depth of impact on those rights, was suggested in *Delgamuukw*, *supra* note 3 at para 169.

¹¹⁴ *Tsilhqot'in*, *supra* note 3 at para 79.

3.5. NEGOTIATING ISSUES: BARGAINING POWER

The duty to consult and accommodate is fulfilled through good faith negotiation between the Crown and Aboriginal peoples.¹¹⁵ Like many newer models of resource governance, such as Impact Benefit Agreements (IBAs), the duty to consult and accommodate is framed in language that assumes the parties are “nominally equal,”¹¹⁶ or that they have “the potential for a leveled playing field.”¹¹⁷ While the good faith demanded of the Crown may temper its power, “mere hard bargaining” is acceptable.¹¹⁸ This belies the weight of resources and colonial history behind the Crown. Further, as proponents become part of the process through information sharing, being delegated with other procedures and proposing accommodations, their bargaining power, supported ideologically by the Crown, also plays a role in the process and outcomes of the duty.

Caine and Krogman, in a study of IBAs between industry and Aboriginal groups in Canada, considered the ways in which the social context of inequality shapes negotiations. Evidently, the Crown and proponents have more and easier access to financial resources, technical, legal, and other information, and support.¹¹⁹ As a repeat player, industry is also more likely to have experience in, or institutional memory of, consultation processes than many Aboriginal communities in Canada,¹²⁰ particularly those more remote communities where projects that will likely impact Aboriginal rights (such as mining, logging and hydro-electric installations) are often proposed.¹²¹

Negotiations within the scope of the duty to consult, however, will be shaped by more than the specific resources of each party. As well as the formal institutional structure of engagement, which includes the written consultation policies we examine within this paper, engagement is shaped by informal behaviour patterns and the broad contextual background of consultation. The informal behaviour patterns include how each party views their obligations under the formal policy and what obligations each participant sees as legitimate, shaping how they then interpret, apply or ignore those formal structures. Views of consultation as simply a technical requirement, or as part of building new relationships, or as a way to protect rights can

¹¹⁵ In *Haida Nation*, *supra* note 3 at para 42 (citing Delgamuukw, the court states that the “common thread” of good faith on the part of the Crown “must be the intention of substantially addressing [Aboriginal] concerns” at 42. This appears to us as an intersection between process and outcome, but we note that the court also ties good faith to procedure, similar to the procedural safeguards mandated by natural justice found in administrative law at para 41).

¹¹⁶ David Szablowski, “Operationalizing Free, Prior and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a negotiated Model of Justice” (2010) 30:1–2 *Can J Development Studies* 111 at 112 [Szablowski].

¹¹⁷ Ken J Caine & Naomi Krogman, “Powerful or Just Plain Power-Full? A power Analysis of Impact and Benefit Agreements in Canada’s North” (2010) 23:1 *Organization & Environment* 76 at 79 [Caine & Krogman].

¹¹⁸ *Haida Nation*, *supra* note 3 at 42.

¹¹⁹ Caine & Krogman, *supra* note 117 at 87–88.

¹²⁰ *Ibid* at 85.

¹²¹ Szablowski, *supra* note 116 at 125; see *ibid* at 117 for an example of bargaining power issues in negotiating an IBA in Canada’s far north in the mid-1990s before the full development of the duty to consult in *Haida Nation*, *supra* note 3.

all shape negotiations. The contextual background includes market and ecological conditions as well the social relations around participants—examples include the history of a specific Aboriginal community with Crown or industry actors; the current local economy, and the community’s social strengths and challenges. Political goals and trade-offs faced by the Crown, given pressures from industry and or non-Aboriginal local communities are further factors shaping negotiations.¹²²

Industry norms that reflect dominant cultural perspectives also shape consultation and negotiation. Both worldviews and previous experience will shape what proponents and governments propose to mitigate impacts, and this may limit their capacities to hear concerns, alternative proposals and what can be imagined as accommodations.¹²³ In a study of IBAs between resource extraction industries and Aboriginal communities in northern Canada, Caine and Krogman found that although Aboriginal leaders were concerned with language retention, time on, and knowledge of, the land, and passing their values onto their youth, the “benefits” agreed to were all framed in the language of industry: jobs, training and new business opportunities. This was the approach that was acceptable to industry and supported by government, and shaped what Aboriginal communities understood as possible to achieve within the context of making an agreement.¹²⁴

The tensions between process and substance in the duty to consult escalate when the purpose of the duty is minimized and efficiency of process is maximized. Practicalities, such as funding and timelines, directly shape the resources and attention each party is able to give to consultation and development of accommodation measures. Unequal bargaining power plays an important role in negotiations and the expectations of each party, creating tensions in expectations as to what best fulfills the duty. This paper does not address the implications of all of the contextual tensions that shape the duty to consult and accommodate described above. In the analysis that follows, however, we explain where procedures contribute more or less to equality in the consultation and accommodation process.

4. POLICIES ON THE DUTY TO CONSULT AND ACCOMMODATE

4.1. METHODOLOGICAL AND ANALYTIC APPROACHES

In analyzing the extent to which duty to consult and accommodate policies contribute to a vision of “mutual recognition, mutual respect, sharing and mutual responsibility”¹²⁵ we recognize the serious constraint of the current no-veto interpretation.¹²⁶ A key effect of the court’s formulation of consultation as not requiring consent (except, perhaps in rare instances) is that it reinforces the inequality of negotiating power between the Crown and Aboriginal groups. Removing this constraint would be a clear contribution to building equal nation-to-

¹²² Szablowski, *supra* note 116 at 122. For a discussion of the importance of context, see Caine & Krogman, *supra* note 117 at 83, 87.

¹²³ Caine & Krogman, *supra* note 117 at 88.

¹²⁴ *Ibid* at 87–88.

¹²⁵ RCAP, *supra* note 13 at 524.

¹²⁶ Ritchie, *supra* note 11 at para 86. Also see discussion of *Tsilhqot’in’s* potential influence on the duty to consult and consent, in text accompanying notes 106–14.

nation relationships. Nonetheless, policies do vary in their support of meaningful consultation and their abilities to foster more equal relationships.

Provincial and federal policies around the duty to consult and accommodate initially developed as reactions to the SCC jurisprudence, and were often put in place quickly to meet the letter of the law without necessarily consulting Aboriginal groups,¹²⁷ a dubious start for policies meant to work towards reconciliation. While some provinces have further developed their original interim policies, others left them as they were. As a result, the policies we analyze range from 2006 (*Ontario's Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal and Treaty Rights*)¹²⁸ to 2015 (Nova Scotia's *Consultation with the Mi'kmaq of Nova Scotia*).¹²⁹ Most provinces have generalized duty to consult and accommodate policies, although Alberta and Newfoundland and Labrador (NL) specifically direct their policies to lands and resources.¹³⁰ Alberta's policies are in some flux—we have focused on its 2013 policy and 2014 guidelines for consulting with First Nations.¹³¹ Alberta's new policy and guidelines for consultation with Métis Settlements came into force in April, 2016, however, due to time constraints we were not able to include these in our analysis.¹³² As Ontario's Draft Guidelines

¹²⁷ Newman, "Revisiting", *supra* note 5 at 116–17.

¹²⁸ Ontario, Ministry of Indigenous Relations and Reconciliation, "Draft Guidelines for Ministries on Consultation with Aboriginal Peoples Related to Aboriginal and Treaty Rights", (MIRR, 17 November 2015), online: <www.ontario.ca/document/draft-guidelines-ministries-consultation-aboriginal-peoples-related-aboriginal-rights-and-treaty> [Ontario Draft Guidelines]. Ontario's Ministry of Indigenous Relations and Reconciliation is currently reviewing the draft consultation policy and expects to complete this in the fall of 2017. See Ontario, Ministry of Indigenous Relations and Reconciliation, "Duty to Consult with Aboriginal peoples in Ontario", (MIRR, 1 December 2016), online: <www.ontario.ca/page/duty-consult-aboriginal-peoples-ontario#section-5>.

¹²⁹ "Government of Nova Scotia Policy and Guidelines: Consultation with the Mi'kmaq of Nova Scotia", (April 2015), online: <novascotia.ca/abor/docs/April%202015_GNS%20Mi'kmaq%20Consultation%20Policy%20and%20Guidelines%20FINAL.pdf> [NS Consultation Guidelines].

¹³⁰ "The Government of Newfoundland and Labrador's Aboriginal Consultation Policy on Land and Resource Development Decisions", (April 2013), online: <www.laa.gov.nl.ca/laa/publications/aboriginal_consultation.pdf> [NL Consultation Policy].

¹³¹ "The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management", (28 July 2014), online: <www.aboriginal.alberta.ca/documents/First_Nations_Consultation_Guidelines_LNRD.pdf.pdf?0.4351395003031939> [Alberta 2014 Consultation Guidelines]. Note that the Alberta 2014 Consultation Guidelines are meant to implement "The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013", (3 June 2013), online: <indigenous.alberta.ca/documents/GoAPolicy-FNConsultation-2013.pdf> [Alberta 2013 Policy]. We refer to both documents in our analysis.

¹³² Alberta released a new Proponent's Guide, effective June 6, 2016, which was not included in this analysis; see "The Government of Alberta's Proponent Guide to First Nations and Metis Settlements Consultation Procedures", (6 June 2016), online: <indigenous.alberta.ca/documents/Proponent-Guide-June6-2016.pdf?0.4108847163231636>. The province also introduced a specific Policy and specific Guidelines for consultation with Métis Settlements; see "The Government of Alberta's Policy on Consultation with Metis Settlements on Land and Natural Resource Management, 2015", (26 October 2015), online: <indigenous.alberta.ca/documents/GOA-Policy-Consultation-Metis-LandNaturalResourceManagement-2015.pdf>; "The Government of Alberta's Guidelines on Consultation with Métis Settlements on Land and Natural Resource Management, 2015", (4 March 2016), online: <indigenous.alberta.ca/documents/Updated_Metis_Settlements_Consultation_Guidelines.pdf>. Alberta states that both the Policy and Guidelines on consultation with the Métis Settlements are "modeled closely after the current

were published in 2006, we supplement our analysis by including Ontario's Ministry of Mines and Northern Development (MNDM) 2012 consultation policy, which followed substantial changes to Ontario's Mining Act in 2009.¹³³ Manitoba has interim guidelines from 2009, which we will be analyzing, although the province expects departments to each develop their own consultation guidelines.¹³⁴

There are limitations to our analysis. Some policies are minimal, while others are interim. Manitoba's policy does not yet reach the accommodation stage. Quebec's policy uses principles as guidance yet does not specify procedural steps. Nova Scotia (NS), Saskatchewan, Alberta, NL and British Columbia (BC) have quite detailed policies, while New Brunswick (NB) and Prince Edward Island (PEI) currently have less thorough consultation policies in place.¹³⁵ Further, we did not include all elements of these policy documents in our analysis. For example, Manitoba, Saskatchewan, and Quebec all make provisions for communication and information sharing, including translation,¹³⁶ and in Manitoba and Quebec, community visits.¹³⁷ Alberta and Saskatchewan both include traditional land use beyond specific treaty lands in their consultation scope.¹³⁸

First Nations consultation policy." See Alberta Indigenous Relations, "Indigenous Consultation Policies and Guidelines," online: <indigenous.alberta.ca/policy-guidelines.cfm>. Both documents came into force on April 4, 2016 and thus are not closely analyzed in this paper.

- ¹³³ Ontario, Ministry of Mines and Northern Development, "MNDM Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration", (September 2012), online: <www.mndm.gov.on.ca/sites/default/files/aboriginal_exploration_consultation_policy.pdf> [Ontario MNDM Consultation Policy]; Ontario announced its plan to revise the Mining Act after the Ontario Court of Appeal described this Act as "a remarkably sweeping law" in its decision in *Frontenac Ventures Corp. v Ardoch Algonquin First Nation*, 2008 ONCA 534 at para 61, 285 DLR (4th) 108; see Office of the Premier, Ontario, "Protecting a Northern Boreal Region One-and-half Times the Size of the Maritimes", July 14, 2008, <news.ontario.ca/opo/en/2008/07/protecting-a-northern-boreal-region-one-and-a-half-times-the-size-of-the-maritimes.html>
- ¹³⁴ Manitoba, Aboriginal and Northern Affairs, "Interim Provincial Policy for Crown Consultations with First Nations, Métis Communities and Other Aboriginal Communities", (May 4, 2009) at 3, online: <digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=20730&md=1> [Manitoba Interim Policy].
- ¹³⁵ Government of Saskatchewan, "First Nation and Métis Consultation Policy Framework", (June 2010), online: <www.gov.sk.ca/adx/asp/adxGetMedia.aspx?mediaId=1164&PN=Shared> [Saskatchewan Consultation Policy]; New Brunswick, Aboriginal Affairs Secretariat, "Government of New Brunswick Duty to Consult Policy", (November 2011), online: <www2.gnb.ca/content/gnb/en/departments/aboriginal_affairs/duty_to_consult.html> [NB Consultation Policy]; British Columbia, "Updated Procedures for Meeting Legal Obligations when Consulting with First Nations, Interim," (May 2010), online: <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations> [BC Updated Procedures]; Indigenous and Northern Affairs Canada, "Mi'kmaq-Prince Edward Island and Canada Consultation Agreement", (2012), online: <www.aadnc-aandc.gc.ca/eng/1344522721221/1344522886022> [PEI Consultation Guidelines].
- ¹³⁶ Saskatchewan Consultation Policy, *supra* note 135 at 4.
- ¹³⁷ Quebec, Secrétariat aux affaires autochtones, "Interim Guide for Consulting the Aboriginal Communities", (2008) at 11, online: <www.autochtones.gouv.qc.ca/publications_documentation/publications/guide_inter_2008_en.pdf> [Quebec Interim Guide]; Manitoba Interim Policy, *supra* note 134 at 4.
- ¹³⁸ Alberta 2014 Consultation Guidelines, *supra* note 131 at 1; Saskatchewan Consultation Policy, *supra* note 135 at 5.

In addition to our more detailed analysis of the provincial policies, we include some aspects of the Federal Guidelines on the duty to consult and accommodate.¹³⁹ Overall, the federal guidelines focus on coordinating inter-departmental federal consultation, determining in what situations the federal Crown can rely on provincial or proponent consultation, and managing records. The federal approach sets out principles, and provides federal officials with lists of questions to help them design, analyze and evaluate consultation plans and processes for their fulfillment of the duty. There is less prescription in the Federal Guidelines than in most of the provincial policies.

We focus on general policy guidelines for fulfilling the duty to consult for several reasons. There is concern among Aboriginal communities and scholars that “meaningful change will not be able to sustain itself without ... [i]mprovements to policy at the strategic level.”¹⁴⁰ Policy development is necessary to implement protection of Aboriginal rights as expressed in law,¹⁴¹ and the duty to consult and accommodate will develop, in part, through its expression and application in policy.¹⁴² Such policies guide Crown actors in the process of engaging Aboriginal groups in consultation and accommodation,¹⁴³ thus shaping understandings and eventually the law around the duty.¹⁴⁴ General guidelines are often the basis for further specific ministerial or departmental policies,¹⁴⁵ and analysis at this level may reveal the overall direction to be refined in specific policies.

In the next section, we describe and compare the policies in the areas of delegation, practical processes and accommodation. Our analysis of how these particular aspects of the policies work together in revealing the willingness of the Crown to build new respectful relationships with Indigenous peoples follows. Table 1 in the Appendix offers a quick visual comparison of policy elements across jurisdictions to accompany the detailed comparisons made in this Section.

¹³⁹ Canada, Minister of Aboriginal Affairs and Northern Development, “Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult”, (March 2011), online: <www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/intgui_1100100014665_eng.pdf> [Federal Guidelines]. Our analysis focuses on Part A, introducing a legal explanation of the duty to consult and the government’s principles of consultation, and Part C which divides consultation into four phases, emphasizing pre-consultation planning.

¹⁴⁰ Fraser McLeod et al, “Finding Common Ground: A Critical review of Land Use and Resource Management Policies in Ontario, Canada and their Intersection with First Nations” (2015) 6:1 Intl Indigenous Policy J 1 at 1.

¹⁴¹ Jennifer E Dalton, “Aboriginal Self-determination in Canada: Protections Afforded by the Judiciary and Government” (2006) 21:1 CJLS 11 at 30 citing Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 270–71.

¹⁴² Newman, “Revisiting”, *supra* note 5 at 116.

¹⁴³ McLeod et al, *supra* note 140 at 2.

¹⁴⁴ Newman, “Revisiting”, *supra* note 5 at 116.

¹⁴⁵ For an example of the back-and-forth between general and specific duty to consult and accommodate policies within Saskatchewan, see Newman, “Revisiting”, *supra* note 5 at 118–19.

4.2. DELEGATION

While the SCC has been clear that the duty to consult and accommodate rests with the Crown, as explained above, the Crown may delegate “procedural aspects” to third parties. Manitoba, NB, and PEI do not mention third parties or proponents in their consultation policies. Ontario, Quebec, Alberta and NL refer specifically to project proponents as third parties in their policies. While much of the duty to consult discourse refers to industry proponents as the third party,¹⁴⁶ in fact, proponents may include industry, municipal or local governments,¹⁴⁷ government departments or ministries, federal agencies, Crown corporations, boards or private entities,¹⁴⁸ or as in Alberta, “any other organization or individual requiring a provincial approval.”¹⁴⁹

The policies vary in their emphasis on Crown responsibility and the extent of delegation to third parties. BC’s policy allows for a proponent to engage in procedural aspects of consultation, including suggesting an appropriate level of consultation and reasonable timelines.¹⁵⁰ This policy states that when proponents are “engaging in consultation” the province “may consider” identifying which First Nations should be consulted, notifying those First Nations that the proponent is conducting procedural aspects of consultation, deciding the “level of consultation that may be required” and “assessing adequacy and appropriateness of consultation and accommodations.”¹⁵¹ Overall, BC’s policy indicates that proponents set up consultation processes, while provincial decision-makers become more involved at the accommodation stage.

Ontario’s Draft Guidelines and Quebec’s Interim Guide envisage a ministry-led consultation process. Quebec requires the government and its departments to actively engage in all stages of consultation and accommodation, while explaining very specific roles for third parties. Project proponents may take part “to explain certain more technical aspects of a project” and “may also be questioned when deciding on accommodation measures and their implementation.”¹⁵² While Ontario’s Draft Guidelines focus mainly on government decision-

¹⁴⁶ See *supra* note 82, referring to legal commentary on the duty to consult and accommodate; see also Bains and Ishkanian, *supra* note 15 for an example of emphasis on private industry and the duty. We note that this emphasis shapes the focal point of consultation and of development proposed on Indigenous lands to for-profit industry; see also Clara MacCallum Fraser & Leela Viswanathan, “The Crown Duty to Consult and Ontario Municipal-First Nations Relations: Lessons Learned from the Red Hill Valley Parkway Project” (2013) 22:1 Can J Urban Research 1 Supplement 2013 at 5 [Fraser & Viswanathan], who explain that the conflicts at Oka (1990) and at Caledonia (mid-2000s) both arose through municipal planning that ignored First Nations rights on local lands.

¹⁴⁷ The role of municipalities in consultation remains unclear, despite their central role in local planning which often impacts Aboriginal and treaty rights. For a discussion of municipalities and the duty to consult see Imai & Stacey, *supra* note 6.

¹⁴⁸ BC Updated Procedures, *supra* note 135 at 3; Alberta 2014 Consultation Guidelines, *supra* note 131 at 6; NS Consultation Guidelines, *supra* note 129 at 30.

¹⁴⁹ Alberta 2014 Consultation Guidelines, *supra* note 131 at 6.

¹⁵⁰ BC Updated Procedures, *supra* note 135 at 12, 14 (procedural aspects of consultation may also be delegated to “the ministry or agency proposing to make a decision” or an “interagency consultation team” at 12).

¹⁵¹ *Ibid* at 12–13.

¹⁵² Quebec Interim Guide, *supra* note 137 at 10.

makers, emphasizing the responsibility of the Crown, Ontario's 2012 MNDM policy envisions the Crown as an overseer on consultation between a mining exploration proponent and an Aboriginal community. The Crown is to direct the scope of consultation, provide oversight and assess the sufficiency of consultation,¹⁵³ while the proponents are to share information on the proposed project, and “gather information” on the impact on treaty rights from communities and discuss proposed mitigation.¹⁵⁴

NL's policy states that the duty ultimately lies with the Crown, while simultaneously requiring the proponent to conduct, as well as fund, the consultation process.¹⁵⁵ The province's role is largely to ascertain the affected Aboriginal groups. In contrast, NS's policy articulates the process as Crown-led, but delegates “procedural aspects of consultation” including “information exchange, conducting studies, and communication and relationship building” among proponents' roles.¹⁵⁶ Saskatchewan's policy states that “the government will not delegate the duty” to third parties, though it “may assign procedural aspects of the consultation process to proponents, such as hosting information-sharing meetings.”¹⁵⁷ The Federal Guidelines allow delegation of information sessions, gathering information on impacts of proposed projects on Aboriginal rights, and mitigation measures.¹⁵⁸ Canada also provides detailed guidance for federal officials to assess whether the Crown may rely on consultations conducted by a province or proponent, and cautions that if either of these are insufficient, the Crown remains responsible to fulfill the duty.¹⁵⁹

Alberta's policy focuses on proponents and provides oversight of the consultation process through the Aboriginal Consultation Office (ACO). The ACO's role is to assess the level of consultation, to direct proponents on how to engage in consultation, to monitor the process, and to extend administrative assistance to both First Nations and proponents throughout the process¹⁶⁰—its stated purpose is to “provide consultation management services ... in a

¹⁵³ Ontario MNDM Consultation Policy *supra* note 133 at 3.

¹⁵⁴ *Ibid* at 4, 9.

¹⁵⁵ NL Consultation Policy, *supra* note 130 at 3.

¹⁵⁶ NS Consultation Guidelines, *supra* note 129 at 4–5, 13; see also Nova Scotia, Office of Aboriginal Affairs, “Proponents' Guide: The Role of Proponents in Crown Consultation with the Mi'kmaq of Nova Scotia”, second revision (November 2012), online: <www.novascotia.ca/nse/ea/docs/ea-proponents-guide-to-mikmaq-consultation.pdf> [NS Proponents' Guide]. Here, proponents' roles are described similarly to the NS Consultation Guidelines, focused on sharing information and “engagement.” The Province's role is described as “[p]roviding guidance,” “[a]ssessing adequacy of proponent's engagement” and “[a]ssessing proposed mitigation strategies”, however, it maintains its role in fulfilling the duty through (in part) “[e]nsuring issues that arise during engagement that are outside of the proponent's scope are addressed in the appropriate forum” at 6.

¹⁵⁷ Saskatchewan Consultation Policy, *supra* note 135 at 4, 7 (very similar language used again under “Roles and Responsibilities” at 7).

¹⁵⁸ Federal Guidelines, *supra* note 139 at 14, 19.

¹⁵⁹ *Ibid* (“[t]he federal department or agency may be able to use provincial or territorial consultation processes to assist in fulfilling, in whole or in part, its consultation obligations” at 27; the Crown “will need to evaluate whether the proponent has adequately consulted with Aboriginal groups and whether further consultations are required to be undertaken by the Crown to fulfill its consultation obligations” at 28).

¹⁶⁰ Alberta 2014 Consultation Guidelines, *supra* note 131 at 8.

way that is efficient, coordinated and consistent.”¹⁶¹ Proponents are responsible for notifying and providing information to First Nations, for engaging with First Nations to address any concerns raised, and for creating a consultation record to the First Nation for review, and then submitting that record to the ACO for its review of the adequacy of the consultation.¹⁶²

Manitoba, NS and Canada have also created specific bodies for overseeing the consultation process. Manitoba has an Agreements Management and Aboriginal Consultations Branch (AMAC), which coordinates Crown-Aboriginal consultations on complex projects, as well as providing consultation education and policy work.¹⁶³ NS has the Office of Aboriginal Affairs (OAA) Consultation Division, which not only advises whether consultation is required but also guides, coordinates and facilitates consultation with government departments and proponents “from start to finish.”¹⁶⁴ The federal government has two bodies that oversee all regulatory aspects of project development, including fulfilling the duty to consult: the Major Projects Management Office for managing federal projects occurring in the provinces, and the Northern Projects Management Office for projects occurring in the three territories.¹⁶⁵

Saskatchewan’s policy indicates that the province makes a pre-consultation assessment of the level of consultation required.¹⁶⁶ In Quebec, the relevant department conducts a “preliminary analysis” to decide whether or not an envisaged action may impact Aboriginal and treaty rights.¹⁶⁷ Similarly, Ontario’s Draft Guidelines asserts that “government decision-makers must always assess particular circumstances to determine whether their ministry has an obligation to consult Aboriginal peoples,”¹⁶⁸ while the MNDM states that it will notify proponents as to which Aboriginal communities proponents must engage.¹⁶⁹ Aboriginal Affairs and Northern Development Canada (AANDC) provides a Consultation Information Service and hosts the Aboriginal and Treaty Rights Information Service, which includes information on agreements, treaties, and specific and comprehensive land claims.¹⁷⁰ NB’s policy maintains that the duty lies with the Crown, and mentions that the Aboriginal Affairs Secretariat “will

¹⁶¹ *Ibid* at 3; see *infra* notes 296–71 and accompanying text for critique of the ACO. In 2015, Alberta’s Indigenous Relations department established a Stewardship and Policy Integration Branch with a mandate to “more effectively establish positive frameworks and policies with First Nations”; see Alberta Indigenous Relations, “Stewardship and Policy Integration”, (3 July 2015), online: <www.indigenous.alberta.ca/stewardship-policy-integration.cfm>.

¹⁶² Alberta 2014 Consultation Guidelines, *supra* note 131 at 10.

¹⁶³ See Manitoba, Aboriginal and Northern Affairs, *Annual Report 2014–2015*, (Thompson: ANA, 2014) at 28, online: <www.gov.mb.ca/ana/resources/pubs/ana_annual_rpt_2014_2015.pdf>. Note that the Manitoba Interim Policy, *supra* note 134, refers to the Aboriginal Consultation Unit (ACU) at 3. Since the publications of the Interim Policy, the ACU merged with the Agreements Management Branch to create AMAC.

¹⁶⁴ NS Consultation Guidelines, *supra* note 129 at 10.

¹⁶⁵ Federal Guidelines, *supra* note 139 at 26–27.

¹⁶⁶ Saskatchewan Consultation Policy, *supra* note 135 at 9.

¹⁶⁷ Quebec Interim Guide, *supra* note 137 at 8.

¹⁶⁸ Ontario Draft Guidelines, *supra* note 128 at 10.

¹⁶⁹ Ontario MNDM Consultation Policy, *supra* note 133 at 6.

¹⁷⁰ Federal Guidelines, *supra* note 139 at 11.

take the lead establishing consistent policies, procedures and practices across the provincial government.”¹⁷¹

4.3. PROCESS

Several of the policies set out detailed procedures for engagement between proponents, the Crown (or oversight body), and the Aboriginal group involved in consultation on a specific project. Here, we focus on timeframes for response and engagement and funding capacity for Aboriginal participation in consultation.

4.3.1. TIMEFRAMES

Most of the provincial policies simply stipulate that “reasonable” timeframes must be enforced. Quebec’s policy indicates that parties “must agree to the time constraints inherent to carrying out the project or to the legal and regulatory constraints, while granting themselves a reasonable time period so that the consultation is adequate.”¹⁷² It also directs proponents and ministries to build in flexibility, as does NS’s policy.¹⁷³ Quebec’s policy notes that timelines should consider the complexity of the proposed action, and ties timelines to the work required of band councils in consultation such as reviewing information, consulting those directly impacted, and preparing a reply.¹⁷⁴ The Federal Guidelines also advise reasonable timelines that allow for Aboriginal groups to assess potential impacts on their rights and prepare responses and tie flexibility to meaningful consultation plans, stating that “[m]eaningful consultation may require more time than anticipated; ensure that your plan is flexible.”¹⁷⁵

Alberta, Saskatchewan and NS, however, provide specific timeframes. Alberta and Saskatchewan provide the most detail with varying response times depending on the depth of consultation required. Alberta determines the level (or depth) of consultation based on both the expected impact of a project and the sensitivity of the treaty right or traditional land use affected.¹⁷⁶ Several of Alberta’s timelines, ranging from four to 20 days to respond to a request for consultation assessment, focus on ACO response to project proponents, and may be adjusted depending on information received by the ACO or project modifications.¹⁷⁷ For consultation at a lower level, once a proponent notifies a First Nation of a project proposal, the First Nation has 15 days to reply. For consultation at a higher level, the First Nation has 20 days to reply to a notification.¹⁷⁸ At a higher level, the consultation process must be completed or “substantially

¹⁷¹ NB Consultation Policy, *supra* note 135 at 1.

¹⁷² Quebec Interim Guide, *supra* note 137 at 10.

¹⁷³ *Ibid* at 11; NS Consultation Guidelines, *supra* note 129 at 9.

¹⁷⁴ Quebec Interim Guide, *supra* note 137 at 11.

¹⁷⁵ Federal Guidelines, *supra* note 139 at 48 (officials are advised to “provide Aboriginal group(s) with enough time to assess any adverse impacts of the proposed activity on their rights and to prepare their views on the matter” at 51).

¹⁷⁶ Alberta 2014 Consultation Guidelines, *supra* note 131 at 14. Alberta sets out detailed matrices to determine the level of consultation tailored to specific industries, in Appendix A.

¹⁷⁷ *Ibid* at 11.

¹⁷⁸ *Ibid* at 12–13, a proponent can only notify a First Nation following the ACO’s pre-consultation assessment. The processes are very detailed and require specific follow-up. For example, where the First

underway” within 60 days of the First Nation’s response to the initial notification.¹⁷⁹ The consultation process timelines may be revised in specific circumstances, such as if a project is complex, or if the First Nation has difficulty responding due to a community emergency.¹⁸⁰

In Saskatchewan, a First Nation must respond to a written notice of consultation on projects with minimal impact within 21 days, followed by a decision on the project within 30 days.¹⁸¹ For those projects involving permanent disturbance to land or resource availability with a potentially significant impact on rights, the Crown must contact the affected First Nation to advise of the review, offer to meet with the community to develop a consultation plan and determine capacity needs, with the participation of the proponent.¹⁸² The First Nation must respond within 45 days, a Crown decision is “anticipated to exceed 90 days,” and the Crown must follow up and report back to the First Nation.¹⁸³ This level of consultation implies the possibility of a lengthy consultation and accommodation, reflecting the potential significance of the impact on rights.

NS’s policy requires that proponents or Crown ministries begin by sending a letter with an offer to consult, including a project description, list of permits, timelines, requests about Mi’kmaq interest in consulting on the project and a request for comments. The typical deadline for response is 30 days.¹⁸⁴ No other timeline is mentioned in the policy, but there is a caveat that departments “should remain flexible with this timeframe.”¹⁸⁵ However, if the Mi’kmaq do not respond, NS will proceed without input from the Indigenous parties concerned.¹⁸⁶

Even at the most extensive level of consultation in Alberta, with the highest potential for impacts on rights, if a First Nation does not respond within the allotted 20-day period, the proponent may request the ACO to review the consultation record. The ACO will then assess the “adequacy” of the consultation.¹⁸⁷ At this point, there is potential for a project to proceed, without response from the First Nation.¹⁸⁸ Ontario’s MNDM policy states this consequence directly:

Lack of response will not prevent a decision by the MNDM. Where good faith efforts have been made to consult and a community fails to provide comment with respect to any potential adverse impacts from an activity on their treaty or Aboriginal

Nation has 20 days to respond, the proponent “will follow up” after 10 days and again after 15 days, if the First Nation has not responded.

¹⁷⁹ *Ibid* at 13.

¹⁸⁰ *Ibid* at 12.

¹⁸¹ Saskatchewan Consultation Policy, *supra* note 135 at 10.

¹⁸² *Ibid*.

¹⁸³ *Ibid*.

¹⁸⁴ NS Consultation Guidelines, *supra* note 129 at 20–21.

¹⁸⁵ *Ibid* at 22.

¹⁸⁶ *Ibid* (note that NS Consultation Guidelines appear to recognize that lack of response from an affected First Nation may require case-by-case analysis. If the Mi’kmaq does not respond, the department involved must provide a reminder, and follow up on a timeline at the discretion of the department).

¹⁸⁷ Alberta 2014 Consultation Guidelines, *supra* note 131 at 10.

¹⁸⁸ *Ibid* at 12–13.

rights, MNDM will make a decision based on its existing understanding of the rights and interests that may be impacted by a proposed activity.¹⁸⁹

While BC's policy document suggests that where First Nations do not respond to an initial request for consultation, follow-up communication may be required, in later sections the document advises that the decision-making process should continue where First Nations have not responded in a reasonable time.¹⁹⁰ Saskatchewan's policy does not indicate whether a project might go ahead in the absence of a response from the notified First Nation.

4.3.2. FINANCIAL AND CAPACITY SUPPORT

All provincial policies except NB's mention funding. Manitoba's policy indicates that "[a]dequate resources should be directed to the process in order to ensure meaningful consultations" and the province has created the Crown Aboriginal Consultation Participation Fund to do so.¹⁹¹ Funding requests pursued under Manitoba's Participation Fund cover such activities as the staffing of community coordinators hired to assist in the administration of consultation-related activities, basic travel costs associated with attending consultation initiatives, and the cost of disseminating consultation materials within affected Aboriginal communities.¹⁹² Similarly, Saskatchewan's policy notes that "the Government recognizes that First Nations and Métis may require assistance to engage in meaningful consultations" and provides a link to the First Nations and Métis Consultation Participation Fund.¹⁹³ This fund may support costs for coordination, research and communication in the community, including hiring costs; fees for professional and technical assistance, including explaining technical aspects of the project, collection of traditional land use data and analysis of impacts on rights; and community participation costs.¹⁹⁴ Quebec's policy states that Aboriginal groups can request funding from its Secrétariat aux affaires autochtones.¹⁹⁵ The Federal Guidelines provide a detailed list of what may be funded, including information sharing; meeting participation honoraria for elders; technical, scientific, and legal reviews prepared for advising consultation, communications, research, and land use; and traditional knowledge and use studies.¹⁹⁶

¹⁸⁹ Ontario MNDM Consultation Policy, *supra* note 133 at 8. This approach is also noted in Bains & Ishkanian, *supra* note 15 at 8 as "ramifications for aboriginal communities who choose not to engage in the consultation process."

¹⁹⁰ BC Updated Procedures, *supra* note 135 at 15–16, 18.

¹⁹¹ Manitoba Interim Policy, *supra* note 134 at 4; Manitoba, Aboriginal Affairs Secretariat, "The Crown-Aboriginal Consultation Participation Fund Community Guide" (June 2010) at 1, online: <www.gov.mb.ca/ana/pdf/pubs/crown_aboriginal_consultation_participation_fund_community_guide.pdf> [Manitoba Participation Fund Community Guide].

¹⁹² Manitoba Participation Fund Community Guide, *supra* note 191 at 2–3.

¹⁹³ Saskatchewan Consultation Policy, *supra* note 135 at 9.

¹⁹⁴ Saskatchewan, Lands and Consultation Branch, "First Nations and Métis Consultation Participation Fund Criteria", (June 2015) at 2–3, online: <www.saskatchewan.ca/residents/first-nations-citizens/duty-to-consult-first-nations-and-metis-communities#funding-to-support-the-duty-to-consult>.

¹⁹⁵ Quebec Interim Guide, *supra* note 137 at 10.

¹⁹⁶ Federal Guidelines, *supra* note 139 at 49.

However, federal officials are also advised to consider various sources for this funding from various federal departments, and seek cost sharing with provinces, territories and industry.¹⁹⁷

PEI's policy is vague, stating that "funding will be provided based on consideration of an annual budget submitted by MCPEI" with each department engaged in consultation, considering whether and how to provide funding.¹⁹⁸ NS's policy is also vague, suggesting that government departments may fund consultation activities.¹⁹⁹ NS states that proponents must cover their own costs, as does Saskatchewan.²⁰⁰ BC's policy indicates that "each party is responsible for their own participation costs" and "[i]n limited circumstances ... limited financial support" will be provided by the province to the First Nation to "off-set consultation participation costs."²⁰¹ Ontario's Draft Guidelines state that Aboriginal communities "may request resources to facilitate their involvement in the consultation process" which will be "considered on a case-by-case basis".²⁰²

Some provinces focus on proponents as funding providers. Alberta's policy dictates that the ACO must obtain funding for consultation processes from industrial stakeholders, and then distribute this funding to First Nations on the basis of demonstrable financial need.²⁰³ NL's policy requires proponents to provide "reasonably necessary capacity-funding" to Aboriginal groups involved.²⁰⁴ Proponents in NS may be asked to cover the costs of further studies requested by the Mi'kmaq on a case-by-case basis.²⁰⁵ Ontario's MNDM policy states that "[p]roponents should be prepared to contribute."²⁰⁶ The MNDM policy also strongly encourages proponents to support First Nations participation through "financial support for technical or other advice depending on the complexity of the project" and financial reimbursement for specific expenses.²⁰⁷

¹⁹⁷ *Ibid.*

¹⁹⁸ PEI Consultation Guidelines, *supra* note 135 at paras 16–17. MCPEI is the Mi'kmaq Confederacy of PEI.

¹⁹⁹ NS Consultation Guidelines, *supra* note 129 at 10.

²⁰⁰ *Ibid.*; Saskatchewan Consultation Policy, *supra* note 135 at 8.

²⁰¹ BC Updated Procedures, *supra* note 135 at 3.

²⁰² Ontario Draft Guidelines, *supra* note 128 at 16.

²⁰³ Alberta 2013 Policy, *supra* note 131 at 9.

²⁰⁴ NL Consultation Policy, *supra* note 130 at 3.

²⁰⁵ NS Consultation Guidelines, *supra* note 129 at 23; see also NS Proponents' Guide, *supra* note 156 ("[t]he Mi'kmaq may request, and the proponent may wish to consider, funding to assist Mi'kmaq with the review of technical details of the project" at 4).

²⁰⁶ Ontario MNDM Consultation Policy, *supra* note 133 at 9; see also Ontario, Ministry of Indigenous Relations and Reconciliation, "New Relationship Fund" (October 2016), online: <www.ontario.ca/aboriginal/new-relationship-fund> (which supports "core consultation capacity funding" to assist Aboriginal communities when consulting with governments and private actors on land and resource issues. The Fund's objectives are to support employment opportunities and engagement with the province, but does not mention constitutional or treaty rights).

²⁰⁷ Ontario MNDM Consultation Policy, *supra* note 133 at 9.

4.4. ACCOMMODATION: PROTECTION OF ABORIGINAL RIGHTS

All provincial policies except those of Manitoba, NB and PEI mention options for accommodation. Most of the policies include plans to “mitigate” or “minimize” or “avoid” impacts as accommodation.²⁰⁸ Some policies provide an option to accommodate through “impact monitoring” or “environmental monitoring” or “monitoring impacts as the project unfolds.”²⁰⁹ Nova Scotia and Quebec specifically suggest that the affected Aboriginal community conduct such monitoring,²¹⁰ and Ontario’s MNDM Policy encourages community involvement in monitoring “as possible.”²¹¹ Some policies include “land protection” measures.²¹² Most suggest that proposals can be modified,²¹³ including their timing or location or footprint.²¹⁴ In NL’s policy, proponents are simply directed to identify ways to “make reasonable efforts to mitigate or ... eliminate potentially adverse impacts.”²¹⁵

Other policies give very specific examples—seemingly aimed at proponents but perhaps also at Aboriginal communities—for how a project might be changed to accommodate the exercise of rights. Ontario’s MNDM policy, pertaining to early exploration, suggests “relocating a drill location to avoid impacts to a gathering site or seasonal restrictions to avoid, eliminate or minimize impacts to hunting or trapping.”²¹⁶ NS’s policy states that, “[a]ccommodation can take many forms, including placing terms and conditions in permits, licenses, or authorizations”²¹⁷ and provides a table of accommodation examples, outlining whether the Crown or the proponent, or both, would be responsible for the accommodation. Examples of how to avoid impacts range from “specific habitat protections” to reductions in the “quantity of materials extracted.”²¹⁸ Suggestions for mitigating impacts include having a Mi’kmaq archeological monitor on material removal sites (gravel pits or mines) near known heritage sites as well as “creat[ing] alternative areas for traditional use.”²¹⁹ The Federal Guidelines state

²⁰⁸ BC Updated Procedures, *supra* note 135 at 18; Alberta 2014 Consultation Guidelines, *supra* note 131 at 16–17; Ontario MNDM Consultation Policy, *supra* note 133 at 9; Quebec Interim Guide, *supra* note 137 at 13; NL Consultation Policy, *supra* note 130 at 6–7.

²⁰⁹ BC Updated Procedures, *supra* note 135 at 18; NS Consultation Guidelines, *supra* note 129 at 26; Quebec Interim Guide, *supra* note 137 at 13; Ontario MNDM Consultation Policy, *supra* note 133 at 9.

²¹⁰ NS Consultation Guidelines, *supra* note 129 at 26; Quebec Interim Guide, *supra* note 137 at 13.

²¹¹ Ontario MNDM Consultation Policy, *supra* note 133 at 11.

²¹² BC Updated Procedures, *supra* note 135 at 18; NS Consultation Guidelines, *supra* note 129 (land protection is achieved through the terms “habitat restoration” or “habitat protections” at 26).

²¹³ BC Updated Procedures, *supra* note 135 at 18; Alberta 2014 Consultation Guidelines, *supra* note 131 at 16; Saskatchewan Consultation Policy, *supra* note 135 at 13; Ontario MNDM Consultation Policy, *supra* note 133 at 9; Quebec Interim Guide, *supra* note 137 at 13; NS Consultation Guidelines, *supra* note 129 at 26.

²¹⁴ Alberta 2014 Consultation Guidelines, *supra* note 131 at 16; NS Consultation Guidelines, *supra* note 129 at 26; Ontario MNDM Consultation Policy, *supra* note 133 at 9 (note that the MNDM policy does not mention footprint).

²¹⁵ NL Consultation Policy, *supra* note 130 at 7.

²¹⁶ Ontario MNDM Consultation Policy, *supra* note 133 at 9.

²¹⁷ NS Consultation Guidelines, *supra* note 129 at 25.

²¹⁸ *Ibid* at 26.

²¹⁹ *Ibid*.

that the government may use its licensing provisions to mitigate impacts and advises that changing the project plan may also be adequate accommodation, noting that, “[t]he proponent is often in the best position to modify the project to avoid, eliminate or minimize the adverse impacts.”²²⁰ Canada also suggests habitat replacements, providing skills training, employment opportunities, land exchanges and IBAs as “compensation.”²²¹

Several of the policies permit financial accommodations, but only if there is an inability to mitigate. In BC, financial accommodation may be considered “where mitigative measures are insufficient and there is a reasonable probability of permanent or ongoing infringement of a strong [Aboriginal] rights claim.”²²² Saskatchewan’s policy states that where a government decision “results in a significant, unavoidable infringement on Treaty and Aboriginal rights, financial compensation may be required for loss of use or access to exercise the right.”²²³ The availability of financial compensation as a remedy for rights infractions may significantly reduce Crown or proponent motivation to demonstrably protect the exercise of Aboriginal and treaty rights. Quebec’s explanation is most explicitly cautious of the risk of financial trade-off for rights:

[T]he payment of financial compensation should not be an automatic reflex or even a means that is favoured to the detriment or exclusion of other accommodation measures. It should only be envisaged when the infringement of the rights and interests of the Aboriginal communities ensuing from a planned government action entails a high degree of seriousness and other measures cannot adequately accommodate the Aboriginal communities concerned.²²⁴

Other provinces appear less concerned about the potential trade-off. The NS policy includes examples of compensation as accommodation ranging from “[h]abitat restoration” to “[s]cholarships” and “[s]kills training” to “[p]rofit sharing,” “[d]irect payment” and “[b]enefits agreement[s].”²²⁵ The NL policy says that the proponent is responsible for financial accommodation.²²⁶ The Federal Guidelines simply include “cash” as one of several items in its compensation list.²²⁷

Few policies envisage a situation where, for lack of appropriate accommodations, severe impact on rights, or other reasons, a project should not be executed. Only Saskatchewan and the Federal Guidelines consider the possibility that cancelling a project may be necessary to fulfill the duty. Saskatchewan’s policy includes, “denying [a proponent’s] application to conduct an activity” under its list of possible accommodations.²²⁸ Canada’s policy explains that,

²²⁰ Federal Guidelines, *supra* note 139 at 53.

²²¹ *Ibid.*

²²² BC Updated Procedures, *supra* note 135 at 18.

²²³ Saskatchewan Consultation Policy, *supra* note 135 at 14.

²²⁴ Quebec Interim Guide, *supra* note 137 at 13.

²²⁵ NS Consultation Guidelines, *supra* note 129 at 26.

²²⁶ NL Consultation Policy, *supra* note 130 at 3–4. Recall that NL’s policy assumes that the proponent is responsible for most of the consultation and accommodation process, unless the government specifically elects to engage in the process.

²²⁷ Federal Guidelines, *supra* note 139 at 53.

²²⁸ Saskatchewan Consultation Policy, *supra* note 135 at 13.

“[i]n some circumstances, appropriate accommodation may be a decision not to proceed with the proposed activity.”²²⁹ Some provinces, however, do suggest limits to projects. NS’s policy includes a list of possible “avoidance” options for accommodation, one of which is “abandon project components.”²³⁰ BC is unique, but rather vague, in suggesting that “accommodations may include measures aimed at promoting the broader interests of First Nations.”²³¹

Quebec’s policy sets out two principles to guide departments developing accommodation measures following the conclusion of consultation processes. The first principle requires departments to understand Aboriginal groups’ concerns, and “try to address these concerns by looking for means to limit, wherever possible, the impact of the envisaged action.”²³² The second principle encourages negotiation and makes efforts to prevent government actors from over-reliance on the “no-veto” aspect of the duty while simultaneously emphasizing that aspect. The Quebec policy states that departments must “deploy all necessary efforts in the search for accommodation measures, even if, ultimately, there is no obligation to reach agreement with the Aboriginal communities, as these communities have no veto right.”²³³

Ontario’s Draft Guidelines, interestingly, state that Aboriginal communities do not have a veto “[b]ut in some limited circumstances—for example, involving serious infringements of Aboriginal title—an Aboriginal community’s consent may be required.”²³⁴ Ontario’s MNDM policy does not mention stopping early exploration projects. NB’s policy simply states, “First Nations do not have veto over decisions.”²³⁵ Alberta’s policy states that neither First Nations nor project proponents have a veto over Crown decisions, “nor is the consent of First Nations or project proponents required.”²³⁶ It remains to be seen whether this reflects the Alberta Crown’s disengagement from the economic growth typically promised by proponents towards a reconciliatory vision, or, if the Crown is positioning itself as a neutral administrative arbiter between two equal groups.

The ways in which accommodation and its purposes are discussed, as well as how accommodation decisions are made, reflect provincial levels of commitment to upholding Aboriginal and treaty rights. Alberta’s Guidelines focus on consultation, and use the term “accommodation” minimally. In fact, accommodation as an objective is absent from the Alberta Guidelines’ Consultation Process Flowchart, which instead uses the language of “exploring

²²⁹ Federal Guidelines, *supra* note 139 at 53.

²³⁰ NS Consultation Guidelines, *supra* note 129 at 26.

²³¹ BC Updated Procedures, *supra* note 135 at 17.

²³² Quebec Interim Guide, *supra* note 137 at 12.

²³³ *Ibid.*

²³⁴ Ontario Draft Guidelines, *supra* note 128 at 8. This statement echoes language in *Delgamuukw*, *supra* note 3 at para 168. However, the relationship between this statement and Ontario’s potential position on continuation of Aboriginal title in the province is unclear, given its history of reluctance to fulfill treaty promises and conservative positions on treaty interpretation; see Michael Coyle, “Respect for Treaty Rights in Ontario: The Law of the Land?” (2007) 39 Ottawa LR 405. For specific examples of literal Crown positions on treaty interpretation see *R v Taylor and Williams* (1981), 62 CCC (2d) 227, 34 OR (2d) 360.

²³⁵ NB Consultation Policy, *supra* note 135 at 2.

²³⁶ Alberta 2013 Consultation Policy, *supra* note 131 at 4.

concerns.”²³⁷ The term is similarly absent from the stated objectives section of NB’s policy, which aims to merely “fulfill the Crown’s obligation to consult First Nations.”²³⁸

The provincial policies vary in the extent to which they support or require collaboration with Aboriginal communities in developing accommodations. Alberta’s policy envisages accommodations coming from the proponent to the First Nation as part of the entire consultation record, with very limited timelines for First Nations’ review.²³⁹ Where a First Nation is concerned about site-specific impacts on treaty or traditional land uses, and raises this concern with the proponent, then the ACO will consider whether the proponent made reasonable attempts to avoid these impacts.²⁴⁰ Otherwise, Alberta’s approach to accommodation is minimal, asking only whether the proponent indicated how it might mitigate potential impacts on rights.²⁴¹

BC’s policy requires the proponent to send any proposals for accommodation to the First Nations involved. First Nations are given “a reasonable time” to respond to those proposals.²⁴² The policy requires the decision-maker to “attempt to reach agreement” and continue discussions “[i]f analysis of the consultation and accommodation record suggests that further consultation or accommodation may be appropriate.”²⁴³ The Saskatchewan policy has a similar openness to responses in consultation, but is unclear on how “appropriate” accommodation measures will be developed. It does note that government responses to Aboriginal groups’ concerns “about potential impacts to the exercise of specific rights and/or traditional uses will be unique to the particular facts of the situation.”²⁴⁴

Ontario’s Draft Guidelines state that if consultation raises concerns that should be accommodated, then the Ministry responsible should determine “through discussions with the affected Aboriginal communities and, if applicable, third parties ... what measures can be put in place.”²⁴⁵ The MNDM policy also states that accommodation measures “should be discussed with Aboriginal communities and, ideally, reflected in arrangements reached”²⁴⁶ and “strongly encourages” proponents to make such arrangements.²⁴⁷ Use of the word “should” over phrases such as “are encouraged to” or “may be appropriate” means, here, that proposed

²³⁷ Alberta 2014 Consultation Guidelines, *supra* note 131 at 10 (this flowchart visually depicts steps in the consultation process, summarizing details for readers. By leaving accommodations out of the flowchart which shows the steps up to, and including, applying for a Crown permit for an action, the role of accommodation is minimized); *ibid* (there is a section entitled “Exploring Concerns” where “[p]roponents are encouraged to consider options to avoid, minimize, or mitigate impacts respecting Treaty rights and traditional uses” and given examples of “efforts to accommodate concerns” at 16).

²³⁸ NB Consultation Policy, *supra* note 135 at 2.

²³⁹ Alberta 2014 Consultation Guidelines, *supra* note 131 at 16–17.

²⁴⁰ *Ibid* at 17.

²⁴¹ *Ibid*.

²⁴² BC Updated Procedures, *supra* note 135 at 18.

²⁴³ *Ibid* at 18–19.

²⁴⁴ Saskatchewan Consultation Policy, *supra* note 135 at 12.

²⁴⁵ Ontario Draft Guidelines, *supra* note 128 at 17.

²⁴⁶ Ontario MNDM Consultation Policy, *supra* note 133 at 9 [emphasis added]. The use of “should” in a policy reflects a requirement rather than a suggestion.

²⁴⁷ *Ibid* at 10.

accommodations must be discussed with Aboriginal groups. Both guidelines make provisions for when agreement on accommodations cannot be reached. The Draft Guidelines require the Ministry to ask itself whether it has made “good faith efforts to address the concerns” by considering whether “sufficient steps [have] been taken to avoid irreparable harm” and whether “the proposed approach reflect[s] an appropriate balancing of interests.”²⁴⁸ The MNDM policy states that where there is no agreement, it will use permitting conditions “to ensure mitigation and accommodation of identified impacts to existing or asserted Aboriginal and treaty rights.”²⁴⁹ MNDM will consider what efforts and proposals proponents make regarding ongoing monitoring and information sharing with the community, as well as specific mitigation measures, in making permit decisions.²⁵⁰

Quebec’s policy states that one of the objectives of consultation is to “[e]stablish, in collaboration with the Aboriginal communities, wherever possible, means making it possible to reconcile the rights and interests of the Aboriginal communities with the planned government action and present the possibilities of accommodation, if any.”²⁵¹ It also states that all parties have “the duty to seek accommodation solutions,”²⁵² although the extent to which Aboriginal groups’ participation is taken into account is unclear.

While Canada’s policy promotes the proponent’s role in proposing accommodation, it asserts its own responsibility for assessing and implementing accommodation. Federal officials must distinguish between accommodations to mitigate or avoid impacts on rights and “other socio-economic measures that are offered to address the Aboriginal communities’ interests in relation to the activity.”²⁵³ Such measures do not always fulfill the Crown duty to consult.²⁵⁴ The Guidelines specifically require that federal officials monitor and follow up on accommodations—if accommodations are found to be ineffective, all parties are advised to work together to find effective ways to mitigate impacts on rights.²⁵⁵ NL’s policy expects proponents to identify ways to mitigate impacts following discussions with Aboriginal groups about their concerns.²⁵⁶ The policy expects Aboriginal groups to “work with the project proponent and NL to find solutions or constructive approaches to address those concerns.”²⁵⁷ However, NL’s policy delegates much to project proponents, as discussed above, creating a sense that NL expects projects to go through, whether there is collaboration on accommodation or not. Minimal Crown involvement in consultation processes suggests over-reliance on both the

²⁴⁸ Ontario Draft Guidelines, *supra* note 128 at 18.

²⁴⁹ Ontario MNDM Consultation Policy, *supra* note 133 at 9.

²⁵⁰ *Ibid* at 11. Ontario has a “Dispute Resolution at Early Exploration” process pursuant to s 170.1 of the *Ontario Mining Act*, RSO 1990, c M-14 which involves non-mandatory third party facilitation; see Ontario Ministry of Northern Development and Mines, “MNDM Policy – Dispute Resolution at Early Exploration”, (2016), online: <www.mndm.gov.on.ca/sites/default/files/null/dispute_resolution_at_early_exploration_.pdf>.

²⁵¹ Quebec Interim Guide, *supra* note 137 at 9.

²⁵² *Ibid* at 10.

²⁵³ Federal Guidelines, *supra* note 139 at 55.

²⁵⁴ *Ibid*.

²⁵⁵ *Ibid* at 56.

²⁵⁶ NL Consultation Policy, *supra* note 130 at 7.

²⁵⁷ *Ibid* at 8.

proponent's ability to consult and its motivation. This is a risk when proponents' motivations are to make their projects reality rather than specifically to protect Aboriginal and treaty rights.

5. ANALYSIS: IMPACTS OF POLICY

The duty to consult and accommodate always aims towards reconciliation. A sense of reconciliation as relationship, Walters argues, is connected to ideals of legality—the ways in which law is accepted as just.²⁵⁸ As discussed previously, building new relationships of mutual respect and equality is key to advancing reconciliation between the Crown, Aboriginal peoples and non-Aboriginal peoples in Canada, according to the RCAP and the TRC. Reconciliation is a rich and challenging concept, from both political and legal perspectives; however, its translation into an application of policy is fraught with risks of routinization and technical management.²⁵⁹ Dorries argues that the goal of reconciliation as relationship “is transformed or weakened as it is transposed from a judicial concept, to a political device [by provinces], to the basis for a policy framework.”²⁶⁰ By measuring the policies against a robust concept of reconciliation, we hope to provide a counter to the effects of this transposition.

Policy is one vehicle through which reconciliation may be developed on a practical level. In our analysis we have found that some aspects of these policies resonate with principles of reconciliation, such as Saskatchewan and Canada's acknowledgement that consultation may result in actually stopping a project and NS's range of accommodation options and flexible timeframes in engaging Aboriginal communities. There is, however, much that falls into technical management rather than real engagement, such as the very limited timeframes stipulated in Alberta's policy, the extensive delegation to industry found in NL's policy, and Ontario's MNM policy that permits mining exploration without response from a First Nation. The next section brings together the elements of delegation, timeframes and funding, and accommodation, and analyzes the extent of Aboriginal collaboration in development or application of the policies. Table 2 in the Appendix provides a quick visual comparison of policy elements across jurisdictions relating to accommodation, balance, and collaboration to accompany the detailed comparisons in the text.

5.1. FULFILLING THE HONOUR OF THE CROWN: MEANINGFUL CONSULTATION

5.1.1. DELEGATION

The honour of the Crown rests in fulfilling the duty to consult and accommodate in good faith negotiations. Reconciliation as relationship cannot be built on distance. Delegation to proponents thus runs the risk of the Crown becoming distant from methods of information sharing and proposals of accommodations in its name. NL's policy runs this risk with its extreme reliance on proponent-led consultation, lack of oversight mechanisms, and minimal attention to accommodation.²⁶¹ NL places all responsibility for capacity funding and payment

²⁵⁸ Walters, *supra* note 8 at 189.

²⁵⁹ Dorries, *supra* note 8 at 174–75.

²⁶⁰ *Ibid* at 175 (Dorries analyzes statements by Ontario politicians about reconciliation to show its use as a political device at 139–41).

²⁶¹ While NL's policy promises a compliance mechanism, currently the only oversight is the requirement for proponents to keep records of consultation which the Crown may review. See NL Consultation Policy,

for accommodations on proponents. Legal commentators have criticized this approach as it will increase proponents' financial costs.²⁶² Despite NL's references to "relationship building" and active encouragement of proponents to find "mutually beneficial outcomes" with Aboriginal communities, this extensive delegation to proponents does distance the Crown from its duty.²⁶³

BC's policy, while also proponent-led, retains more Crown control including the ability to require further consultation and accommodation as well as taking specific responsibility for ensuring accommodation measures are put in place.²⁶⁴ Ontario's MNDM retains control over permitting while encouraging proponents to build relationships with Aboriginal communities.²⁶⁵ While this may support improved local engagement, it does not build nation-to-nation relations with the Crown. It remains to be seen whether a Ministry historically committed to mining development, above all else, can implement consultation and accommodation such that it will respect rights and rebuild relationships.²⁶⁶ The Federal Guidelines, however, directly support consultation as relationship building where it advises officials that "[f]or good governance and other policy reasons, your department or agency may decide to consult regardless of whether there is a duty."²⁶⁷ While the policy mentions the need for the government to be able to demonstrate it has fulfilled the duty to consult several times,²⁶⁸ creating an impression of consultation as risk management, here, the policy reaches beyond formal law to consultation as a norm of engagement.

Alberta's policy, which is again heavily proponent-led, includes oversight mechanisms in its ACO that appear to keep control of the process with the Crown. Whether Alberta's consultation process can uphold Aboriginal rights will depend on how the ACO approaches Aboriginal communities and enforces oversight mechanisms. Critique of the ACO has grown since its inception, putting into question its capability to determine whether consultation is needed.²⁶⁹ Laidlaw and Passelac-Ross critique the ACO's communication style and extensive

supra note 130 at 5.

²⁶² Sam Adkins, Stephanie Axmann & Thomas Isaac, "Unprecedented Aboriginal Consultation Policy Released by Government of Newfoundland and Labrador" (1 May 2013), online: McCarthy Tetrault <www.mccarthy.ca/article_detail.aspx?id=6254>.

²⁶³ NL Consultation Policy, *supra* note 130 at 4, 7.

²⁶⁴ BC Updated Procedures, *supra* note 135 at 19.

²⁶⁵ Ontario MNDM Consultation Policy, *supra* note 133 at 2, 5, 6, and 12.

²⁶⁶ Prior to the amendments in 2009, the purpose of Ontario's Mining Act was: "to encourage prospecting, staking and exploration for the development of mineral resources and to minimize the impact of those activities in public health and safety and the environment through rehabilitation of mining lands in Ontario." See *Mining Act*, RSO 1990, c M14, s 2. This section now includes, following the words "mineral resources", "in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult".

²⁶⁷ Federal Guidelines, *supra* note 139 at 40.

²⁶⁸ *Ibid* at 6, 12, 37, 48, 50–51.

²⁶⁹ See e.g. Bob Weber, "Alberta band sues province over consultation", *Global News* (15 January 2015), online: <globalnews.ca/news/1774801/alberta-band-sues-province-over-consultation/>; David Laidlaw & Monique Passelac-Ross, *Alberta First Nations Consultation and Accommodation Handbook* (Calgary: Canadian Institute of Resources Law, 2014) at 37–46, online: <www.cirl.ca/files/cirl/consultationhandbookop44w.pdf> [Laidlaw & Passelac-Ross].

support for proponents contrasted with minimal support for First Nations.²⁷⁰ An oversight mechanism is key in managing delegation—only the Crown has the flexibility to adjust to new information raised in consultations that exceed the scope of, or require responses beyond, consultation agreements made with proponents, or that were based on erroneous assumptions about Aboriginal rights, consultation and accommodation.²⁷¹

Where delegation to proponents is excessive, or where IBAs and other agreements between industry and Aboriginal communities are included in discussions of consultation and accommodation processes, there is a risk that the inequalities that exist in bargaining positions between proponents and Aboriginal communities will limit accommodations—both in scope and in kind. This is a particular risk where IBAs with proponents are proposed as potential fulfillment of accommodations or as compensation.²⁷² As discussed above, IBAs between Aboriginal communities and proponents in the far north often include “benefits” based on proponent norms rather than community values.²⁷³ Further, some Aboriginal communities may “take what they can get” in the face of expectations that projects are likely to go ahead as community agreement is not necessary. This risk is exacerbated where consultation policies state that, in some cases, projects may go ahead even without community response.²⁷⁴

5.1.2. TIMELINES AND FUNDING

Tight timeframes and lack of funding are likely to limit community engagement, while flexible timeframes and supportive funding facilitate community engagement, particularly, according to communities’ own norms or processes. Those policies reflecting the former approach seem to envision the role of Aboriginal groups as passive recipients in a process of risk management, rather than active participants who may shape the process in valuable ways.

The Fraser Institute report provides a clear example of how emphasizing strict timelines shifts attention away from protecting Aboriginal rights and towards fulfilling the needs of industry. The report recommends that all provinces place timelines on the consultation process, highlighting the difficulties faced by proponents when policies differ and processes become “more lengthy.”²⁷⁵ While there is brief reference to “keeping in mind the capacity of the First

²⁷⁰ Laidlaw & Passelac-Ross, *supra* note 269 at 39.

²⁷¹ Ritchie, *supra* note 11 at para 51.

²⁷² NS Consultation Guidelines, *supra* note 129 (IBAs between a proponent and an Aboriginal community may be developed as an accommodation measure at 25, or as compensation at 26); Ontario MNDM Consultation Policy, *supra* note 133 (encourages industry and Aboriginal communities to work together to “realiz[e] opportunities that mineral exploration may have to offer” at 2, and after noting that IBAs have become “the norm,” states that the MNDM “will continue to encourage such arrangements deferring to the parties to negotiate and structure their relationship and form of commitments” at 13); Federal Guidelines, *supra* note 139 (recognizes IBAs as possible compensation for infringements of rights at 53); NL Consultation Policy, *supra* note 130 (the policy expects that industry proponents will “enter into a dialogue with Aboriginal organizations to address project-specific opportunities” at 7); Alberta 2013 Policy, *supra* note 131 (“[t]he option of entering into agreements about project impact benefit agreements is open for exploration between First Nations and proponents” at 9).

²⁷³ See the text accompanying notes 123–124.

²⁷⁴ See discussion on which provincial policies contemplate continuing action where First Nations do not respond to opportunities to engage in text accompanying notes 186–90.

²⁷⁵ Bains & Ishkanian, *supra* note 15 at 14–15 (see recommendation 3).

Nations²⁷⁶ when setting timelines, the focus remains on the importance of completing the project and enabling the proponent to move forward. This approach to timelines ignores the substance of the duty in its emphasis on process certainty and reveals the importance of what values are used to assess policy.

Alberta's attachment of prescriptive timeframes to the various levels of consultation was meant to provide guidance to a complex process.²⁷⁷ Considering that Aboriginal communities are often dealing with multiple notifications and may need to conduct their own research and community discussions on potential impacts,²⁷⁸ these very tight timeframes seem to value "certainty" and "efficiency" in project management over a desire for thorough responses from Aboriginal groups. This level of detail appears to favour a checklist approach to consultation rather than a substantive and collaborative approach, undermining possibilities for full participation by, let alone equal collaboration with, Aboriginal communities.

More open timeframes, decided upon in consultation with Aboriginal communities, as set out in BC's, Manitoba's, NS's and Quebec's policies, provide less certainty on the timing of decision making, yet retain flexibility for studying impacts and considering accommodation measures. This is particularly evident in NS's policy which states that those consulting with Aboriginal communities "*should* remain flexible with this timeframe" [emphasis added].²⁷⁹ This requirement for flexibility means that the parties can shape the timeframe according to the project's potential impact and the depth of consultation required. Such flexibility may result in decisions that are more thoughtful, more responsive to the constitutional nature of Aboriginal rights, and more acceptable to Aboriginal communities. Further, timelines set in consultation with Aboriginal communities are much more likely to provide communities with opportunities to follow their own processes and norms in gathering information, assessing potential harms and discussing solutions.

PEI's and NL's consultation policies combine access to funding with relaxed yet reasonable timeframes. Both policies require only that Aboriginal groups be allotted "adequate" or "sufficient" time in which to identify and articulate concerns to Crown representatives and industrial stakeholders.²⁸⁰ NL's policy, however, states that timelines will be set out in forthcoming "Consultation Guidelines,"²⁸¹ so its current flexible approach may change.

²⁷⁶ *Ibid* at 12.

²⁷⁷ Alberta 2014 Consultation Guidelines, *supra* note 131 at 11.

²⁷⁸ In Ontario, Aboriginal communities are inundated with notifications from planners about a wide variety of projects. Many communities do not have enough time to review these notifications, let alone engage with issues they may raise. Ritchie, *supra* note 11 at paras 58–59; Dorries, *supra* note 8 at 184; Fraser & Viswanathan, *supra* note 146 at 14.

²⁷⁹ NS Consultation Guidelines, *supra* note 129 at 9.

²⁸⁰ PEI Consultation Guidelines, *supra* note 135 ("Canada or PEI shall make good faith efforts to provide to the Mi'kmaq Consultation Unit all relevant information with respect to the proposed decision or activity and sufficient time to assess whether or not and the extent to which the decision or activity may impact on established or asserted Mi'kmaq Aboriginal or treaty rights" at para 5b); NL Consultation Policy, *supra* note 130 ("[a] party is expected to provide pertinent information to the other parties and allow adequate time for the other parties to review it" at 3).

²⁸¹ NL Consultation Policy, *supra* note 130 at 2, 4. The Consultation Guidelines have not been released as of January 9, 2017.

PEI's and NL's policies both include mechanisms for distributing capacity funding to First Nations, but PEI's policy speaks of government funding while NL's policy requires proponents to fund consultation.²⁸² Unlike Manitoba's funding directives, which require governmental departments to work in tandem with concerned First Nations to develop draft budgets and mutually endorsed funding agreements for consultation activities,²⁸³ neither policy mentions an intention of the Crown to collaborate with Aboriginal groups when deciding the amount of funding available to those participating in consultation processes.

5.1.3. COLLABORATION IN PRACTICAL PROCESSES

Several provincial policies set timelines and other consultation procedures in collaboration with Aboriginal communities. Collaboration is a significant aspect of relationship building and often reflects Crown efforts to support equal partnerships in reconciliation. Community input into the design of the consultation process is one avenue towards more equal bargaining power. This is how a community may be able to set, or at least influence, the agenda for discussion, as well as frameworks for those discussions.²⁸⁴ Further, opportunities to collaborate may become opportunities for a community to bring its own norms and legal traditions to the process.

NS's policy is closely based on the Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process, negotiated by the three parties to guide consultation processes.²⁸⁵ Almost all Mi'kmaq communities have given authority to the Assembly of Nova Scotia Mi'kmaq Chiefs to consult on their behalf, however specific consultations may be conducted by either the Assembly or individual communities, as decided by the Mi'kmaq.²⁸⁶ One of the steps of consultation is described as "internal deliberations" and the policy recognizes that the format and method of such deliberations are determined by the Mi'kmaq.²⁸⁷ While it remains to be seen how the policy will unfold in practice, the policy affirms the government's "collaborative approach to consultation."²⁸⁸ The policy states that, "[a]n effective and efficient consultation process requires coordination, collaboration, and co-operation between all parties, including the Mi'kmaq of Nova Scotia, provincial government departments, the Government of Canada, and proponents."²⁸⁹ Its "one project = one consultation" approach,²⁹⁰ also found in BC's policy under the term "coordinated consultation,"²⁹¹ means that long-term and ripple effects from a project are more likely to be considered than in a piece-by-piece consultation. NS's policy

²⁸² PEI Consultation Guidelines, *supra* note 135 at paras 16–17; NL Consultation Policy, *supra* note 130 at 3.

²⁸³ Manitoba Participation Fund Community Guide, *supra* note 191 at 3.

²⁸⁴ Caine & Krogman, *supra* note 117 at 82, 84.

²⁸⁵ Indigenous and Northern Affairs Canada, "Terms of Reference for a Mi'kmaq-Nova Scotia-Canada Consultation Process" (15 September 2010), online: <www.aadnc-aandc.gc.ca/eng/1100100031918/1100100031919>.

²⁸⁶ NS Consultation Guidelines, *supra* note 129 at 11, 15–16, 22.

²⁸⁷ *Ibid* at 23.

²⁸⁸ *Ibid* at 25.

²⁸⁹ *Ibid* at 20.

²⁹⁰ *Ibid*.

²⁹¹ BC Updated Procedures, *supra* note 135 at 12.

overall appears to have been developed in a conciliatory, flexible and open-minded way, and indicates support for meaningful Aboriginal participation.

Manitoba's policy states that "[c]onsultation should occur as early in the decision-making process as possible"²⁹² and recognizes that consultation can occur in various forms, from a phone call to community dialogue.²⁹³ Significantly, Manitoba's policy states: "[t]he consultation process *should* be designed and developed with participation from the First Nation/Métis Community/other aboriginal community to ensure the process is mutually acceptable."²⁹⁴ As Aboriginal groups' agreement is key to the process, this provides opportunities for communities to follow their own consultation protocols, if they have them, or bring other community norms and traditions forward to the consultation and accommodation process. Combined with flexible timeframes and access to funding, this is clearly an effort to create equal partnerships with Aboriginal communities in consultation and accommodation.

Saskatchewan has specific timelines, yet warns proponents in particular that timelines may change based on new information gained through consultation and the unique nature of the government's responses to concerns raised by First Nation and Métis communities.²⁹⁵ Saskatchewan is also open about providing funding for Aboriginal communities to participate in consultation.²⁹⁶ Overall, the policy expects a certain amount of engagement between a proponent and an Aboriginal community in order to develop a consultation plan and "determine capacity needs."²⁹⁷ Yet, the final decision on how a project might proceed remains firmly in the hands of the Crown.²⁹⁸ This control ensures that decision making does not default to proponents, as is risked by the Alberta and NL policies, but also reflects a centralized approach that may circumscribe Aboriginal participation. Saskatchewan re-developed its initial policy through consultation with First Nations, however, the final document was not supported by the Federation of Saskatchewan Indians.²⁹⁹

The Federal Guidelines are vague, advising federal officials to "consider involving Aboriginal groups" in consultation process design.³⁰⁰ Only the Federal Guidelines, however, refer directly to consultation protocols developed by some Aboriginal communities. While cautioning officials that they must follow the Federal Guidelines, the policy advises that "understanding the policies, guidelines or protocols of the Aboriginal group may become the starting point for a discussion on an effective and meaningful consultation process."³⁰¹ Referencing Aboriginal community approaches in the policy provides an opening for Aboriginal communities to shape aspects of consultation with their own legal traditions.

²⁹² Manitoba Interim Policy, *supra* note 134 at 4.

²⁹³ *Ibid* at 3.

²⁹⁴ *Ibid* at 4 [emphasis added].

²⁹⁵ Saskatchewan Consultation Policy, *supra* note 135 at 12.

²⁹⁶ *Ibid* at 9; see also Manitoba Participation Fund Community Guide, *supra* note 191.

²⁹⁷ *Ibid* at 10.

²⁹⁸ *Ibid* at 13.

²⁹⁹ Newman, "Revisiting", *supra* note 5 at 117–18.

³⁰⁰ Federal Guidelines, *supra* note 139 at 48.

³⁰¹ *Ibid*.

The extent of collaboration with Aboriginal communities varies among the provincial policies. Collaboration and a vision of the process as negotiation between equal partners are most apparent in NS's and Quebec's policies. NS' policy focuses on collaboration throughout. The language used in the Quebec policy is generally collaborative and similar to the Federal Guidelines. It analyzes the consultation through a list of questions, reflecting an openness from the Crown to learn about impacts and understandings of rights from the perspectives of Aboriginal communities.³⁰² The Federal Guidelines have a strong discourse of collaboration, which extends to industry as well as to Aboriginal groups.³⁰³ This makes it less clear to what extent "collaboration" is about nation-to-nation relationship-building. Manitoba's policy is very collaborative in setting up consultation processes with affected Aboriginal groups, providing a good example of partnership in shaping the process itself. It remains to be seen whether future development of specific consultation guidelines at the departmental level will be supportive of this collaborative approach.

Both Alberta's and BC's policies articulate the need for response from Aboriginal communities, but neither refer to collaboration directly. Alberta gives proponents the ability to request a review of the consultation process, by submitting a record of consultation, where an Aboriginal group has not responded within the time allotted.³⁰⁴ This means that the ACO could assess a proponent's record of consultation as "adequate", allowing a project to move to the next step, without response from the affected Aboriginal group.³⁰⁵ This procedural entitlement for proponents belies equal partnership, in that there is no accompanying ability for an Aboriginal group to trigger a similar review of the record—for example, of accommodations suggested by the proponent, where the community sees those suggestions as insufficient.

While BC's interim policy does not refer directly to collaboration, the province is currently involved in a process of negotiating reconciliation agreements and in some cases reconciliation protocols with First Nations across the province. According to the province, the agreements are "based on respect, recognition and accommodation of Aboriginal title and rights; respect for each others' laws and responsibilities; and for the reconciliation of Aboriginal and Crown titles and jurisdictions."³⁰⁶ Details of specific agreements evince a

³⁰² Quebec Interim Guide, *supra* note 137 at 12–13.

³⁰³ Federal Guidelines, *supra* note 139 at 7, 10 (referring to government consultations with Aboriginal groups and industry representatives), at 14 (referring to Aboriginal groups and industry as "partners") and at 23 "Developing effective working relationships through networks and forums with Aboriginal communities as well as with other departments and agencies in the region, with provincial and territorial counterparts and with industry will, in the long run, assist federal managers and their officials in leading consultation and accommodation efforts."

³⁰⁴ Alberta 2014 Consultation Guidelines, *supra* note 131 at 12–13. These pages describe timeframes relevant to each level of consultation, and each description explains when the proponent may ask for a review of the consultation record. Under "Level 2: Standard Consultation", the policy that if the "notification period has expired, and the First Nation has not responded, the proponent ... may ask the ACO to review the consultation record", at 12. The wording varies slightly in each section, with specific grace periods or requirements for follow-up letters, depending on the consultation level, and always including an opportunity for the First Nation to review the record of consultation prepared by the proponent.

³⁰⁵ *Ibid.* This outcome is most visible in the flowchart at 10.

³⁰⁶ British Columbia, "Reconciliation and Other Agreements", online: <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/reconciliation-other-agreements>.

shared decision-making approach between First Nations and BC, respecting specific First Nations' values and community well-being as principles in such decisions. In the Haida Gwaii Agreement, for example, the parties acknowledge their contrasting understandings of title and agree "to focus on shared and joint decision-making respecting lands and natural resources."³⁰⁷ The Agreement further states that, "[a] socio-economic approach, with children and families at the centre, will be developed by the Haida Nation with the engagement and support of British Columbia."³⁰⁸ The Ahousat Protocol states that several principles will guide their "government-to-government relationship" including: "Iisaakstalth (respect one another); yaakstalth (care for one another); hopiitstalth (help one another); and hahopstalth (teach one another)."³⁰⁹ The Carrier-Sekani Agreement references Aboriginal title as described in *Tsilhqot'in*, recognizing that the Carrier-Sekani peoples "have important duties and sacred responsibilities to protect, manage, and enhance the lands, water, and ... Aboriginal title ... for future generations," and establishes collaboration working groups with specific responsibilities.³¹⁰ It is only through implementation of these agreements over time that their ability to support reconciliatory relationships will be seen. However, these are very clear examples of language that makes space for Aboriginal groups' traditional laws and values to shape collaborative decision-making on traditional territories.

Both NL's policy and Ontario's MNDM encourage proponents to work with Aboriginal communities on consultation plans. Partnerships with proponents can certainly be beneficial, particularly if an Aboriginal group and a proponent begin in agreement on the desirability of a specific development. However, given proponents' interests in driving projects forward, policies that emphasize collaboration and relationship building with proponents, rather than the Crown, may result in eroding Aboriginal rights over time. Ontario has made some efforts to educate the mining exploration industry on "Aboriginal Awareness," making it a condition for receiving a prospecting license.³¹¹ This educational component is a significant first step in relationship building between proponents and First Nations, although its effects remain to be seen.

³⁰⁷ Haida Nation, "Kunst'aa guu – Kunst'aayah Reconciliation Protocol" (2009) at 2 (s C), online: <www.haidanation.ca/Pages/Agreements/pdfs/Kunstaa%20guu_Kunstaayah_Agreement.pdf> [Haida Gwaii Agreement]. For a discussion of the agreement, see Coast Funds, "Kunst'aa guu – Kunst'aayah: Moving to a Sustainable Future Together" (21 September 2016), online: <coastfunds.ca/stories/kunstaa-guu-kunstaayah-reconciliation-protocol-moving-to-a-sustainable-future-together/>.

³⁰⁸ Haida Gwaii Agreement, *supra* note 307 at 4 (s 5.1).

³⁰⁹ British Columbia, "Ahousat Protocol" (18 July 2016) at 3, online: <www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/ahousaht_protocol_agreement_aug_2016.pdf>.

³¹⁰ British Columbia, "Carrier-Sekani Tribal Council Collaboration Agreement" (2 April 2015) at s 2(1) (c), 4(3), online: <www2.gov.bc.ca/assets/gov/british-columbians-our-governments/aboriginal-people/aboriginal-peoples-documents/cstc_-_collaboration_agreement_-_signed_april_2015.pdf>. Some communities, including the Carrier-Sekani, have several agreements and reviewing all of them together would lead to a fuller understanding of the extent to which traditional laws, values and processes might shape decision-making.

³¹¹ This was recommended by First Nations consulted on the amendments to Ontario's *Mining Act*; see Union of Ontario Indians, Lands & Resources Department, "Anishinabek Minerals and Mining: Community Engagement Sessions Report 2011" (North Bay: Nipissing First Nation, 2011) at 5, online: <www.anishinabek.ca/wp-content/uploads/2016/07/MiningReport.pdf>.

5.2. RESPECTING ABORIGINAL RIGHTS: ACCOMMODATION

As discussed above, there are few court decisions guiding appropriate accommodation. Provincial policies are more expressive on defining consultation and consultation procedures than they are on accommodation. Yet, it is in the breadth and detail of potential accommodations in the provincial policies where we might find the “proof” of meaningful consultation, good faith negotiation, and the honour of the Crown. Accommodations may also be viewed as attempts towards reconciliation as relationship and evidence of respect for Aboriginal and treaty rights.

Although the idea of serious infringements of Aboriginal rights and title was once attached to the full consent of Aboriginal communities in *Delgamuukw* and suggested in *Mikisew Cree*, most legal scholars agree that the Court’s statements in the trilogy of cases are clear; that the duty provides no veto to Aboriginal communities.³¹² Following Potes and Sossin in their arguments that the role of the duty to consult and accommodate in reconciliation is strongly connected to substantive outcomes,³¹³ we emphasize that if the Crown can contemplate stopping a project because that is the most appropriate accommodation, for example because the project’s infringement of Aboriginal rights is too deep or impossible to mitigate, this would reflect an understanding that the goal of the duty is *constitutional*—that the duty is to recognize and affirm Aboriginal rights, rather than to ensure that projects go forward.³¹⁴ The willingness to contemplate stopping a project is a manifestation of the rights protection purpose of section 35.

Saskatchewan’s policy and the Federal Guidelines are the most inclusive in possible outcomes of consultation by envisioning a range of potential accommodation measures, including specifically stopping a project.³¹⁵ Saskatchewan uniquely notes in its consultation matrix that, where it is “not clear whether an activity triggers a consultation requirement”³¹⁶ the government should begin with the assumption that there may be an impact. Only those activities which clearly will not impact Aboriginal rights require no consultation.³¹⁷ NS’s policy also reflects an openness to stopping aspects of projects, although this is contradicted in its willingness to go ahead on projects where there is no response from the Mi’kmaq.³¹⁸ Significantly, all three of these policies were developed with some collaboration with Aboriginal communities.³¹⁹

³¹² *Delgamuukw*, *supra* note 3 (“[s]ome cases may even require the full consent of an aboriginal nation” at para 168); Ritchie *supra* note 11 at para 83 points out that *Mikisew Cree*, *supra* note 3, could be interpreted to suggest that where an impact could leave no meaningful right to hunt, there may be a case for a veto; Newman, “Revisiting”, *supra* note 5 at 9.

³¹³ Sossin, *supra* note 7; Potes, *supra* note 7; see also discussion of their work at text accompanying notes 74, 100–02.

³¹⁴ This is still problematic in that it continues to center the Crown’s vision of land use, yet it does increase the possibility of understanding an Aboriginal community’s approach to its traditional territory; see Christie 2005, *supra* note 8 at 45.

³¹⁵ Saskatchewan Consultation Policy, *supra* note 135 at 13; Federal Guidelines, *supra* note 139 at 53.

³¹⁶ Saskatchewan Consultation Policy, *supra* note 135 at 10.

³¹⁷ *Ibid.*

³¹⁸ NS Consultation Guidelines, *supra* note 129 at 22.

³¹⁹ See text accompanying notes 288–300 and 302; Federal Guidelines, *supra* note 139 at 7.

Policies that require discussion with Aboriginal communities on proposed accommodations, such as BC, Saskatchewan, Ontario's MNDM Policy and the Federal Guidelines, evidence a desire for Aboriginal communities to see those accommodations as acceptable. While this does not specifically include stopping a project in the case of BC and Ontario, it does demonstrate an interest in relationship building.

While the jurisprudence does refer to balance and compromise of interests as part of reconciliation, policies that emphasize a "balancing" approach to Aboriginal and broader societal *interests* detract from the substantial purpose of the procedural duty to consult and accommodate: protecting Aboriginal and treaty *rights*. Following a statement that consultation must not exclude any sort of accommodation, NS's policy states that, "in discussing accommodation measures, the government may have to balance Mi'kmaq interests with broader societal interests."³²⁰ Similarly, BC's policy states that, "the Crown must balance concerns regarding potential impact of the decision on the Aboriginal interest with other societal interests."³²¹ Interests are too easily substituted for rights in the ways these two policies explain accommodation.

NB's policy hopes "[t]o balance constitutionally protected aboriginal and treaty rights with the Government of New Brunswick's constitutional mandate to manage public lands and resources for the benefit of all New Brunswickers."³²² The use of "balancing" language suggests a stance that is less interested in upholding Aboriginal rights and more focused on ensuring "certainty for government, industry and First Nations."³²³ Ontario's Draft Guidelines also describes accommodation as "a process of balancing of interests."³²⁴ Ontario's definition evokes an image of the government as a neutral arbiter between groups with interests rather than an honourable agent of consultation and accommodation. In contrast, the introduction to Saskatchewan's policy is thoroughly framed by the language of rights. The first objective of the duty to consult is "[t]o respect and protect Treaty and Aboriginal rights by ensuring, through the consultation process and subsequent decisions, that negative impacts on these rights and uses are avoided, minimized or mitigated and rights are accommodated, as appropriate."³²⁵

Elaborating on the role Aboriginal groups play in the duty to consult, the governments of both Ontario and NS implicitly endorse this discourse of "balance" in consultation. The guidelines of both provinces insist that First Nations are not to deliberately hamper good faith attempts at consultation undertaken by the Crown, nor are they to assume "unreasonable positions" that prevent proposed projects from moving forward.³²⁶ However, this language suggests that First Nations communities have a reciprocal interest in the advancement of industry-proposed projects and a consequent duty to facilitate them. This understanding of

³²⁰ NS Consultation Guidelines, *supra* note 129 at 24.

³²¹ BC Updated Procedures, *supra* note 135 at 6.

³²² NB Consultation Policy, *supra* note 135 at 2.

³²³ *Ibid.*

³²⁴ Ontario Draft Guidelines, *supra* note 128 at 8.

³²⁵ Saskatchewan Consultation Policy, *supra* note 135 at 3.

³²⁶ See Ontario MNDM Consultation Policy, *supra* note 133 at 4; NS Consultation Guidelines, *supra* note 129 at 7; see also Bains & Ishkanian, *supra* note 15 at 8–9.

the consultation-related duties of Aboriginal communities detracts from an understanding of consultation as a means of rights protection and advancement.

Emphasizing a “balancing” approach to Aboriginal and broader societal “interests” undermines the respect for the constitutional rights which gave rise to the duty.³²⁷ MacIntosh argues that the political negotiations necessary for reconciliation “must take as their starting place the full recognition of the Aboriginal legal entitlement.”³²⁸ Aboriginal and treaty rights are a constitutive element of Canada,³²⁹ and economic or other interests do not amount to rights. To make Aboriginal and treaty rights commensurable with “interests” misunderstands their purpose and standing. Any balancing in accommodations must stem from section 35 and not reduce Aboriginal and treaty rights to interests.

6. CONCLUSION: RECONCILIATION THROUGH CROWN CONSULTATION POLICIES?

As observed throughout this paper, the policies across the provinces and at the federal level are eclectic with several containing both truly responsive elements promoting relationship building, as well as elements that maintain the status quo in Crown-Aboriginal interactions. We conclude by summarizing elements found in policies that seem, given the focus of our analysis, to create the clearest opportunities for building new relationships followed by a summary of elements found in policies that circumscribe relationship building.

New, respectful relationships are not built without resources, nor overnight. Thus, while access to financial support for Aboriginal community engagement in consultation and accommodation is very important,³³⁰ combining this support with flexible timeframes is more likely to create ongoing relationships.³³¹ Recognizing the complexities of consultation³³²

³²⁷ See *supra* notes 57–60 and accompanying text.

³²⁸ Constance MacIntosh, “Tsilhqot’in Nation v BC: Reconfiguring Aboriginal Title in the Name of Reconciliation” (2014) 47:1 UBC L Rev 167 at para 76.

³²⁹ For discussions of the role of Aboriginal and treaty rights as constitutive of Canada, see John Borrows, “(Ab)Originalism and Canada’s Constitution” (2012) 58 SCLR (2nd) 351; Brian Slattery, “The Organic Constitution: Aboriginal Peoples and the Evolution of Canada” (1996) 34:1 Osgoode Hall LJ 101.

³³⁰ Saskatchewan Consultation Policy, *supra* note 135 at 9; Manitoba Interim Policy, *supra* note 134 at 4; Quebec Interim Guide, *supra* note 137 at 10; NL Consultation Policy, *supra* note 130 at 3 (states that proponents are to pay for consultation and accommodation costs, but how is unclear); NS Consultation Guidelines, *supra* note 129 at 23 (case-by-case proponent funding), 10 (government funding).

³³¹ Saskatchewan Consultation Policy, *supra* note 135 at 12 (timelines), 9 (funding); Quebec Interim Guide, *supra* note 137 at 10 (timelines and funding); Federal Guidelines, *supra* note 139 at 23, 48–49 (timelines), 49 (funding); Manitoba Interim Policy, *supra* note 134 at 4–5 (specifically, 4–5 for funding, and 5 for timeframe).

³³² Quebec Interim Guide, *supra* note 137 (see, for example, “The parties must demonstrate good faith and openness” at 9, and see 9–10, 12); Federal Guidelines, *supra* note 139 (see especially the Guiding Principles at 11–15).

and making clear statements reflecting Crown responsibility for consultation³³³ and accommodation³³⁴ also support new relationships.

Relationship building that reaches towards reconciliation must be premised on respect and equality.³³⁵ Processes that support collaboration with Aboriginal communities on consultation frameworks including timelines,³³⁶ and those that support collaboration with Aboriginal communities on accommodation,³³⁷ are a clear reflection of these premises. Evidence of at least some collaboration and consultation with Aboriginal groups in policy development supports reconciliation as building relationships between equal peoples. Those policies that showed some evidence of collaboration in policy development were often also those that built flexibility into specific procedures, such as timelines.

Rebuilding relationships requires open-mindedness, especially to the results of consultation.³³⁸ Providing examples (for government actors, proponents and Aboriginal groups) that envisage a broad range of possibilities for and responses to consultation frames, results, and accommodations³³⁹ encourages creativity in negotiations. Recognition that, in some cases, appropriate accommodations may require refusing a proposed project,³⁴⁰ evidences the most open-minded approach to accommodations because it gives priority to Aboriginal rights, recognizing and supporting the purpose of section 35.

Other policy elements, however, tend to shape the duty into a technical exercise, or minimize rights protection, and thus circumscribe opportunities to build new relationships between Aboriginal peoples and the Crown. Elements that tend to reduce the duty to a technical exercise include: largely inflexible or tight timelines;³⁴¹ provisions that allow projects to proceed without response from Aboriginal communities;³⁴² provisions that minimize or

³³³ Saskatchewan Consultation Policy, *supra* note 135 at 4, 7; Quebec Interim Guide, *supra* note 137 at 10 (processes reflecting Crown responsibility are outlined at 8–10); Federal Guidelines, *supra* note 139 at 52–53.

³³⁴ BC Updated Procedures, *supra* note 135 at 3, 18; Saskatchewan Consultation Policy, *supra* note 135 at 4.

³³⁵ Saskatchewan Consultation Policy, *supra* note 135 at 3. “Respect” is a Guiding Principle, defined as follows: “Consultations with First Nations and Métis communities will be undertaken in a spirit of mutual respect and trust. For example, cultural practices, such as opening prayers, will be respected and traditional knowledge will be taken into consideration. As the holders of Treaty and/or Aboriginal rights, the Government does not consider First Nations and Métis to be ‘stakeholders.’”

³³⁶ Manitoba Interim Policy, *supra* note 134 at 4, 5; Quebec Interim Guide, *supra* note 137 at 10–11; Federal Guidelines, *supra* note 139 at 23, 48, 49; Ontario MNDM Consultation Policy, *supra* note 133 at 9 (briefly encourages proponents to discuss and if possible make agreements with Aboriginal communities on accommodations).

³³⁷ BC Updated Procedures, *supra* note 135 at 18; Federal Guidelines, *supra* note 139 at 53–54.

³³⁸ Quebec Interim Guide, *supra* note 137 at 13; Saskatchewan Consultation Policy, *supra* note 135 at 12–13; Federal Guidelines, *supra* note 139 at 52–53.

³³⁹ NS Consultation Guidelines, *supra* note 129 at 26; Saskatchewan Consultation Policy, *supra* note 135 at 13; Ontario MNDM Consultation Policy, *supra* note 133 at 9; Federal Guidelines, *supra* note 139 at 53.

³⁴⁰ Saskatchewan Consultation Policy, *supra* note 135 at 12–13; Federal Guidelines, *supra* note 139 at 52.

³⁴¹ Alberta 2014 Consultation Guidelines, *supra* note 131 at 11.

³⁴² NS Consultation Guidelines, *supra* note 129 at 22; Ontario MNDM Consultation Policy, *supra* note 133 at 8.

ignore the need for financial support for Aboriginal communities to engage in consultation,³⁴³ and extensive delegation to proponents, to the point that opportunities to build relationships with the Crown are minimized.³⁴⁴ Control of the process by the Crown (or proponent), with little influence on process by or collaboration with Aboriginal peoples reflects an understanding of the duty to consult as a check-list and reduces opportunities to develop new relationships.³⁴⁵

A failure to directly connect protection of Aboriginal rights with the duty to consult and accommodate disrespects the constitutional standing of Aboriginal rights. Thus, policies with minimal or no reference to accommodation or to Aboriginal rights, or an overemphasis on frameworks of “balance” and “interests” particularly in discussing accommodation,³⁴⁶ prevent relationship-building.

The duty to consult and accommodate will be implemented in Canada through policy. Analyzing the policies for how they structure Aboriginal-Crown engagement in the duty as well as the details of engagement found within those policies reveals the possibilities for the various approaches to contribute towards a transformative reconciliation.³⁴⁷ The TRC states that a transformative reconciliation offers respect for Aboriginal and treaty rights, builds new nation-to-nation relationships, and respects Indigenous self-determination.³⁴⁸ The idea of reconciliation-as-relationship, as expressed by Walters, acts as an ongoing normative principle in Canadian law.³⁴⁹ We have argued that a robust norm of transformative reconciliation must enliven consultation policies, while affirming Aboriginal and treaty rights as section 35 has promised. This is the frame through which we have analyzed elements of the policies, including delegation, timeframes, financial support, accommodation, and collaboration with Aboriginal communities. As demonstrated above, there are clearly elements of the policies that hinder reconciliation, by minimizing the protection of and possibilities to accommodate Aboriginal rights. Other elements of policies support reconciliation, by centring rights, expanding accommodations and fostering new and equal relationships with Aboriginal communities.

This analysis, however, can only address the policy *frames* that have been established in our examples (largely by the Crown), within which the real work of undoing past practices and building new, just relations must be done. Further detailed studies of how such policy frames are developed, as well as how consultation, accommodation and negotiations actually work in terms of shared decision-making and evidence of new relationships, are necessary. Such studies would help to understand and assess whether the application of the duty to consult

³⁴³ BC Updated Procedures, *supra* note 135 at 3.

³⁴⁴ NL Consultation Policy, *supra* note 130 at 3; Alberta 2014 Consultation Guidelines, *supra* note 131 at 6, 17; Ontario MNDM Consultation Policy, *supra* note 133 at 3–4.

³⁴⁵ Alberta 2014 Consultation Guidelines, *supra* note 131 at 3, 6, 15–17; BC Updated Procedures, *supra* note 135 at 14–16 (BC’s policy is collaborative in terms of accommodation, but not the consultation process); NL Consultation Policy, *supra* note 130 at 3.

³⁴⁶ Ontario Draft Guidelines, *supra* note 131 (Ontario’s definition of accommodation is a “process of balancing of interests,” at 8 although the document also refers to Aboriginal rights at 11); NB Consultation Policy, *supra* note 135 at 2; NS Consultation Guidelines, *supra* note 129 at 6, 7, 9.

³⁴⁷ See discussion at the end of Part 2.b, *above*.

³⁴⁸ TRC Summary Report, *supra* note 12 at 244.

³⁴⁹ Walters, *supra* note 8 at 169.

and accommodate is fulfilling its constitutional goals, as well as help to understand the roles of policy in reconciliation.

Respect for Aboriginal rights, and their constitutional nature, are the basis for reconciliation. Policies that attempt to separate the procedural aspects of the duty to consult from its substance cannot support the spirit of reconciliation in “real social, political, and economic change” as expressed by the TRC,³⁵⁰ nor fulfil the court’s preference for good faith negotiations towards reconciliation. Infusing policy with reconciliatory attitudes and just procedures is one way in which the Crown might show good faith in working towards a transformative reconciliation. Creating consultation and accommodation policies that centre protection of Aboriginal and treaty rights while providing frames that consciously work towards reconciliation is one step towards substantive change in relationships between the Crown and Indigenous nations.

³⁵⁰ TRC Summary Report, *supra* note 12 at 240.

Appendix

Table 1: Procedural Policy Elements by Jurisdiction.

Policy → Element Jurisdiction ↓	Specific/ Strict Timelines	Flexible Timelines	Decision may be made without response from Aboriginal community	Delegation to Proponents Emphasized	Crown Role Emphasized	Funding by Proponent	Clear Funding by Crown
Alberta	■		■	■		■	
British Columbia		■	■	■	■		
Manitoba					■		■
New Brunswick					■		
Newfoundland & Labrador				■		■	
Nova Scotia			■		■	■ (some)	■ (some)
Ontario		■	■ (mining)	■ (mining)	■ (draft)	■ (mining)	
Prince Edward Island		■			■		
Quebec		■					■
Saskatchewan	■				■		■
Federal		■			■		■

This table provides a quick visual comparison of policy elements across jurisdictions to accompany the detailed comparisons made in section 4. Not every element discussed is included in the table. Where elements are nuanced, for example, where timelines are both flexible and specific, no entry has been made in either category. No entry is made where policies are vague.

Table 2: Accommodation, Balance, and Collaboration in Policies by Jurisdiction.

Policy Element → Jurisdiction ↓	Accommodation Emphasized	Accommodation Minimized	Accommodation Includes Stopping Project	Balance of Interests Approach	Collaboration with Aboriginal Communities in Consultation Process	Collaboration with Aboriginal Communities in Policy Design
Alberta			■			
British Columbia	■			■	■	■
Manitoba					■	
New Brunswick						
Newfoundland & Labrador		■				
Nova Scotia	■		■ (aspects may be stopped)	■	■	■
Ontario				■ (both)		
Prince Edward Island						
Quebec					■	
Saskatchewan			■			
Federal			■		■	■ (some)

This table provides a quick visual comparison of policy elements across jurisdiction relating to accommodation, balance, and collaboration to accompany the detailed comparisons in the text. Where a policy is vague or neutral, no entry is made.